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The First Amendment and the Freedom Not to Speak: California Pro-Life Pregnancy Centers Take Their Case to the Supreme Court

Elizabeth Slattery and Melanie Israel

Abstract

In March, the U.S. Supreme Court will hear a case regarding whether the State of California can force pro-life pregnancy centers to advertise the state's free or low-cost abortion program. These centers argue that requiring them to communicate a message they find morally objectionable—and which contradicts the work they do—violates their freedom of speech. The Supreme Court has previously acknowledged that the freedom of speech includes the right not *to speak. Now the Justices will consider whether California's law meets the high burden set for state restrictions of speech.*

Introduction

On March 20, 2018, the Supreme Court will hear a case dealing with whether the State of California can force pro-life pregnancy centers to advertise the state's free or low-cost abortion program. These centers argue that requiring them to communicate a message they find morally objectionable—and which contradicts the work they do—violates their freedom of speech. California's law mandates that centers prominently post signs in their waiting rooms, making the state's message one of the *first* things women see upon entering—and undermining the centers' message that they hope to convey to women who are oftentimes vulnerable and afraid. The centers challenged this regulation in court, and the appeals court decided that since this involves regulation of "professional speech" (a category the Supreme Court has never recognized), the centers' speech is entitled to less protection under the First Amendment. The Court has, however, acknowledged that the

Key Points

- The U.S. Supreme Court will soon hear a case regarding whether the State of California can force pro-life pregnancy centers to advertise the state's free or low-cost abortion program.
- The Supreme Court has long recognized that the First Amendment protects the freedom *not* to speak.
- California's free speech violation is particularly egregious because the forced speech contradicts these centers' very reason for existing.
- While the Justices will be focused on levels of scrutiny and various First Amendment doctrines, at the heart of this case is the ability to speak one's mind on an issue of national importance: the right to life.
- The State of California is entitled to take a position on abortion, but it cannot force others to agree with it and speak its message. Yet that is exactly what the Ninth Circuit's ruling allows.

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

freedom of speech includes the right *not* to speak. Now, the Justices of the Supreme Court will consider whether California's law meets the high burden set for state restrictions of speech.

Pro-Life Pregnancy Centers: A Primer

Pro-life pregnancy centers are entities that provide support to women who are facing a difficult or unplanned pregnancy and seek to provide women with the support they need to give their children the gift of life. From medical care, pregnancy tests, ultrasounds, parenting classes, material resources, assistance navigating public health programs, adoption support, and counseling, the range of services varies from center to center. These centers are life affirming and often faith-based; they do not provide or refer for abortions.

According to a Charlotte Lozier Institute report, 2016 data indicates that there are more than 2,700 centers across the country, and 1,661 of those locations offer free ultrasounds, 557 offer sexually transmitted disease testing (with 400 of those locations offering on-site treatment), and there are 100 mobile ultrasound units that can provide services to women at even more locations. Nine out of 10 workers at pregnancy centers are volunteers.[1]

In at least 20 states, health departments refer women to these centers. Though they can receive funding from government sources, such as state Temporary Assistance for Needy Families funds, grants, and "Choose Life" license plates,[2] the overwhelming majority of funding for pregnancy centers comes from community support and private dollars rather than public funding.

California's FACT Act and Abortion Policy

In 2015, the state of California enacted Assembly Bill 775, the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act. The bill requires state-licensed pregnancy centers, which provide medical services such as ultrasound examinations, health provider consultations, and medical referrals, to instruct women on how to receive "free or low-cost access to...abortion" in direct contradiction of their mission of providing compassionate alternatives to abortion. Failure to comply carries the threat of a civil penalty of $500 for a first offense and $1,000 for each subsequent offense.

Additionally, the law requires unlicensed centers that provide nonmedical services such as counseling, education, maternity clothes, and baby supplies to post extensive disclaimers in as many as 13 languages that they are not a licensed medical center. These notices must be posted on-site as well as online and in print and digital advertisements.[3] The prominence and size of the disclaimer—in addition to being compelled speech—is so voluminous that it detracts from a pregnancy center's primary message and is so extensive that advertisements are cost prohibitive.

The FACT Act was passed in the months following the Center for Medical Progress's release of disturbing videos showing abortion industry representatives—many of them from California—discussing the harvesting and transfer of fetal body parts. Unlike states such as Indiana[4] and Texas[5] and the U.S. House Select Investigative Panel of the Energy and Commerce Committee[6] that responded to these explosive videos by investigating potential violations of the law, the State of California doubled down by bringing charges against the Center for Medical Progress's president and passing the FACT Act, forcing pro-life pregnancy centers to advertise the state's free or low-cost abortion program.

A look at the numbers shows that, sadly, California is leading the nation in abortions.[7] Planned Parenthood's former research arm, the Guttmacher Institute, reports that in 2014 approximately 926,200 abortions were performed in the United States with an abortion rate of 14.6 abortions per 1,000 women. Approximately 157,350 abortions that year occurred in California, with an abortion rate of 19.5 abortions per 1,000 women.[8] Nearly one-fifth of abortions in the United States occur in California.[9]

California has virtually no restrictions on abortion such as waiting periods and parental consent requirements. The state is so abortion-friendly that it allows state tax dollars to pay for abortion services[10] and requires employee health insurance plans—even church insurance plans—to cover elective abortions.[11]

Faced with these sobering challenges, life-affirming pregnancy centers have nonetheless gone to great lengths to counter California's pro-abortion culture and offer women alternatives. The FACT Act poses a direct threat to their mission and ability to serve women and their unborn children. These pregnancy centers are fighting back by challenging California's law as a violation of free speech.

The First Amendment and the Freedom *Not* to Speak

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech,"[12] and through the Fourteenth Amendment, this prohibition applies to the states as well. The Supreme Court has long recognized that the First Amendment protects the freedom to speak as well as the freedom to refrain from speaking. For example, the Court sided with public school students who refused to say the Pledge of Allegiance, newspapers deciding what content to print or not to print, and drivers who objected to their state-issued "Live Free or Die" license plates.[13] As the Court explained in *Wooley v. Maynard*, a state may not require "the dissemination of an ideological message by displaying it on...private property in a manner and for the express purpose that it be observed and read by the public."[14] A state's attempt to force people to speak a message with which they disagree is subject to the highest standard of constitutional review—strict scrutiny.

To survive this level of review, a state's action must be narrowly tailored to, and the least restrictive means of achieving, a compelling state interest. Likewise, a speech regulation that is content-based is presumptively unconstitutional unless it can satisfy strict scrutiny, and the Court has explained that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."[15] Further, the First Amendment violation is "all the more blatant" when a state engages in viewpoint discrimination and targets particular speech."[16] The Court has indicated that a state "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[17] Indeed, "The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[18]

The Court does recognize some limitations on the freedom of speech. Certain types of speech have a long history of being considered beyond the First Amendment's protection, such as obscenity and fighting words.[19] Restrictions on "commercial speech" are subject to a lower standard of review; they must be narrowly drawn to advance a substantial state interest.[20] The Court has tolerated greater regulation of commercial speech because of the government's interest in protecting consumers from false or misleading speech.[21] The Court has explained, however, that it does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[22] The Court has been generally protective of speech, even when it may not be popular.[23]

Legal Challenges to California's Law

In *National Institute of Family and Life Advocates v. Becerra*, the centers brought a pre-enforcement challenge in federal district court, seeking a preliminary injunction.[24] The district court denied the centers' request for injunctive relief, finding that the act survived review under either the rational basis or intermediate scrutiny standards.[25] On appeal to the U.S. Court of Appeals for the Ninth Circuit, a three-judge panel upheld the district court's denial of a preliminary injunction. In an opinion by senior Judge Dorothy W. Nelson, the panel divided its analysis between licensed and unlicensed centers, finding that the act is subject to intermediate scrutiny regarding regulation of licensed centers and "survives any level of scrutiny" for regulation of unlicensed centers.[26] The panel concluded that the act is "content-based, but does not discriminate based on viewpoint"[27] because it applies "to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services."[28] The panel declined to follow the Supreme Court's determination that "[c]ontent-based laws...are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[29] Instead, the panel concluded that since the Supreme Court's previous "abortion-related disclosure cases" did not involve First Amendment claims, it was free to determine the standard of review. Pointing to another Ninth Circuit case "recogniz[ing] that not all content-based regulations merit strict scrutiny," the panel held that "strict scrutiny is inappropriate in abortion-related disclosure cases."[30]

The panel determined that requiring licensed centers to post these notices is a regulation of "professional speech." Professional speech and conduct are "best understood as along a continuum" with "engag[ing] in a 'public dialogue'" receiving the greatest First Amendment protection and conduct or a "form of treatment" being subject only to rational basis review.[31] Concluding that the issue at hand is somewhere in the middle of this continuum, the panel

applied intermediate scrutiny, noting that "[l]icensed clinics engage in speech that occurs squarely within the confines of their professional practice."[32] Under intermediate scrutiny, a law must advance a substantial state interest and be narrowly tailored to meet that interest. The fit need not be "necessarily perfect, but reasonable."[33] The panel concluded that the state has a substantial interest in the "health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion."[34] Its regulation is narrowly tailored because the "Notice informs the reader only of the existence of publicly-funded family-planning services. It does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services."[35] Turning to unlicensed centers, the panel concluded that requiring them to post notices and disclose they are not licensed by the state survives *any* level of scrutiny because the state has a "compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state."[36]

In another case, *Scharpen Foundation, Inc. v. Harris*, a pro-life clinic challenged the FACT Act in state court under the California Constitution's free speech clause. The Superior Court in Riverside County, California, ruled for the clinic and issued a permanent injunction against the law.[37] Judge Gloria Trask determined that the "speech required by the FACT Act is unquestionably compelled and content based" and could not withstand strict scrutiny review.[38] While the state maintained that the law simply requires centers to "post true, factual information," Judge Trask noted that these signs are misleading and could "leave the reader with the belief that the referral [for an abortion] is being made by the clinic in which is it posted."[39] For Scharpen and the other life-affirming centers, that would be "profoundly inaccurate."[40]

Judge Trask also rejected the claim that these signs are the same as requiring informed consent before a doctor performs an abortion because women entering centers must be told about the free or low-cost abortion program whether or not they are pregnant. She concluded that the state could not "impress free citizens into State service in this political dispute."[41] She also was underwhelmed by the state's "myriad" efforts to educate the public about the available services. In fact, the evidence "describes very little."[42] The state's education efforts include the Health Department website for roughly 25 percent of the counties in California, which mentioned "family planning" services (without going into details)—and only two specifically mentioned the state's free or low-cost abortions. Alameda County mounted an educational campaign by advertising "free pregnancy tests" on buses. As Judge Trask wrote, "[T]he State, which controls public education from K–12, community colleges, State Universities, the UC [University of California] system, and which controls the funding of the services at issue, makes no other effort to inform women about the availability of those services."[43] She concluded her opinion noting, "This statute compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message."[44]

Arguments at the Supreme Court

The centers that lost at the Ninth Circuit asked the Supreme Court to review their case, and in late 2017, the Court agreed to hear it. The centers argue that their speech should receive the "highest level" of protection because they are engaged in "issue advocacy on an important matter of public concern."[45] Their brief explains, "The very reason [these centers] exist is to encourage and support women in choosing to give birth to their unborn children...[b]ut the Act undermines this advocacy and forces [them] to speak a message not only detrimental to their cause, but in direct conflict with their purpose and core convictions."[46] Thus, the centers point to three separate grounds for the Supreme Court to apply strict scrutiny to the FACT Act:

1. It "unquestionably compels speech";
2. It is "undeniably content based"; and
3. It discriminates based on viewpoint "in both its stated purpose and actual effect."[47]

To survive strict scrutiny, a state's action must be narrowly tailored to, and the least restrictive means of achieving, a compelling state interest. The centers contend that the FACT Act does not advance a compelling interest; California's interest in informing women of available health care services is "far too general" to be considered compelling.[48] By comparison, the Supreme Court has held that stopping voter

fraud and intimidation at the polls on Election Day[49] is a compelling interest for the purposes of strict scrutiny review.

The FACT Act is not narrowly tailored given its number of exemptions—such as obstetrician/gynecologists working in private practice, centers that provide general medical care, and women's centers that perform abortions. The centers maintain that "[s]uch underinclusiveness is not narrow tailoring; it is the mark of an ill-fitted law."[50] After these exemptions, nearly all that is left for the state to regulate is the life-affirming centers. California acknowledges as much: The exemptions recognize "the lack of need to compel notice about public funding options at centers that were already able and motivated to enroll patients in those options."[51] The FACT Act also is not the least restrictive means to advance the state's interest because there are plenty of other ways the state could make this information available, such as running advertisements on television, billboards, or public transportation.

California argues that the Supreme Court should follow the Ninth Circuit's lead and apply a lower standard of review under the professional speech doctrine that some appeals courts have developed. But the First Amendment "does not ratchet up or down depending on whether [a speaker] is paid," as the Institute for Justice explains in its *amicus curiae* brief.[52] Indeed, "any rule to the contrary would be both wrong and utterly impossible to administer."[53] As the Institute for Justice further notes, "[A]ny reduction in First Amendment protection for 'professionals' will inevitably bleed over into more fields than the Court anticipates," pointing to examples of lower courts applying some form of this doctrine to "justify silencing unlicensed speech"[54] such as fortune tellers, tour guides, and advice columnists, to name a few.[55] Rejecting this doctrine would not affect states' ability to license particular industries because such laws should target *conduct*: "Financial advisers take money from their clients to invest on their behalf; doctors perform surgeries; lawyers prepare and file binding legal documents."[56] The Court should make clear that so-called professional speech is not relegated to a lesser status under the First Amendment.

Conclusion

The Supreme Court has long recognized that the First Amendment protects the freedom *not* to speak. While the justices will be focused on levels of scrutiny and various First Amendment doctrines, at the heart of this case is the ability to speak your mind on an issue of national importance: the right to life. The State of California is entitled to take a position on abortion, but it cannot force others to agree with it and speak its message. Yet that is what the Ninth Circuit's ruling would allow. Whether or not you agree with the message that life-affirming pregnancy centers stand for, all Americans should be wary of government compelling dissenting voices to communicate a message that directly contradicts and undermines their very reason for existing.

*—**Elizabeth Slattery** is a Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation. **Melanie Israel** is a Research Associate in the Richard and Helen DeVos Center for Religion and Civil Society, of the Institute for Family, Community, and Opportunity, at The Heritage Foundation.*

Endnotes

1. Charlotte Lozier Institute, *Fact Sheet: Pregnancy Help Centers: Serving Women and Saving Lives* (Jan. 18, 2018), https://lozierinstitute.org/fact-sheet-pregnancy-help-centers-serving-women-and-saving-lives/ (accessed Feb. 6, 2018).
2. Brief of March for Life Education Fund et al., Nat'l Inst. of Family and Life Advocates v. Becerra (No. 16-1140).
3. Assembly Bill No. 775, Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB775 (accessed Feb. 6, 2018).
4. Stephanie Wang, *Pence Calls for Indiana Planned Parenthood Investigation*, IndyStar (July 16, 2015), https://www.indystar.com/story/news/politics/2015/07/16/pence-calls-indiana-planned-parenthood-investigation/30241441/ (accessed February 7, 2018).
5. Edgar Walters, *State Leaders Order Investigation Into Fetal Organ Preservation*, Texas Tribune (July 15, 2015), https://www.texastribune.org/2015/07/15/abbott-launches-investigation-fetal-organ-preserva/ (accessed Feb. 7, 2018).
6. Select Investigative Panel of H. Comm. on Energy & Commerce, 114th Cong., Final Rep. (Dec. 30, 2016), https://archives-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/Select_Investigative_Panel_Final_Report.pdf (accessed Feb. 28, 2018).
7. Guttmacher Institute, *Data Center*, https://data.guttmacher.org/states/table?state=AL+AK+AZ+AR+CA+CO+CT+DE+DC+FL+GA+HI+ID+IL+IN+IA+KS+KY+LA+ME+MD+MA+MI+MN+MS+MO+MT+NE+NV+NH+NJ+NM+NY+NC+ND+OH+OK+OR+PA+RI+SC+SD+TN+TX+UT+VT+VA+WA+WV+WI+WY&topics=66&dataset=data (table showing number of abortions, by state of occurrence) (accessed Feb. 7, 2018).
8. Guttmacher Institute, *State Facts About Abortion: California* (Jan. 2018), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-california (accessed Feb. 6, 2018).
9. Rachel Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 Perspectives on Sexual & Reproductive Health, 17–27 (2017), http://onlinelibrary.wiley.com/doi/10.1363/psrh.12015/full (accessed Feb. 27, 2018).
10. Guttmacher Institute, *supra* note 8.
11. Alliance Defending Freedom, *Obama Administration Refuses to Enforce Federal Law Protecting Freedom of Conscience* (June 21, 2016), http://www.adfmedia.org/News/PRDetail/10005 (accessed Feb. 6, 2018).
12. U.S. Const. amend. I.
13. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); Miami Herald Printing Co. v. Tornillo, 418 U.S. 241 (1974); Wooley v. Maynard, 430 U.S. 705 (1977).
14. *Wooley*, 430 U.S. at 713.
15. Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 795 (1988).
16. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).
17. *Id*.at 829.
18. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993).
19. *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (discussing the "historic and traditional categories" of speech outside the First Amendment's protection.)
20. Central Hudson Gas & Elec. Corp. v. Public Srvs. Comm. of New York, 447 U.S. 557 (1980).
21. Several members of the Supreme Court have expressed concerns with subjecting regulations on commercial speech to a lower standard of review than noncommercial speech. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1750 (2017) (Kennedy, J., concurring); *id.* at 1769 (Thomas, J., concurring).
22. *Stevens*, 559 U.S. at 472.
23. *See, e.g.*, *Tam*, 137 S. Ct. at 1744 (ruling in favor of the Slants' bid to trademark their band's name, which the Patent and Trademark Office deemed "offensive"); Virginia v. Black, 538 U.S. 343 (2003) (cross-burning); *Stevens*, 559 U.S. at 460 (animal "crush" videos); Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011) (violent video games); United States v. Alvarez, 567 U.S. 709 (2012) (lying about military honors); Snyder v. Phelps, 562 U.S. 443 (2011) (protesting military funerals).
24. The centers also raised free exercise claims, but the Supreme Court is only considering the free speech issue. This *Legal Memorandum* will focus on the free speech claims.
25. To survive rational basis review, a law must be rationally related to a legitimate state interest. To survive intermediate scrutiny, a law must advance a substantial government interest and be narrowly drawn to achieve that interest.
26. Nat'l Inst. of Family and Life Advocates v. Harris, 839 F.3d 823, 843 (2016).
27. *Id*. at 836.
28. *Id*. at 835.
29. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

30. *Nat'l Inst.*, 839 F.3d at 837.
31. *Id.* at 839.
32. *Id.*
33. *Id.* at 841.
34. *Id.*
35. *Id.* at 842.
36. *Id.* at 843.
37. Scharpen Foundation, Inc. v. Harris, No. RIC1514022 (Cal. Super. Ct. Oct. 30, 2017), printed in Brief of Petitioners, Nat'l Inst. of Family and Life Advocates v. Becerra (No. 16-1140).
38. *Id.* at 13a.
39. *Id.* at 14a.
40. *Id.*
41. *Id.* at 15a.
42. *Id.* at 7a.
43. *Id.* at 9a.
44. *Id.* at 19a.
45. Brief of Petitioners at 17.
46. *Id.*
47. *Id.* at 17–18.
48. *Id.* at 51.
49. Burson v. Freeman, 504 U.S. 191 (1992).
50. Brief of Petitioners at 19.
51. Respondent's Brief in Opposition at 14, Nat'l Inst. of Family and Life Advocates v. Becerra (No. 16-1140).
52. Brief of Institute for Justice at 4, Nat'l Inst. of Family and Life Advocates v. Becerra (No. 16-1140).
53. *Id.*
54. *Id.* at 14–15.
55. Moore-King v. County of Chesterfield, 708 F.3d 560 (4th Cir. 2013); Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014); Rosemund v. Markham, 135 F. Supp. 3d 574 (E.D. Ky. 2015).
56. Brief of Institute for Justice at 11–12.