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PERSPECTIVE

NIFLA v Becerra: folly, fallout and follow-up

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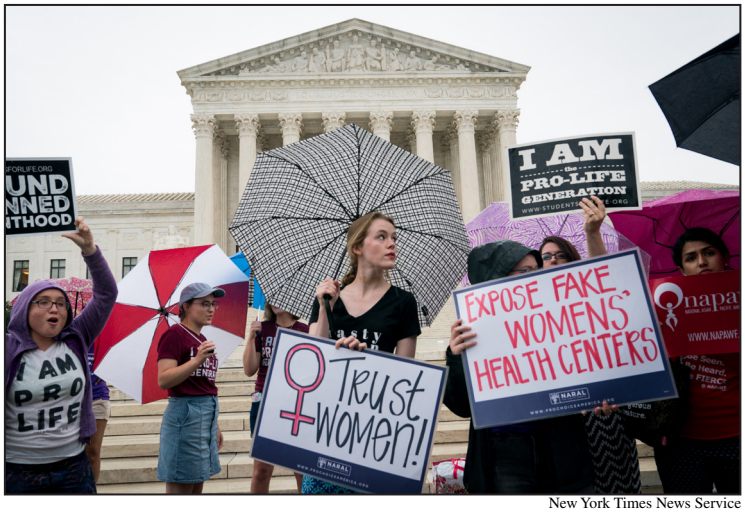
In a week marked by Justice Anthony Kennedy's retirement and the U.S. Supreme Court's approval of the travel ban, the court's sweeping and somewhat puzzling *NIFLA v. Becerra* (2018 DJDAR 6224, June 26, 2018) decision was just one among many troubling moments.

In *NIFLA*, the court addressed First Amendment challenges to California's 2015 Reproductive FACT Act. This law was designed to curb deceptive tactics by anti-abortion "crisis pregnancy centers" and inform women of the publicly funded reproductive health care services, including abortion, available to them. Some centers are licensed to provide health care; others have neither state-issued licenses nor medical personnel on staff. Both varieties of crisis pregnancy centers exist to dissuade women from seeking birth control and abortion care. And all too often, licensed and unlicensed centers mislead women by hiding their anti-choice mission, offering inaccurate or incomplete medical information, and undermining access to comprehensive reproductive health care, especially for low-income women and members of minority groups. *See* "Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers," Policy Number 20113, American Public Health Association (Nov. 1, 2011).



New York Times News Service

Anti-abortion and abortion-rights activists demonstrate outside the U.S. Supreme Court, June 22, 2018.

Background

The FACT Act contained two notice requirements. The first applied to licensed clinics that specialize in pregnancy care but decline to participate in certain state-funded programs guaranteeing women access to a full range of reproductive care, including birth control and abortion, regardless of income. The FACT Act required these licensed clinics to post a notice stating the availability of publicly funded reproductive health care services and a phone number to call for more information. Licensed clinics that participate in the state's programs and provide the services listed in the notice were exempt.

The second notice requirement applied to unlicensed crisis pregnancy centers, which misleadingly offer certain pregnancy-related services like ultrasound scans and pregnancy tests despite having no medical staff but pretending that they do. The FACT Act required them to display a notice the size of an ordinary sheet of paper stating their unlicensed status.

The 9th U.S. Circuit Court of Appeals upheld the licensed clinic disclosure requirement under an intermediate standard of First Amendment scrutiny applicable to "professional speech," e.g., speech of lawyers, doctors, accountants and others acting as professionals. Justice Clarence Thomas, joined by Chief Justice John Roberts and Justices Anthony Kennedy, Samuel Alito and Neil Gorsuch, reversed, holding that professional speech is protected by the same First Amendment standard applicable to other commercial speech.

According to Justice Thomas, the licensed clinics disclosure requirement was "wildly underinclusive" because it applied only to clinics focused on pregnancy care. It is also unnecessarily burdensome because California has other means, like advertising campaigns, to educate women about the services available to them.

The court likewise held that the unlicensed clinics disclosure requirement violated the First Amendment. To the majority, that disclosure requirement's justification — "ensuring that pregnant women in California know when they are getting medical care from licensed professionals" — appeared "purely hypothetical." In addition, the court decided that it was unduly burdensome because unlicensed crisis pregnancy centers in one California county (Los Angeles) could be required to provide the disclosure in up to 13 languages, and the 29-word disclosure had to appear in a font of equal size to the main text on all electronic and print advertising, including any billboards hypothetically featuring just the words: "Choose Life."

Folly

Perhaps the most baffling passage of Justice Thomas' analysis is his discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In an atypical joint opinion by Justices Kennedy, Sandra Day O'Connor and David Souter, *Casey* upheld a Pennsylvania statute that required physicians performing abortions to tell their patients about the availability of state-issued materials with information about fetal development; state-provided medical assistance; and adoption agencies, including their phone numbers. The disclosure upheld in *Casey* was almost the exact mirror image of the FACT Act's licensed clinics disclosure requirement.

Not so, according to the majority: Unlike the FACT Act, the *Casey* disclosure "regulated speech only 'as part of the *practice* of medicine'" (emphasis in original) and was "tied to" a medical pro-

cedure. Justice Stephen Breyer's dissent in *NIFLA*, joined by Justices Ruth Bader Ginsberg, Sonia Sotomayor and Elena Kagan, shredded those distinctions. The staff of licensed clinics, including licensed crisis pregnancy centers, are medical personnel "engaging in activities that directly affect a woman's health — not significantly different from the doctors at issue in *Casey*." In fact, while abortion is a medical procedure with risks and alternatives, the risks in childbirth are generally much greater than those of abortions. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016).

Similarly, the majority was far from evenhanded in its assessment of the unlicensed clinics disclosure requirement. Despite documentation that women unknowingly seeking medical care at unlicensed crisis pregnancy centers, and the California Legislature's judgement that women should be made aware of these clinics' unlicensed status, the majority dismissed these as "purely hypothetical."

Yet, when it suited them, the majority relied on hypothetical concerns in pronouncing the disclosure requirement unduly burdensome. Justice Thomas worried that an unlicensed crisis pregnancy center that advertises hypothetically might want to put up a billboard and would have to add the disclosure. He also fretted that centers in Los Angeles County might have to print the disclosure in up to 13 languages, despite the dissent's reminder that, in the vast majority of California's counties, only English and Spanish would be required. Finally, the majority was troubled that unlicensed clinics offering a different array of services than those identified in the FACT Act would not be burdened by the required disclosure.

True, the record was sparse as to both the FACT Act's justification and its application, but the court has options when it confronts an undeveloped record: It can remand the case for further fact development or wait for someone to challenge the statute as applied. The court's insistence that the state come armed with an arsenal of facts, while indulging the centers' hypothetical concerns, reveals a striking imbalance.

Fallout

The only silver lining in the court's decision is that reproductive-rights advocates may have a stronger hand in challenging some anti-choice statutes. The court's holding that professional speech warrants the same protection as other commercial speech could be turned against laws that require medical providers to tell their patients scientifically dubious or wrong information before providing birth control or abortion care.

Moreover, any state that tries to rework Florida's failed attempt to prohibit doctors from discussing gun safety with their patients is unlikely to overcome *NIFLA*'s First Amendment standard. *See Wollschlaeger v. Governor of Florida*, 848 F. 3d 1293 (CA11 2017) (en banc) (relied on by Justice Thomas in *NIFLA*.) On the other hand, opponents of laws restricting sexual orientation change efforts (or "conversion therapy") may seize on the majority's reasoning in support of their pseudoscientific practices.

Follow-up

Requiring licensed crisis pregnancy centers to inform women of the reproductive care available to them may be impractical post-*NIFLA*. Although as the majority admits, states remain free to post this "information on public property near crisis pregnancy centers." With respect to unlicensed centers, states and municipalities could try crafting a disclosure requiring smaller fonts and fewer languages and impose the requirement on a more comprehensive set of clinics.

During oral argument, Justices Ginsberg and Gorsuch suggested states might challenge crisis pregnancy centers' deception under anti-fraud or false and misleading advertising statutes. Nothing in the court's opinion precludes this approach.

NIFLA was a significant loss for reproductive rights, but Justice Kennedy's decision to leave the court may prove even more significant for women's right to choose. Even though Justice Kennedy was AWOL this term from the battle for choice, not to mention LGBTQ rights, his retirement raises the specter that *Roe v. Wade* itself may be in jeopardy — posing especially grave consequences for low-income women, women of color, and others who have historically lacked adequate and safe access to reproductive health care.

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