SUPREME COURT TO HEAR ARGUMENT ON CALIFORNIA LAW REQUIRING PRO-LIFE CLINICS TO NOTIFY PATIENTS OF ABORTION SERVICES

Media Law & First Amendment Alert
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The United States Supreme Court is poised to hear a First Amendment case likely to determine the boundaries for government-imposed speech. Although the case arises in the controversial area of abortion rights, the outcome may substantially affect review of all government-compelled speech obligations.

On March 20, 2018, the Court will hear the case of *National Institute of Family and Life Advocates v. Becerra*, in which a pro-life health clinic is challenging the constitutionality of California's Reproductive FACT Act. The issue is how far the government may go in ordering a services provider to inform or advertise certain information to its clients.

Petitioner, the National Institute of Family and Life Advocates ("NIFLA"), operates approximately 130 pro-life, non-profit pregnancy centers across California. Some of its facilities are licensed to provide medical services, advice, and information to the client; others are non-licensed and provide only non-medical information. Under the FACT Act, such facilities must provide the client with, and conspicuously display, the following statement:

> 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. To determine whether you qualify, contact the county social services office at [phone number].

An even more detailed statement must be provided by non-licensed facilities, advising the client that the "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."

Opponents of the law claim it violates free speech rights by requiring abortion-related advertising, while supporters say it provides important, neutral information to women at a critical moment.

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The central issue in the case is the level of scrutiny that should be applied to the state law. NIFLA makes a three-part argument asserting the law must be subject to strict scrutiny under First Amendment precedents. First, it claims that the FACT Act compels non-commercial speech, as the services and speech at issue in this case are plainly non-commercial. (Commercial speech requires a lower level of scrutiny). Second, NIFLA claims the speech is content-based, as it requires the speaker to deliver a particular message. And third, NIFLA argues that the required speech is viewpoint discriminatory, as the law was designed to target centers with a particular (*i.e.*, pro-life) viewpoint. This last point may be one of the keys to the case; state mandates that licensed professionals provide non-viewpoint information have been upheld, but those rules apply to all such practitioners. If the Court accepts the premise that only the pro-life clinics are targeted by the FACT Act, NIFLA claims that, once strict scrutiny is applied to the law, there is no compelling state interest that justifies it, nor is it narrowly tailored to achieve an asserted interest.

The Ninth Circuit Court of Appeals previously upheld the law as Constitutional, holding that it was not subject to strict scrutiny. Instead, it held that the speech was content-neutral, professional speech and applied intermediate scrutiny. NIFLA argues that the Ninth Circuit's decision violates the rule set forth by the Supreme Court in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), in which the Court stated a "'clear and firm rule" for content-based laws that regulate protected speech: when a law "imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny.'" Petitioners' Brief at 28-29.

Respondents, including the State of California, argue that states have a right to regulate entities through which medical care is provided, and, to the extent some of the institutions are unlicensed, it is important for their clients to be notified of their unlicensed status, to avoid misdirection and confusion. They rely heavily on the Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), in which the Court held that states could require "lawyers advertising contingency arrangements to disclose that clients might be liable for litigation costs if their cases were unsuccessful." *See* Respondents' Brief at 19.

Respondents add that the FACT Act is narrowly tailored to require facilities to provide vital factual information to a woman, and that, regardless, the content of the required statement is neutral.

This case is the third First-Amendment challenge the Supreme Court will hear this term. The other cases involve the right to ban certain apparel at polling places (*Minnesota Voters Alliance v. Mansky*) and whether local governments can compel their public employees to pay certain union fees, even those who don't join the union (*Janus v. American Federation of State, County, and Municipal Employees*). These cases were argued on Feb. 26 and 28, respectively.

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