First Amendment — Freedom of Speech — Compelled Speech — National Institute of Family & Life Advocates v. Becerra

Consumer-protective regulations often mandate disclosures on packaging or in places where products or services are sold.[1] The Supreme Court has upheld such requirements, including that lawyers clearly explain fee structures, when the disclosures include "purely factual and uncontroversial information."[2] In the abortion context, states can compel doctors to give patients "truthful, nonmisleading information" without violating the First Amendment.[3] Last Term, in *National Institute of Family & Life Advocates v. Becerra*[4] (*NIFLA*), the Court narrowed its prior commercial speech decisions, widening the scope of First Amendment protection in a way that could undercut a significant number of consumer protection laws. Applied to abortion, the doctrine created by the Court preserves compelled disclosures in the interest of opposing abortion but forecloses disclosures aimed at increasing abortion access.

In 2015, California passed the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act[5] (FACT Act). The Act required licensed facilities providing services including ultrasounds, contraception, pregnancy tests, and abortions to post notices informing patients of California's free and low-cost family planning services, prenatal care, and abortion.[6] Many unlicensed facilities providing ultrasounds, prenatal care, or pregnancy tests were required to disclose on-site and in advertising: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."[7] Both notices were required "in English and in the primary threshold languages for [state health care] beneficiaries as determined by the State Department of Health Care Services for the county."[8]

A national network of nonprofit pro-life pregnancy centers filed for a preliminary injunction, arguing that the Act violated its member's rights to free exercise of religion and free speech.[9] The District Court rejected

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[1] *See, e.g.*, CAL. CODE REGS. tit. 27, § 25603.3(e)(1), (e)(3)(A)–(D) (2018) (requiring premises serving alcohol to post: "WARNING: Drinking Distilled Spirits, Beer . . . and Other Alcoholic Beverages May Increase Cancer Risk, and, During Pregnancy, Can Cause Birth Defects").

[2] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

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

[4] 138 S. Ct. 2361 (2018).

[5] CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West Supp. 2018).

[6] *Id.* §§ 123471(a), 123472(a). The notice could be "posted in a conspicuous place," printed and given to clients, or distributed digitally on arrival. *Id.* § 123472(a)(2).

[7] *Id.* § 123472(b)(1).

[8] *Id.* § 123472(a), (b).

[9] Nat'l Inst. of Family & Life Advocates v. Harris, No. 15cv2277, 2016 WL 3627327 (S.D. Cal. Feb. 9, 2016).

the Plaintiffs' claims. On the licensed clinic notice, the court held that "the providers' action in informing patients of their treatment options is professional conduct subject to rational basis review"[10] and that the law could even survive intermediate scrutiny.[11] As to the unlicensed clinics, the court held that the Act was valid under any level of scrutiny, as the state had a compelling interest in ensuring patients knew whether a provider was licensed and the law was narrowly tailored to that interest.[12]

A Ninth Circuit panel affirmed.[13] The panel first explained that the Supreme Court did not announce a standard of review when upholding abortion-related disclosure laws in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[14] and *Gonzales v. Carhart*.[15] It therefore relied on Ninth Circuit precedent describing a spectrum of professional behavior from the most protected "public dialogue" to the least protected "professional conduct."[16] The panel held that the FACT Act fell at the midpoint of that continuum, "within the professional-client relationship" where "the purpose . . . is to advance the welfare of the clients, rather than to contribute to public debate," and so applied intermediate scrutiny.[17] It noted that "the professional nature of the licensed clinics' relationship with their clients extends beyond the examining room" to notices provided in the waiting room.[18] The Ninth Circuit upheld the licensed clinic notice as reflecting California's compelling interest in ensuring women could access state-provided reproductive care and as narrowly drawn to inform specifically targeted patients in a time-sensitive situation.[19] The panel held that the unlicensed notice survived even strict scrutiny, as the statute was narrowly tailored to California's compelling interest in making accurate information about clinics available.[20]

The Supreme Court reversed.[21] Writing for the Court, Justice Thomas[22] held that both requirements of the FACT Act were unconstitutional regulations of speech.[23] The Court rejected the Ninth Circuit's continuum of scrutiny for professional speech, instead identifying only

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[10] *Id.* at *7.

[11] *Id.* at *8.

[12] *Id.* at *9.

[13] Nat'l Inst. of Family & Life Advocates v. Harris (*NIFLA*), 839 F.3d 823 (9th Cir. 2016).

[14] 505 U.S. 833 (1992).

[15] 550 U.S. 124 (2007); *NIFLA*, 839 F.3d at 834, 837–38.

[16] *NIFLA*, 839 F.3d at 839 (quoting Pickup v. Brown, 740 F.3d 1208, 1227, 1229 (9th Cir. 2014)).

[17] *Id.* (quoting *Pickup*, 740 F.3d at 1228).

[18] *Id.* at 840. The panel rejected the argument that nonprofits were not "professional," holding that the clinics entered the market in a professional context despite being nonprofits. *Id.* at 841.

[19] *Id.* at 841–42.

[20] *Id.* at 843.

[21] *NIFLA*, 138 S. Ct. 2361.

[22] Justice Thomas was joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch.

[23] *NIFLA*, 138 S. Ct. at 2375, 2378. Justice Thomas noted that there were "serious concerns" about viewpoint discrimination in this case but did not reach the issue. *Id.* at 2370 n.2.

two exceptions to the strict scrutiny applied to content-based regulations: "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'"[24] under *Zauderer v. Office of Disciplinary Counsel*[25] and laws regulating professional conduct that "incidentally involves speech" under *Casey*.[26] The Court held that the licensed notice did not fall under the exception in *Zauderer* because it related to services the state, not the clinic, provided, "including abortion, anything but an 'uncontroversial' topic."[27] Distinguishing *Casey*, the Court noted that the FACT Act's disclosure was "not tied to a procedure at all" and applied to all interactions at a covered facility, making it a regulation of speech rather than of professional conduct of a doctor performing the abortion.[28] As the licensed notice did not fall into either the *Zauderer* or *Casey* exceptions, the Court applied strict scrutiny.

But the Court held that even if there was a reason to apply a lower standard, the licensed notice would not survive intermediate scrutiny, as it was not tailored to meet the purpose of educating low-income women about available state services.[29] Instead, the Court determined that the exceptions for federal clinics and clinics that were part of the state health care program made the law "wildly underinclusive,"[30] and that California could instead have sponsored a "public-information campaign" to educate women.[31] As to the unlicensed clinic regulations, the Court held that they were "unjustified and unduly burdensome" and thus could not meet the test in *Zauderer*, even if it applied.[32] According to the Court, California had neither claimed an interest in preventing confusion about the status of clinics nor shown a purpose for the law that was nonhypothetical.[33] The Court deemed the notice underinclusive, as it applied to clinics that provided pregnancy-related services, but not contraception, and unduly burdensome, as it included requirements to call attention to the government's statement "in as many as 13 different languages," drowning out the clinics' own advertising.[34]

Justice Kennedy concurred.[35] He wrote separately to emphasize the viewpoint discrimination concerns that the Court did not reach, arguing "that viewpoint discrimination is inherent in the design and structure of

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[24] *Id.* at 2372 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).
[25] 471 U.S. 626.
[26] *NIFLA*, 138 S. Ct. at 2372.
[27] *Id.*
[28] *Id.* at 2373; *see id.* at 2373–74.
[29] *Id.* at 2375–76.
[30] *Id.* at 2375 (quoting Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 802 (2011)).
[31] *Id.* at 2376.
[32] *Id.* at 2378.
[33] *Id.* at 2377.
[34] *Id.* at 2378.
[35] Justice Kennedy was joined by Chief Justice Roberts and Justices Alito and Gorsuch.

this Act," as the Act compelled clinics likely to be pro-life to give a notice about abortion availability.[36] He particularly noted that "the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs."[37]

Justice Breyer dissented.[38] Addressing the Court's narrow exceptions to the general strict scrutiny requirement for content-based laws compelling speech, Justice Breyer responded that "[b]ecause much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."[39] Justice Breyer particularly cautioned that the standard announced by the Court could lead to *Lochner*-like judicial assessments of a large range of ordinary social and economic regulation.[40] The dissent would have analyzed the licensed notice regulation under the Court's precedent on physicians' compelled speech in *Casey*, which upheld, among others, a requirement that "the doctor must inform his patient about where she could learn how to have the newborn child adopted (if carried to term) and how she could find related financial assistance."[41] The dissent rejected the majority's distinction between informed consent in a medical procedure and a notice in a clinic, noting that all the licensed clinics included doctors and licensed professionals providing pregnancy-related services, so the law similarly regulated the conduct of medical practice.[42] Justice Breyer also argued that the licensed notice should have survived under *Zauderer* and the Court should not have applied heightened scrutiny, as the notice related to the services provided by the clinics (including family planning and prenatal care) and supported disclosure of potentially valuable information.[43] Furthermore, the dissent rejected the Court's analysis of the unlicensed notice requirement, arguing that the majority applied too strict a standard for an "informational interest[]" similar to that in *Zauderer*.[44] Justice Breyer rejected each of the Court's conclusions: the California legislature heard

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[36] *Id.* at 2379 (Kennedy, J., concurring).

[37] *Id. But cf.* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Leslie Kendrick & Micah Schwartzman, *The Supreme Court, 2017 Term — Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133, 152 (2018) ("[The Court] upheld President Trump's travel ban despite overwhelming evidence that it was motivated by religious animus.").

[38] Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

[39] *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting); *see also id.* at 2380–81 (explaining that the majority's logic could apply to almost all disclosure laws, including laws requiring elevator emergency signs and mandates for hospitals to tell parents about pertussis vaccines and child seat belts).

[40] *Id.* at 2381.

[41] *Id.* at 2385 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992)).

[42] *Id.* at 2385–86.

[43] *Id.* at 2387.

[44] *Id.* at 2390; *see also id.* at 2389–90.

testimony about delays in care and health problems due to a lack of information, making the state's interest nonhypothetical; broad rules to combat particular misleading claims had been upheld in prior cases; the FACT Act did not differentiate between speakers on its face; and overly burdensome language restrictions should be considered as part of an as-applied challenge, not a facial one.[45] Finally, the dissent addressed the petitioners' viewpoint discrimination claim, despite the Court's decision not to reach the issue. The dissent found that claim to be insufficiently supported in the record of the case, which provided no factual basis for the allegations that the Act applied only to pro-life clinics.[46]

NIFLA marks a profound shift in the Court's treatment of compelled commercial disclosures. The Court fundamentally undermined its previous commercial speech doctrine, which allowed compelled disclosures in order to protect consumer interests, and advanced one side in the abortion debate by carving out a convoluted exception to its previous medical-disclosure cases. Taken as written, *NIFLA* represents a dramatic expansion of the scope of First Amendment protection for commercial speech that threatens the entire foundation of a broad range of consumer protections. If limited to the abortion context, "the majority has chosen the winners" between ideological viewpoints "by turning the First Amendment into a sword."[47]

Compelled disclosures have a complex history in the Supreme Court. Though statutes compelling and restricting speech are generally both subject to strict scrutiny,[48] commercial speech has operated differently. Until 1976, the Court did not explicitly recognize speech that does "no more than propose a commercial transaction" as implicating the First Amendment.[49] Since then, the Court has subjected commercial speech restrictions to intermediate scrutiny, explaining that "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information,"[50] but that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[51] In *Zauderer*, the Court recognized an even

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[45] *Id.* at 2390–92.

[46] *Id.* at 2389.

[47] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting); *see also id.* at 2501–02 ("Today is not the first time the Court has wielded the First Amendment in such an aggressive way. *See, e.g.*, National Institute of Family and Life Advocates v. Becerra . . . .").

[48] *See* William Baude & Eugene Volokh, *The Supreme Court, 2017 Term — Comment: Compelled Subsidies and the First Amendment,* 132 HARV. L. REV. 171, 172–73 (2018).

[49] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

[50] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–62 (1980).

[51] *Id.* at 563. The Court recently confused the issue further, explaining: "[P]rior precedent . . . applied what we characterized as 'exacting' scrutiny, a less demanding test than the 'strict' scrutiny that might be thought to apply outside the commercial sphere." *Janus*, 138 S. Ct. at 2465 (citation

broader state power to compel "purely factual and uncontroversial" commercial disclosures so long as they met a very low standard — the regulations could not be "unjustified or unduly burdensome."[52] This distinction between compelled and restricted speech was based on the value to the consumer: while commercial speech restrictions may frustrate the interests of consumers, factual disclosures promote consumers' interests in obtaining information.[53] The *Zauderer* Court did not define "purely factual and uncontroversial," but, as the *NIFLA* dissent noted, it contrasted the requirement for attorneys to disclose contingency fee costs in advertising — which was upheld — with the compulsion to say the Pledge of Allegiance, in which the state "prescribe[d] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force[d] citizens to confess by word or act their faith therein."[54]

Given its lack of clear definition, the *Zauderer* standard has generated significant confusion and extensive analysis. Courts have wrestled with whether an interest in preventing deception is necessary for *Zauderer* to apply or is merely one among a number of a sufficient government interests that could justify the application.[55] Many scholars have noted the inherent difficulties in distinguishing "factual" information from messages that provoke an emotional response.[56] Others have seized on the word "uncontroversial," some arguing that it should refer to the possibility of disagreement over a compelled disclosure's truth,[57] and some supporting heightened judicial scrutiny of compelled factual disclosures when the context or relevance of the disclosure is controversial.[58]

The Court in *NIFLA* reinterpreted its prior doctrine to narrow substantially any exceptions to strict scrutiny. Rather than clarify what information is "purely factual and uncontroversial," *NIFLA* introduced

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omitted). But the Court defined "exacting" scrutiny as nearly identical to strict, not intermediate, scrutiny: "Under 'exacting' scrutiny, we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting Knox v. SEIU, Local 1000, 567 U.S. 298, 310 (2012)).

52 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

53 *Id.* ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information . . . [the] constitutionally protected interest in *not* providing any particular factual information . . . is minimal." (citation omitted)).

54 *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

55 *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014) (en banc) (overruling several prior cases to the extent they "limit[ed] *Zauderer* to cases in which the government points to an interest in correcting deception," *id.* at 22).

56 *See, e.g.*, Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513 (2014); Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2406–07 (2014); Caroline Mala Corbin, *Emotional Compelled Disclosures*, 127 HARV. L. REV. F. 357 (2014).

57 *See* Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 236–37 (2011) ("[W]hether the fact is controverted . . . asks whether there is disagreement over the fact's truth, not whether there is disagreement over disclosing the fact.").

58 Goodman, *supra* note 56, at 550–54.

a new, substantially subjective determination of what *subjects* — as distinct from speech about those subjects — are "controversial." Though the FACT Act disclosure was purely factual — merely stating the services California provides for low-income women — the Court focused not on the disclosure's content but rather its "controversial" subject matter in distinguishing it from the fee disclosure in *Zauderer*.[59] But Justice Thomas's approach of deeming subjects themselves controversial threatens to swallow any application of *Zauderer*. Any definition of controversial topics immediately creates line-drawing issues: even seemingly uncontroversial norms are not necessarily uncontested.[60] These issues are even more apparent in the world of "alternative facts,"[61] when scientific or historical facts become politically controversial. In this context, a subject-based exception for *Zauderer* threatens to require strict scrutiny for almost all mandated disclosures about commercial speech.[62]

NIFLA's characterization of the interests at play also curiously ignores the consumers whose interest in access to timely, accurate information underlies First Amendment protection of commercial speech. Instead of focusing on whether consumers' informational interest justified lesser scrutiny of disclosure mandates, as the Court did in *Zauderer*, Justice Thomas focused on the harm of requiring anti-choice clinics to advertise "the very practice . . . [they] are devoted to opposing."[63] This framing centers the inquiry on the beliefs of the *clinics* rather than those of their patients. The Court sidestepped the conflict with prior doctrine by not explicitly addressing whether the FACT Act regulated commercial speech.[64] But the fact that crisis pregnancy centers might offer ultrasounds, pregnancy tests, or other covered services for political reasons does not make those services noncommercial — for advertisements, the Court has held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional

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[59] *See NIFLA*, 138 S. Ct. at 2372.

[60] *See, e.g.*, Tushnet, *supra* note 56, at 2429 (rejecting the view that eating less sugar is a clearly uncontroversial norm, as compared to encouraging people to buy more U.S.-made products).

[61] Mahita Gajanan, *Kellyanne Conway Defends White House's Falsehoods as "Alternative Facts,"* TIME (Jan. 22, 2017), http://ti.me/2jPzKup [https://perma.cc/SW5L-KPGX]; *see also Meet the Press* (NBC television broadcast Aug. 19, 2018), https://www.nbcnews.com/meet-the-press/meet-press-august-19-2018-n901986 [https://perma.cc/9WLD-A7JL] ("RUDY GIULIANI: . . . Truth isn't truth.").

[62] Indeed, state legislatures are increasingly polarized, which makes it likely that more subjects they take up will have a partisan valence, even if compelled disclosures are limited to facts. *See* Boris Shor, *How U.S. State Legislatures Are Polarized and Getting More Polarized (in 2 Graphs)*, WASH. POST (Jan. 14, 2014), https://wapo.st/1gECkbx [https://perma.cc/2AY6-3PQA].

[63] *NIFLA*, 138 S. Ct. at 2371. *But see* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006) (questioning the actual harms of compelled speech).

[64] The Ninth Circuit rejected the commercial speech label in a footnote, *NIFLA*, 839 F.3d 823, 834 n.5 (9th Cir. 2016), but did so while categorizing professional speech separately, *id.* at 840.

protection afforded noncommercial speech."[65] And commercial regulation frequently requires disclosures on topics actively opposed by the businesses — if they supported the disclosures, the regulations might be unnecessary. Casinos in many states are forced to advertise counseling services for gambling addiction that might actively discourage their customers, and some regulations even require posting the odds of winning.[66] Bars must post signs on the negative effects of alcohol.[67] And employers, even those ideologically opposed to employment discrimination laws, are required to "post and keep posted in conspicuous places upon [their] premises" information about workers' rights under Title VII.[68] The beliefs of those companies or their owners are not currently taken into consideration when deciding which disclosure requirements apply.

The way the *NIFLA* Court applied intermediate scrutiny would also seem to preordain failure for almost all consumer-protective regulations. While purporting to show that the licensed clinic requirement would fail even intermediate scrutiny, which typically requires a law to be substantially related to the state's interest,[69] the Court held that the state's policy failed because it could have been drawn more narrowly using a public-information campaign as a substitute.[70] In this analysis, which looks more like the narrow tailoring requirement of strict scrutiny, the Court disregarded the California legislature's findings that public information campaigns had proven to be insufficient, "as evidenced by the gap [in knowledge of services] that has remained despite their efforts to publicize."[71] Moreover, the Court's rationale would undercut any

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[65] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980)). The clinics' nonprofit status should likewise not change the analysis. The Court has in other contexts rejected attempts to classify nonprofits outside commerce. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 585–86 (1997) (explaining that because both entities "purchase goods and services in competitive markets [and] offer their facilities to a variety of patrons . . . any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory" in Commerce Clause analysis). The constitutional protections of the First Amendment should similarly not turn on the question of profit, as the interests of the customers and patients do not change based on the tax-exempt status of the entity that is providing the service.

[66] *See, e.g.*, FLA. STAT. § 551.114(3) (2018); 230 ILL. COMP. STAT. 10/13.1(b) (2016).

[67] In California, for instance, those signs are posted at each table, not recited by the bartender in every transaction — looking more like the FACT Act's regulation of a facility than a regulation of each procedure. *See* CAL. CODE REGS. tit. 27, § 25603.3(e)(1), (3)(D) (2018).

[68] 42 U.S.C. § 2000e-10(a) (2012).

[69] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[70] *NIFLA*, 138 S. Ct. at 2376. *Zauderer* itself rejected the use of any "least restrictive means" test and particularly noted that under the test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), disclosure requirements were recommended "as one of the acceptable less restrictive alternatives to actual suppression of speech." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652 n.14 (1985).

[71] Transcript of Oral Argument at 45, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1140_0759.pdf [https://perma.cc/CXG5-6YYC].

asserted government interest in regulating through compelled speech — no disclosure requirements can survive even intermediate scrutiny if the government always has the option to create an advertising campaign rather than mandate disclosure. Coupled with the explanation in *Janus v. AFSCME, Council 31*[72] that commercial speech regulations of all types should receive "exacting" scrutiny,[73] the Court is moving closer to a regime where government advertising is the only means of spreading consumer information and tort liability is the only mechanism to prevent deception in commercial or professional speech.[74]

If the Court did not intend *NIFLA* to signal the defeat of all commercial disclosure requirements, then the rationales underlying the decision seem intended to justify differential treatment of abortion opponents and reproductive rights supporters. This is first evinced in the unconvincing distinction between *NIFLA* and *Casey*. In *Casey*, compelled "truthful, nonmisleading information" did not implicate the First Amendment, regardless of the potential controversy.[75] The FACT Act's seems to meet that standard. However, to the *NIFLA* Court, "informed consent" laws compelling doctors' speech on abortion regulate a procedure and appear to require only a rational basis, while regulations on facilities regulate "speech as speech" and are therefore subject to strict scrutiny.[76] But in *Casey*, the mandated disclosures included a requirement to "inform patients of the availability of printed materials from the State, which provided information about the child and various forms of assistance"[77] — information little different from the FACT Act licensed clinic disclosures that likewise "provide[d] no information about the risks or benefits of [the] procedures."[78] In addition, the Court justified its invalidation of the unlicensed clinic regulations in part by mischaracterizing and minimizing the state's interests. Justice Thomas relied on the Respondent's answers at oral argument to reject the idea that the

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[72] 138 S. Ct. 2448 (2018).

[73] *See supra* note 51.

[74] *See, e.g.*, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 651 (1990); Scott Wellikoff, Note, *Mixed Speech: Inequities that Result from an Ambiguous Doctrine*, 19 ST. JOHN'S J. LEGAL COMMENT. 159, 192–93 (2004). Yet torts cannot prevent all marketplace deceptions — heightened scienter requirements and "flexibility of language" make the protections provided by fraud claims largely illusory. Rebecca Tushnet, *It Depends On What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 228 (2007); *see id.* at 254 n.122 (citing Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc., No. A-5207-05T3, 2008 WL 649024, at *4, *25 (N.J. Super. App. Div. Mar. 12, 2008), for "finding a consumer protection law violation, but not fraud, when a hotel's undisclosed definition of 'guaranteed' led to substantial damages . . . ; although the hotel's definition was unreasonable and 'Orwellian,' it did not intend to dishonor the reservations at the time it promised a guarantee").

[75] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion).

[76] *NIFLA*, 138 S. Ct. at 2374; *id.* at 2373–74.

[77] *Id.* at 2373 (citing *Casey*, 505 U.S. at 881).

[78] *Id.* at 2373–74.

unlicensed clinic regulation had the purpose of preventing consumer confusion.[79] By not acknowledging an antideception interest, Justice Thomas was able to more easily dismiss the FACT Act as hypothetical, underinclusive, and not narrowly tailored to the state's merely informational interest. But in oral argument, California's attorney explained the multiple interests driving the legislation: "The primary issue is women not knowing where they can get the free care they need for all of their options . . . . But, obviously, the informational problem is going to be especially concerning where there are cases of deception . . . ."[80] Redefining the state's interests and creating a constitutionally relevant distinction between a waiting room and a doctor's office allowed the Court to ignore the experience of patients in clinics, as well as legislative factfinding that many crisis pregnancy centers "employ 'intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.'"[81]

The Court has repeatedly made it clear that the state's interest in preserving fetal life is legitimate and compelling, and the state can express that view by requiring physicians to give information about the "probable gestational age of the unborn child," child support, and adoption agencies,[82] or by banning one form of abortion altogether.[83] But a pregnant woman has no countervailing interest in being made aware of the availability of the constitutionally protected right to an abortion. And no state interest appears sufficient to support disclosures making abortion more accessible: an interest in disclosing available options for pregnancies to the women who need them most allows only a state-sponsored public information campaign, and factfinding showing deceptive advertising is not enough to support an antideception interest. Because abortion as a topic is inherently controversial, the government can never compel disclosures outside of the actual procedure, so it can regulate only abortion providers and not anti-choice health care providers. Taken together, this doctrine establishes the very viewpoint-based distinction that Justice Kennedy's concurrence explicitly condemns. And this viewpoint discrimination is not being created by a legislature that can be checked by the courts — it is now a part of the First Amendment itself.

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[79] *Id.* at 2377.

[80] Transcript of Oral Argument, *supra* note 71, at 47. That statement was also made in the context of the *licensed* clinic notice that provided information on "free care" for all pregnancy options, *id.* — the unlicensed notice did not include such information and the interests underlying it more strongly related to preventing confusion and deception.

[81] *NIFLA*, 839 F.3d 823, 829 (9th Cir. 2016) (alteration in original) (quoting CAL. ASSEM. COMM. ON HEALTH, AB 775, 2015–2016 Leg., Reg. Sess., at 3 (2015)).

[82] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992) (plurality opinion).

[83] Gonzales v. Carhart, 550 U.S. 124, 157–59 (2007).