Pregnant and Scared: How *NIFLA v. Becerra* Avoids Protecting Women's Reproductive Autonomy

SAVANNAH R. MONTANEZ*

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* © 2019 Savannah R. Montanez. J.D. 2019, University of San Diego School of Law; B.A. 2015, Northern Arizona University. Thank you, *San Diego Law Review* Editorial Board, for this special opportunity, for your hard work, and for your dedication to legal scholarship. I would especially like to thank Nicole Sumida, Garrett Gaughan, Sarah Kim, and Kelly Reis for their thoughtful feedback on this Note. And thank you, Professor Dov Fox, for your unwavering encouragement.

I. INTRODUCTION

When Donna faced an unplanned pregnancy, she searched online for abortion services in her area.[1] White Rose Women's Center came up.[2] Thinking it was an abortion clinic, Donna called White Rose and asked how much they charged for a first-trimester abortion.[3] A White Rose representative told Donna they did not discuss pricing over the phone, but if she came into the clinic she would receive a pregnancy test and a sonogram for free.[4] Donna booked an appointment.[5] During her twenty-minute sonogram, the nurse repeatedly told Donna she "really need[ed] God in [her] life" and counselled Donna against abortion.[6] When Donna tried to get up to leave, the nurse pushed the sonogram device back onto her stomach.[7] Donna had to physically remove the nurse's hand from her stomach to leave.[8]

The nurse called Donna a few days later apologizing and offering another sonogram.[9] Equipped with a hidden camera, Donna returned to White Rose.[10] At the beginning of this visit, Donna had to watch a video discussing all potential risks of abortion, even the unlikely ones.[11] The video alleged that abortion can cause major depression, anxiety, substance abuse, and suicide.[12] Then, a counselor showed Donna a doll the size of a twelve-week-old fetus and claimed Donna would face an increased risk of breast cancer if she received an abortion.[13] At the end of Donna's visit, a White Rose

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1. Donna shared her story with VICE News, which only used her first name for privacy reasons. VICE News, *The Fake Abortion Clinics of America: Misconception*, YOUTUBE (Sept. 17, 2014), https://www.youtube.com/watch?v=g-ex4Q-z-is#action=share [https://perma.cc/AN97-VUGC].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* The American Psychological Association maintains that women who terminate unwanted pregnancies do not suffer from any greater mental health issues than women who carry unwanted pregnancies to term. BRENDA MAJOR ET AL., AM. PSYCHOLOGICAL ASS'N, MENTAL HEALTH AND ABORTION (2008), https://www.apa.org/pi/women/programs/abortion/executive-summary.pdf [https://perma.cc/AP5Y-6A9L].
13. VICE News, *supra* note 1. Scientific research shows that abortion does not increase a woman's risk of breast cancer. Organizations like the American College of Obstetricians and Gynecologists "routinely review the evidence on this topic," and they repeatedly conclude that abortion is not linked to breast cancer. *Table 25: Abortion and Breast Cancer Risk*, SUSAN G. KOMEN (July 3, 2018), https://ww5.komen.org/BreastCancer/Table25Abortionandbreastcancerrisk.html [https://perma.cc/8HZA-VTL8].

representative apologized that Donna felt misled.[14] The representative continued, "But we have to fight for each other. That's what God wanted us to do. We're all supposed to help each other."[15]

Donna's story is not unique. She is one of many women who entered a crisis pregnancy center (CPC) thinking it was an abortion clinic, only to be proselytized, shamed, and counselled with medically inaccurate information.[16] White Rose Women's Center is one of more than 3,500 CPCs across the United States.[17]

The California Legislature passed the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) in 2015 to regulate the CPCs in its state.[18] The FACT Act sought to ensure California women were fully informed of their options by requiring licensed reproductive healthcare facilities to post or distribute a notice stating in part, "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" (Licensed Notice).[19]

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14. VICE News, *supra* note 1.

15. *Id.*

16. For several examples of women's experiences at crisis pregnancy centers across the country, see generally NARAL PRO-CHOICE CAL. FOUND., UNMASKING FAKE CLINICS: THE TRUTH ABOUT CRISIS PREGNANCY CENTERS IN CALIFORNIA (2010), https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf [https://perma.cc/36J4-VV3G].

17. NARAL PRO-CHOICE AM., CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM 1 (2015), https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf [https://perma.cc/5FGC-ARTK]. As of 2014, there were approximately 788 abortion clinics in the United States. *Data Center*, GUTTMACHER INST., https://data.guttmacher.org/states/table?state=US&topics=57&dataset=data [https://perma.cc/P6PA-FRMM]. Thus, for every abortion clinic in the United States there more than four CPCs.

18. A.B. 775, 2015–2016 Leg., Reg. Sess. (Cal. 2015). According to a 2018 report, as of 2014, 59% of California counties had one or more abortion providers; however, a 2010 report revealed that 93% of counties had one or more CPC. *Id.*; GUTTMACHER INST., STATE FACTS ABOUT ABORTION: CALIFORNIA (2018), https://www.guttmacher.org/sites/default/files/factsheet/sfaa-ca.pdf [https://perma.cc/S9CG-Q7EB].

19. CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West Supp. 2019), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). The FACT Act also requires "unlicensed covered facilit[ies]" to disseminate a notice to clients on site and online stating: "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." *Id.* § 123472(b)(1). However, this Note specifically focuses on the Licensed Notice requirement of the FACT Act.

However, a few days after the FACT Act was signed into law, the National Institute of Family and Life Advocates (NIFLA)—an organization operating more than 1,400 CPCs[20]—and two California CPCs sued the State of California.[21] The plaintiffs filed for a preliminary injunction to prevent the FACT Act from taking effect, arguing the Licensed Notice infringed upon their First Amendment free speech rights.[22] The case made its way to the Supreme Court of the United States, and in June 2018 the Court held that the plaintiffs would likely succeed on their free speech claim.[23] In so doing, the Court announced that state laws regulating professional speech receive strict scrutiny, with just two exceptions.[24] However, the Court determined the Licensed Notice did not fit into either exception.[25]

This Note analyzes the Court's determination that the Licensed Notice did not fit into either exception. Part II of this Note provides a brief overview of CPCs and how the FACT Act was designed to curb CPCs' interference with women's reproductive autonomy. Part III discusses the litigation between NIFLA, the CPCs, and California, culminating in a controversial 5–4 decision in the Supreme Court. Next, Part IV argues that even if the Court wanted to limit the circumstances wherein professional speech received diminished scrutiny, it could have fit the Licensed Notice into its newly-delineated exceptions. This Note ultimately questions why the Court did not fit the Licensed Notice into these exceptions, when doing so would have yielded the fairest result for women's reproductive autonomy.

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20. *About NIFLA*, NAT'L INST. FAM. & LIFE ADVOCATES (May 13, 2019, 9:38 PM), https://nifla.org/about-nifla/ [https://perma.cc/RT2L-5WHU].

21. Nat'l Inst. of Family & Life Advocates v. Harris, Civ. No. 15cv2277 JAH(DHB), 2016 WL 3627327, at *1 (S.D. Cal. Feb. 9, 2016), *aff'd* 839 F.3d 823 (9th Cir. 2016), *rev'd sub nom. Becerra*, 138 S. Ct. 2361.

22. *Id.* at *2. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. *See generally* Gitlow v. New York, 268 U.S. 652 (1925). The plaintiffs also challenged the FACT Act on freedom of religion grounds, but those claims are outside the scope of this Note. *See Harris*, 2016 WL 3627327, at *2.

23. *Becerra*, 138 S. Ct. at 2376. Plaintiffs argued they were entitled to injunctive relief because they would likely be successful on the merits of their free speech claim. *See* Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998).

24. Professional speech regulations will receive deferential review when they (1) "require professionals to disclose factual, noncontroversial information" about the services the professional provides or (2) "regulate professional conduct" that incidentally affects speech. *Becerra*, 138 S. Ct. at 2372. Before this decision, some courts of appeals recognized "professional speech" as a distinct category of speech subject to different constitutional protections. *See, e.g.*, King v. Governor of New Jersey, 767 F.3d 216, 232 (3d Cir. 2014), *abrogated by Becerra*, 138 S. Ct. 2361; Pickup v. Brown, 740 F.3d 1208, 1227–29 (9th Cir. 2014), *abrogated by Becerra*, 138 S. Ct. 2361; Moore-King v. County of Chesterfield, 708 F.3d 560, 568–70 (4th Cir. 2013), *abrogated by Becerra*, 138 S. Ct. 2361.

25. *Becerra*, 138 S. Ct. at 2372.

II. BACKGROUND

CPCs are facilities that present themselves as comprehensive reproductive health centers but actually "aim to discourage and prevent women from seeking abortions."[26] NIFLA—which, as mentioned, operates more than 1,400 CPCs across the country—specifically describes itself as a faith-based nonprofit that "envisions achieving an abortion-free America."[27]

CPCs use deceptive practices to lure women into their facilities. For example, some CPCs post vague billboard advertisements like "Pregnant & Scared?" with a CPC phone number listed underneath.[28] Many other CPCs pay to appear as advertisements when individuals search keywords like "abortion" or "morning-after pill" online.[29] CPCs use these deceptive practices to target young, low-income women in particular.[30] They strategically advertise near high schools, colleges, and low-income neighborhoods.[31] This is significant because young, low-income women are more likely to seek abortion care,[32] yet they have limited access to reproductive healthcare services due to finances, geography, or both.[33]

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26. *Reproductive FACT Act: Hearing on A.B. 775 Before the Assemb. Comm. on Health*, 2015–2016 Leg., Reg. Sess. 3 (Cal. 2015) [hereinafter *Hearing on A.B. 775*] (analysis by Lara Flynn, Member, Assemb. Comm. on Health). About 90% of CPCs are affiliated with one of three pro-life organizations—the National Institute of Family and Life Advocates (NIFLA), Care Net, and Heartbeat International. NARAL PRO-CHOICE CAL. FOUND., *supra* note 16, at 5 (citing Thomas A. Glessner, *NARAL Smear Tactics Distort the Truth About Crisis Pregnancy Centers*, NAT'L INST. FAM. & LIFE ADVOCATES (Dec. 14, 2009), https://nifla.org/naral-smear-tactics-distort-truth/ [https://perma.cc/U886-CBBS]). These organizations provide legal, financial, and personnel assistance to CPC affiliates across the country. *Id.*

27. *About NIFLA*, *supra* note 20.

28. NARAL PRO-CHOICE AM., *supra* note 17, at 2, 4.

29. *Id.* at 4.

30. NARAL PRO-CHOICE CAL. FOUND., *supra* note 16, at 6 (citing *Free Resources*, CARE NET (May 13, 2019, 10:02 PM), https://www.care-net.org/free-resources [https://perma.cc/5BP5-SJV6]). CPCs have also been known to target women of color. *Id.* (citing *Free Resources*, CARE NET (May 13, 2019, 10:02 PM), https://www.care-net.org/free-resources [https://perma.cc/5BP5-SJV6]). For example, Care Net has an outreach initiative that specifically targets African-American and Latina women. *Id.* (citing *Care Net Initiatives*, CARE NET, http://carenet-test.digiknow.com/ourwork/program.php?id=1 [https://perma.cc/68RP-APT5]).

31. *Id.* at 6–7.

32. Over 50% of United States abortion patients in 2014 were under thirty years old and about 75% were poor or low-income. GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES (Jan. 2018), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf [https://perma.cc/29V4-QJYY].

33. NARAL PRO-CHOICE CAL. FOUND., *supra* note 16, at 6.

Licensed[34] CPCs typically offer pregnancy tests, counseling, and ultrasounds.[35] But they also systematically provide incomplete or medically inaccurate information about abortion.[36] For instance, NARAL Pro-Choice America investigators found that CPCs describe heavy bleeding, sepsis, uterine perforation, and death as risks of abortion, without disclosing that less than one-half percent of first-trimester abortions result in serious complications.[37] CPCs also inaccurately state that abortion causes breast cancer, infertility, "post-abortion syndrome," and suicide.[38] CPCs even delay some women from seeking timely access to abortion by inaccurately stating a woman's gestation[39] or inaccurately stating that abortion is legal in the United States throughout all nine months of pregnancy.[40]

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34. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1204 (West 2019) (describing the types of medical clinics eligible for licensure by the State of California).

35. NARAL PRO-CHOICE CAL. FOUND., *supra* note 16, at 4–5 (citing NARAL PRO-CHOICE MD. FUND, THE TRUTH REVEALED: MARYLAND CRISIS PREGNANCY CENTER INVESTIGATIONS (2008), https://maryland.prochoiceamericaaffiliates.org/wp-content/uploads/sites/11/2018/04/crisispregnancycenterreport.pdf [https://perma.cc/7VXK-C6XH]).

36. *See* NARAL PRO-CHOICE AM., *supra* note 17, at 7.

37. *Id.* (first citing NARAL PRO-CHOICE MASS., "JUST BECAUSE YOU'RE PREGNANT . . .": LIES, HALF TRUTHS, AND MANIPULATION AT CRISIS PREGNANCY CENTERS IN MASSACHUSETTS 11 (2011); and then citing GUTTMACHER INST., *supra* note 32). Actually, "pregnancy and childbirth [are] riskier than most abortions." *How Safe Is the Abortion Pill?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-safe-is-the-abortion-pill [https://perma.cc/ZF49-J9GB]. NARAL Pro-Choice America is an organization of more than two million individuals "fighting for access to abortion care, birth control, paid parental leave[,] and protections from pregnancy discrimination." *About Us*, NARAL PRO-CHOICE AM., https://www.prochoiceamerica.org/about/ [https://perma.cc/LB4R-728Q].

38. NARAL PRO-CHOICE AM., *supra* note 17, at 7. "Post-abortion syndrome" and "post-abortion stress disorder" are not included in any medical diagnostic manual and are not recognized conditions by medical professionals. *Id.* at 9 (citing *Countering Misinformation:* MENTAL HEALTH ISSUES AND ABORTION, ADVANCING NEW STANDARDS REPROD. HEALTH, http://www.ansirh.org/research/late-abortion/countering-misinformation/mental-health-abortion.php [perma.cc/D5WB-AHS7]). *See generally* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007) (discussing the unconstitutionality of woman-protective abortion restrictions).

39. At White Rose Women's Health Center in Dallas, Texas, Donna was told she was nine weeks pregnant when she was actually only seven weeks pregnant. VICE News, *supra* note 1.

40. *See, e.g.*, NARAL PRO-CHOICE AM., *supra* note 17, at 12 (citing NARAL PRO-CHOICE N.Y. FOUND., "SHE SAID ABORTION COULD CAUSE BREAST CANCER": A REPORT ON THE LIES, MANIPULATIONS, AND PRIVACY VIOLATIONS OF CRISIS PREGNANCY CENTERS IN NEW YORK CITY 11 (2010), https://www.nirhealth.org/wp-content/uploads/2015/09/cpcreport2010.pdf [https://perma.cc/V9HX-E2KK]). The majority of states in the United States prohibit abortion after a certain gestational point. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (May 1, 2019), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [https://perma.cc/T6S5-RPQL]. *Roe v. Wade* allows states to prohibit abortion after viability. 410 U.S. 113, 163–64 (1973).

To curb CPCs' "interfere[nce] with women's ability to be fully informed and exercise their reproductive rights" via "deceptive advertising and counseling practices" that "often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care,"[41] the California Legislature passed the FACT Act.[42] The Act's express purpose was to ensure that California women were "fully informed of their options and [were] able to make their own healthcare and pregnancy-related decisions."[43]

The FACT Act had an eye toward protecting economically disadvantaged women in particular.[44] Because economically disadvantaged women have diminished access to reproductive care, they may think a CPC is their only option.[45] But in California, there are public programs available to provide women with contraception, health education and counseling, family planning, prenatal care, abortion, and delivery.[46] Accordingly, the FACT Act wanted pregnant women to be aware of these public programs as soon as possible in order to make time-sensitive reproductive decisions.[47]

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41. *Hearing on A.B. 775*, *supra* note 26, at 6–7.

42. A.B. 775, 2015–2016 Leg., Reg. Sess. (Cal. 2015). *See generally* Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1339–51 (2014) (discussing other local governments that passed similar legislation and evaluating the constitutionality of such compelled disclosures).

43. *Reproductive FACT Act: Hearing on A.B. 775 Before the Assemb. Comm. on Judiciary*, 2015–2015 Leg., Reg. Sess. 2 (Cal. 2015) (analysis by Eric Dang & Anthony Lew, Members, Assemb. Comm. on Judiciary).

44. *See* Cal. A.B. 775. Unintended pregnancy disproportionately affects economically disadvantaged women. *See* Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46, 47 (2016). In 2011, the rate of unintended pregnancies "among women with an income below the federal poverty level . . . was more than five times" that of women with incomes above 200% the federal poverty level. *Id.* (citing Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, NEW ENG. J. MED. (Mar. 3, 2016), https://www.nejm.org/doi/full/10.1056/NEJMsa1506575 [https://perma.cc/9FCB-64SE]).

45. NARAL PRO-CHOICE CAL. FOUND., *supra* note 16, at 6.

46. Cal. A.B. 775. California has the Family PACT and Presumptive Eligibility for Pregnant Women Medi-Cal programs that provide low-income women with immediate access to free or low-cost comprehensive family planning services and pregnancy-related care. *Id.* According to the Department of Health Care Services, the Patient Protection and Affordable Care Act expansion has made millions of Californians—more than half of whom are women—eligible for Medi-Cal, California's Medicaid program. *Hearing on A.B. 775*, *supra* note 26, at 6.

47. Cal. A.B. 775.

To achieve this goal, the FACT Act required "licensed covered facilities"[48] that provide family planning or pregnancy-related services to post or distribute a notice stating in part, "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."[49] The Act required the Licensed Notice to be "posted in a conspicuous place" like a waiting room, printed and distributed to all clients, or digitally distributed to all clients at check-in.[50]

III. *THE NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES V. BECERRA*

The governor of California signed the FACT Act into law on October 9, 2015.[51] A few days later, NIFLA, one unlicensed CPC,[52] and one licensed CPC (collectively Plaintiffs) sued the State of California.[53] Plaintiffs filed a motion for preliminary injunction, arguing "their right to freedom of speech . . . will be violated when the Act becomes effective because it forces them to recite government messages promoting abortion and deterring

48. A "licensed covered facility" for purposes of the FACT Act is:

> [A] facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

CAL. HEALTH & SAFETY CODE § 123471(a) (West Supp. 2019).

49. *Id.* § 123472(a)(1), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

50. *Id.* § 123472(a)(2).

51. Cal. A.B. 775.

52. Most CPCs are unlicensed. NARAL PRO-CHOICE CAL. FOUND., *supra* note 16, at 5. Unlicensed CPCs offer non-medical services like counseling and pregnancy tests that the client takes herself. *Id.*

53. *See* Nat'l Inst. of Family & Life Advocates v. Harris, Civ. No. 15cv2277 JAH(DHB), 2016 WL 3627327, at *1 (S.D. Cal. Feb. 9, 2016), *aff'd* 839 F.3d 823 (9th Cir. 2016), *rev'd sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). Specifically, the defendants were Kamala Harris in her official capacity as Attorney General for the State of California, Edmund D. Brown in his official capacity as Governor of the State of California, Thomas Montgomery in his official capacity as County Counsel for San Diego County, and Morgan Foley in his official capacity as attorney for the City of El Cajon in the Southern District of California. *Id.*

women from speaking with them."[54] Accordingly, Plaintiffs urged the court to enjoin enforcement of the FACT Act until their suit was resolved.[55]

To get injunctive relief, Plaintiffs had to show they would likely be successful on their free speech claim.[56] To do so, Plaintiffs argued that the FACT Act constituted content[57] and viewpoint[58] discrimination because it "target[ed] 'crisis pregnancy centers,' that 'aim to discourage and prevent women from seeking abortions,' by 'deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women,'" contrary to their pro-life position.[59] As such, Plaintiffs contended the FACT Act was subject to strict scrutiny and did not survive that level of scrutiny.[60]

California argued that, under *Pickup v. Brown*,[61] the Licensed Notice regulated professional conduct and was therefore subject to rational basis

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54. *Id.* at *2 (quoting Plaintiff's Notice of Motion and Motion for Preliminary Injunction at 1, *Harris*, 2016 WL 3627327, at *1 (Civ. No. 15cv2277 JAH(DHB)).

55. *Id.*

56. *Id.* at *3. A party seeking injunctive relief under Federal Rule of Civil Procedure 65 "must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in [the moving party's] favor." Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998).

57. A regulation discriminates based on content when "on its face," the regulation "draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011)).

58. A regulation discriminates based on viewpoint when it regulates speech "based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Id.* at 2230 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)).

59. *Harris*, 2016 WL 3627327, at *7 (quoting Combined Reply Brief in Support of Plaintiff's Motion for Preliminary Injunction at 7, *id.* (Civ. No. 15cv2277 JAH(DHB)).

60. *Id.* In evaluating the constitutionality of a particular law or regulation, the Court will apply one of three levels of scrutiny. *See id.* at *9. Strict scrutiny requires the challenged law to be narrowly tailored to achieve a compelling state interest. *See id.* Intermediate scrutiny requires the challenged law to be substantially related to achieve an important state interest. *See id.* at *8. And under rational basis review, the challenged law must be rationally related to a legitimate state interest. *See id.* at *7. Content-based regulations are "presumptively unconstitutional" and must survive strict scrutiny. *Reed*, 135 S. Ct. at 2226.

61. 740 F.3d 1208 (9th Cir. 2014), *abrogated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). The Ninth Circuit in *Pickup* perceived First Amendment protection of professional speech as existing along a continuum. *Id.* at 1227. The court stated:

> At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine.

review.[62] Specifically, California argued that the requirement regulated "the delivery of pregnancy-related health care services and [did] not concern expressive activity."[63] California further argued that the FACT Act should be upheld under *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[64] California interpreted *Casey* to mean that "the state can use regulatory authority to require physicians to provide information regarding abortion in a non-misleading, truthful way even if the information might encourage the patient to choose something other than abortion."[65]

A. The Lower Courts' Opinions

The district court held that Plaintiffs failed to demonstrate a likelihood of success on the merits of their free speech challenge to the Licensed Notice.[66] Accordingly, the court denied Plaintiffs' motion for preliminary injunction.[67] The court agreed with California that the Licensed Notice regulated professional conduct, not speech.[68] The court determined that the Licensed Notice did not regulate speech because it did not preclude Plaintiffs from speaking their message.[69] Rather, the Licensed Notice regulated conduct because it mandated disclosure of treatment options to ensure patients made fully informed decisions regarding their pregnancies.[70] The court

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Id. At the middle of the continuum, First Amendment protection is "somewhat diminished" because "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *Id.* at 1228. At the other end of the continuum lies professional conduct, such as medical treatment, where First Amendment protection is the weakest. *Id.* at 1229.

62. *Harris*, 2016 WL 3627327, at *5.

63. *Id.*

64. *Id.* at *6 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882–884 (1992) (plurality opinion)). *Casey* upheld a law requiring physicians to inform patients considering an abortion about the nature of the abortion procedure, the health risks of abortion and childbirth, the probable gestational age of the fetus, and the availability of printed material describing the consequences to the fetus, alternatives to abortion, and a list of public and private agencies that offer financial assistance. *Casey*, 505 U.S. at 881, 884.

65. *Harris*, 2016 WL 3627327, at *6. *See generally* Veneeta Jaswal, *A New Approach to Abortion Informed Consent Laws: How an Evidence Law Framework Can Clarify* Casey*'s Truthful, Non-Misleading Standard*, 6 LAWS 1 (2017).

66. *Harris*, 2016 WL 3627327, at *9.

67. *Id.* at *9, *11.

68. *Id.* at *7. For a description of the professional speech continuum under *Pickup*, see *supra* note 61 and accompanying text.

69. *Harris*, 2016 WL 3627327, at *7.

70. *Id.* The district court thought the Licensed Notice was similar to the regulation in *Pickup*. *Id.* In that case, a California law subjected mental health professionals engaging in "sexual orientation change efforts" with minor clients to professional discipline. Pickup v. Brown, 740 F.3d 1208, 1215 (9th Cir. 2014) (quoting CAL. BUS. & PROF. CODE §§ 865.1, 865.2 (West Supp. 2019)), *abrogated by* Nat'l Inst. of Family & Life Advocates v. Becerra,

therefore applied rational basis review per *Pickup* and concluded, "The state clearly has a legitimate interest in ensuring pregnant [women] are fully advised of their rights and treatment options when making reproductive health care decisions and the required disclosure is undeniably rationally related to that interest."[71]

The Ninth Circuit affirmed.[72] However, it disagreed with the district court that the Licensed Notice regulated conduct; it concluded that the Licensed Notice was a content-based regulation of speech because it "'mandates speech that a speaker would not otherwise make' which 'necessarily alters the content of the speech.'"[73] Specifically, the court determined the Licensed Notice regulated *professional* speech.[74] It found that because licensed clinics offer medical and clinical family-planning services in a professional context, "[a]ll the speech related to the clinics' professional services that occurs within the clinics' walls, including within [] the waiting room, is part of the clinics' professional practice."[75] Accordingly, the court applied intermediate scrutiny under *Pickup*[76] and concluded that the Licensed Notice survived such scrutiny.[77] The court reasoned, "California 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."[78]

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138 S. Ct. 2361 (2018). The court held that this law regulated conduct, specifically treatment. *Id.* at 1229, 1231.

71. *Harris*, 2016 WL 3627327, at *7.

72. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 829 (9th Cir. 2016), *rev'd and remanded sub nom. Becerra*, 138 S. Ct. 2361.

73. *Id.* at 835 (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)). The Ninth Circuit disagreed the Licensed Notice discriminated based on viewpoint, however, because it "does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker" but "merely states the existence of publicly-funded family-planning services." *Id.* at 835–36.

74. *Id.* at 839. *See generally* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016) (providing a comprehensive account of the doctrinal and theoretical bases of professional speech pre-*Becerra*).

75. *Harris*, 839 F.3d at 840.

76. *Id.* (Strict scrutiny does not apply because the licensed clinics "are not engaging in a public dialogue when treating their clients," and rational basis review does not apply because the "Licensed [N]otice does not regulate therapy, treatment, medication, or any other type of conduct.").

77. *Id.* at 841.

78. *Id.*

B. The Supreme Court Majority Opinion

In a 5–4 decision, the Supreme Court reversed the Ninth Circuit, holding that Plaintiffs demonstrated a likelihood of success on the merits of their free speech claim.[79]

In the majority opinion—authored by Justice Thomas and joined by Chief Justice Roberts as well as Justices Kennedy, Alito, and Gorsuch—the Court agreed with the Ninth Circuit that the Licensed Notice was "a content-based regulation of speech" because it compelled clinics to provide information about the availability of state-sponsored services.[80] However, the Court disagreed that the Licensed Notice was subject to intermediate scrutiny because it regulated professional speech.[81] Significantly, the Court proclaimed that it does not recognize professional speech as a distinct category of speech, abrogating *Pickup*.[82]

Rather, the Court declared it only affords less First Amendment protection to speech uttered by professionals in just two circumstances.[83] The Court will apply deferential review to state laws that (1) "require professionals to disclose factual, noncontroversial information" about the services the professional provides (*Zauderer* exception)[84] or (2) regulate professional conduct that incidentally affects speech (*Casey* exception).[85]

The Court determined that the Licensed Notice did not fit into either exception.[86] More specifically, the Court reasoned that the Licensed Notice

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79. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018).

80. *Id.* at 2368, 2371, 2378. The Court added, "By requiring [Plaintiffs] to inform women how they can obtain state-subsidized abortions—at the same time [Plaintiffs] try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of [Plaintiffs'] speech." *Id.* at 2371 (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)). *See generally* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018) (discussing the categories of government action constituting compelled speech post-*Becerra*).

81. *Becerra*, 138 S. Ct. at 2371.

82. *Id.* at 2371–72; *see also* Robert McNamara & Paul Sherman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 220 (submitting that the Court's rejection of the professional-speech exception marks a major change in the law).

83. *Becerra*, 138 S. Ct. at 2372.

84. *Id.* The Court in *Zauderer v. Office of Disciplinary Counsel* upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. 471 U.S. 626, 652, 655–56 (1985). The Court found this requirement to be "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

85. *Becerra*, 138 S. Ct. at 2372. *Planned Parenthood of Southeastern Pennsylvania v. Casey* upheld an abortion formed consent law because it regulated speech only "as part of the practice of medicine, subject to reasonable licensing and regulation by the state." 505 U.S. 833, 884 (1992) (plurality opinion).

86. *Becerra*, 138 S. Ct. at 2372.

did not fit into the *Zauderer* exception because "[t]he [N]otice in no way relates to the services that licensed clinics provide" and abortion is "anything but an 'uncontroversial' topic."[87] And the Licensed Notice did not fit into the *Casey* exception because it "is not an informed-consent requirement or any other regulation of professional conduct."[88]

Thus, the Court concluded the Licensed Notice was by default subject to strict scrutiny,[89] but asserted that the Notice was unlikely to survive even intermediate scrutiny.[90] The Court opined that the Licensed Notice was not sufficiently drawn to achieve California's interest in "providing low-income women with information about state-sponsored services."[91] The Court believed that the Licensed Notice was "wildly underinclusive" because it only applied to clinics that primarily provide family-planning or pregnancy-related services, instead of all kinds of community clinics, and that California could achieve its interest with a public-information campaign.[92]

C. The Supreme Court Dissenting Opinion

Justice Breyer filed a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.[93] The dissent took issue with the idea that all content-based speech is subject to strict scrutiny except speech falling under the *Zauderer* exception or the *Casey* exception.[94] According to the dissent, this interpretation of the First Amendment "threatens to create serious problems" because "[v]irtually every disclosure law could be considered 'content based,' for virtually every disclosure law requires individuals 'to speak a particular message.'"[95] Thus, the majority's constitutional framework

87. *Id.*
88. *Id.* at 2373.
89. *See id.* at 2375. Under *Reed v. Town of Gilbert*, content-based regulations are generally subject to strict scrutiny. 135 S. Ct. 2218, 2226 (2015). The Court determined California did not provide a sufficient reason to except the Licensed Notice from this general rule. *See Becerra*, 138 S. Ct. at 2375.
90. *Becerra*, 138 S. Ct. at 2375.
91. *Id.*
92. *Id.* at 2375–76 (quoting Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 802 (2011)).
93. *Id.* at 2367.
94. *See id.* at 2380 (Breyer, J., dissenting).
95. *Id.*

could put much of securities law, consumer protection law, or ordinary disclosure requirements in the healthcare context at risk.[96]

Instead of pronouncing and applying the majority's new First Amendment framework, the dissent would have simply applied *Casey* as controlling authority.[97] In *Casey*, the Supreme Court upheld a law that required physicians to inform patients considering an abortion about the nature of the abortion procedure, health risks of abortion and childbirth, probable gestational age of the fetus, consequences to the fetus, alternatives to abortion, and financial assistance.[98] The Court wrote:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[99]

Accordingly, since a state can constitutionally require a doctor to tell a woman seeking an abortion about adoption services and financial assistance, the dissent maintained that "the law's demand for evenhandedness" should allow a state to "require [medical counselors] to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services."[100] Indeed, the dissent urged, the demand for evenhandedness is even greater in cases addressing topics of moral debate, like abortion, on which Americans have such strong, opposing views.[101]

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96. *Id.* The dissent offered California Vehicle Code section 27363.5 as one example, which required hospitals to tell parents about child seat belts. *Id.* (citing CAL. VEH. CODE § 27363.5 (West 2019)). This requirement, the dissent pointed out, would not fall under the *Zauderer* exception nor the *Casey* exception. *Id.*; *see First Amendment—Freedom of Speech—Compelled Speech*—National Institute of Family & Life Advocates v. Becerra, 132 HARV. L. REV. 347, 351 (2018) ("*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.'" (quoting Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting))).

97. *See Becerra*, 138 S. Ct. at 2385–86 (Breyer, J., dissenting).

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

99. *Id.* at 884 (citations omitted).

100. *Becerra*, 138 S. Ct. at 2385 (Breyer, J., dissenting) ("After all, the rule of law embodies evenhandedness, and 'what is sauce for the goose is normally sauce for the gander.'" (quoting Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016))).

101. *Id.* at 2388. In 2018, 48% of Americans identify as pro-choice and 48% as pro-life. Jeffrey M. Jones, *U.S. Abortion Attitudes Remain Closely Divided*, GALLUP (June 11, 2018), https://news.gallup.com/poll/235445/abortion-attitudes-remain-closely-divided.aspx [https://perma.cc/JN4R-JYU4].

IV. THE SUPREME COURT COULD HAVE, BUT DID NOT, FIT THE LICENSED NOTICE INTO EITHER EXCEPTION

The Court refused to recognize "professional speech" as a distinct category of speech—and held professional speech receives deferential review in just two circumstances—because it wanted to limit the categories of speech subject to diminished constitutional protection.[102] When government regulates professional speech, it risks "suppress[ing] unpopular ideas or information"[103] and "fail[ing] to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'"[104] Accepting that position, the Court nevertheless could have fit the Licensed Notice into either exception. But it did not. Notably, the Court was quite conclusory in deciding that the Licensed Notice did not fit into either exception.

A. The Court Could Have Fit the Licensed Notice into the Zauderer *Exception*

Again, the *Zauderer* exception permits deferential review to laws requiring professionals to disclose "purely factual and uncontroversial information about the terms under which . . . services will be available."[105] In rejecting the Licensed Notice's fit into the *Zauderer* exception, the Court simply stated, "The [N]otice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic."[106]

But the Court could have fit the Licensed Notice into the *Zauderer* exception, as defined by the Court. For one, it is readily conceivable that the Licensed Notice related to the services that licensed clinics provide. A "licensed covered facility" for purposes of the FACT Act is a licensed facility "whose primary purpose is providing family planning or pregnancy-

102. *Becerra*, 138 S. Ct. at 2372 ("This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996))).

103. *Id.* at 2374 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

104. *Id.* (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014)).

105. *Id.* at 2372 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)). Under *Zauderer*, a law requiring a commercial speaker to disclose "purely factual and uncontroversial information" need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651.

106. *Becerra*, 138 S. Ct. at 2372.

related services," such as ultrasounds, contraception counseling, pregnancy testing, pregnancy options counseling, or abortions.[107] And the Licensed Notice required these facilities to post or distribute a notice stating in part, "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."[108]

So, although the Licensed Notice required licensed covered facilities to provide information about state-sponsored services, it cannot be said that those services *in no way* related to the services these facilities provide. As the *Becerra* dissent pointed out, contraception is a family-planning service, ultrasounds and pregnancy testing are prenatal care, and abortion is a service identified in both the Licensed Notice and the services that qualify a clinic as a "licensed covered facility."[109] Indeed, it would be reasonable to say that the Licensed Notice related to the exact same services the licensed covered facilities provide.

Secondly, although abortion is a controversial topic,[110] the fact that California provides free or low-cost access to reproductive healthcare, including abortion, is "purely factual and uncontroversial."[111] The Supreme Court has not expressly defined "purely factual and uncontroversial." In *Zauderer*, the Court upheld a rule that required lawyers advertising their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs.[112] The Court upheld this rule because it mandated disclosure of "purely factual and uncontroversial information" as opposed to "prescrib[ing]

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107. CAL. HEALTH & SAFETY CODE § 123471(a) (West Supp. 2019).

108. *Id.* § 123472(a)(1), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

109. *See Becerra*, 138 S. Ct. at 2387 (Breyer, J., dissenting).

110. *See* Karlyn Bowman & Jennifer Marsico, *Opinions About Abortion Haven't Changed Since* Roe v. Wade, ATLANTIC (Jan. 22, 2014), https://www.theatlantic.com/politics/archive/2014/01/opinions-about-abortion-havent-changed-since-em-roe-v-wade-em/283226/ [https:// perma.cc/2LA7-2NFZ] ("Most Americans are deeply conflicted about abortion. Many believe it is an act of murder. But polls also show that Americans simultaneously believe that the decision to have an abortion should be a personal choice between a woman and her doctor. These two ideas are in deep conflict but many people hold these contradictory views and see no need to reconcile them."). For a concise overview of the judicial and legislative history of abortion regulation, see generally JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL33467, ABORTION: JUDICIAL HISTORY AND LEGISLATIVE RESPONSE (2014).

111. *Becerra*, 138 S. Ct. at 2376.

112. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652, 655–56 (1985). The plaintiff in *Zauderer* was an attorney who ran an advertisement in the local newspaper advertising that "his law firm would represent defendants in drunken driving cases and that his clients' 'full legal fee would be refunded if they were convicted of DRUNK DRIVING.'" *Id.* at 629–30.

what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[113]

The circuit courts have attempted to define "purely factual and uncontroversial."[114] The Ninth Circuit, for instance, understands "uncontroversial" as referring to the "factual accuracy of the compelled disclosure, not to its subjective impact on the audience."[115] Thus, according to the Ninth Circuit, "a disclosure may be 'purely factual and uncontroversial' although it disturbs the party being compelled to make the disclosure or disturbs its customers, including if it 'discourages the latter from' purchasing the product or service at issue or 'harms the reputation' of the entity that previously benefitted from the misleading advertising."[116]

Under this definition, the Licensed Notice was plainly "purely factual and uncontroversial." The Licensed Notice perhaps disturbed CPCs and could have discouraged women from pursuing reproductive healthcare services at CPCs. However, the information contained in the Licensed Notice was factually accurate. California, in fact, has public programs that provide immediate free or low-cost access to reproductive healthcare, including abortion. California provides access to these services through its Medi-Cal and Family PACT programs.[117]

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113. *Id.* at 651 (quoting W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 642 (1943)). The *Zauderer* Court distinguished the mandated disclosure at issue from the mandated disclosure in *Wooley v. Maynard*, wherein the state required noncommercial motor vehicles to bear licensed plates embossed with the state's motto, "Live Free or Die." *Id.* at 650–51 (citing Wooley v. Maynard, 430 U.S. 705 (1977)).

114. *See, e.g.*, Nat'l Ass'n Mfrs. v. SEC, 800 F.3d 518, 528 (D.C. Cir. 2015) ("One clue is that 'uncontroversial,' as a legal test, must mean something different than 'purely factual.' . . . Perhaps the distinction is between fact and opinion. But that line is often blurred, and it is far from clear that all opinions are controversial."); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 34 (D.C. Cir. 2014) (Kavanaugh, J., concurring) ("To be sure, determining whether a disclosure is 'uncontroversial' may be difficult in some compelled commercial speech cases, in part because it is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial."); *see also* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 898 (2010) (examining the relationship between the First Amendment and facts).

115. Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 732 (9th Cir. 2017) (quoting CTIA-The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 2708 (2018)). In *Owen*, the Ninth Circuit held that requiring a mortgage refinancing company to disclose to lenders' customers that its solicitations are not authorized by their mortgage lenders is "purely factual and uncontroversial." *See id.* at 733.

116. *Id.* at 732 (quoting *CTIA-The Wireless Ass'n*, 854 F.3d at 1118).

117. A.B. 775, 2015–2016 Leg., Reg. Sess. (Cal. 2015).

The Licensed Notice was like other mandated disclosures deemed "purely factual and uncontroversial" in the circuit courts. For example, the Ninth Circuit concluded that an Environmental Protection Agency (EPA) regulation requiring municipalities to "distribute educational materials to the community . . . about the impacts of stormwater discharges on water bodies and the steps the public can take to reduce pollutants in stormwater runoff"[118] mandated "purely factual and uncontroversial" information.[119] The court reasoned that informing the public about safe toxin disposal involved no "affirmation of belief"[120] and did not prevent the municipalities from "stating [their] own views about the proper means of managing toxic materials."[121]

On the other hand, the Seventh Circuit determined that a state law requiring "sexually explicit" video games—by the state's standards—to bear an "18" sticker did not mandate "purely factual and uncontroversial" information.[122] Because deciding whether something is "sexually explicit" is opinion-based, "[t]he sticker ultimately communicates a subjective and highly controversial message—that the game's content is sexually explicit."[123]

The Licensed Notice was more like the EPA regulation than the "18" sticker. Like the EPA regulation, the Licensed Notice asserted no affirmation nor belief. It did not suggest that women ought to receive family planning, prenatal, or abortion services, nor did it offer any normative statement about these services. And unlike the "18" sticker, the Licensed Notice did not depend on an opinion. Rather, it merely stated the fact that California has public programs providing free or low-cost access to reproductive healthcare.

Indeed, the very purpose of the FACT Act comports with *Zauderer*'s underlying rationale. *Zauderer* justified applying rational basis review to "purely factual and uncontroversial" mandates because "[commercial speakers'] constitutionally protected interest in *not* providing any particular factual information in [their] advertising is minimal."[124] Such mandates can be

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118. Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 848 (9th Cir. 2003) (quoting 40 C.F.R. § 122.34(b)(1)(i) (2011)).

119. *Id.* at 851.

120. *Id.* at 850 (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980)).

121. *Id.*; *see also* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) (holding that the country of origin of meat is "purely factual and uncontroversial"); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009) (holding that calorie content on menus is "purely factual and uncontroversial"); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (holding that the presence of mercury in a product is "purely factual and uncontroversial").

122. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

123. *Id.*; *see also* Nat'l Ass'n Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (stating in dicta that a "not conflict free" label was not "purely factual and uncontroversial" because "'not conflict free' is a metaphor that conveys moral responsibility for the Congo war").

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

necessary "to dissipate the possibility of consumer confusion or deception."[125] This rationale applies with equal force to the FACT Act, which aimed to curb CPCs' "deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care."[126]

Evidently, instead of deeming the Licensed Notice not "purely factual and uncontroversial" because it used the term "abortion," the Court could have deemed the Licensed Notice "purely factual and uncontroversial" if it focused on the Licensed Notice's factual nature. Of course, abortion is a controversial topic. But California does, in fact, have public programs providing access to reproductive healthcare, including abortion. That is not debatable.

B. The Court Could Have Fit the Licensed Notice into the Casey *Exception*

The Court could have fit the Licensed Notice into the *Casey* exception too, if it had broadened its conception of informed consent. Again, the *Casey* exception affords deferential review to state regulations of professional conduct, even if that conduct incidentally involves speech.[127] The Court described obtaining informed consent to a medical procedure, like abortion, as an example of professional conduct incidentally involving speech.[128]

In rejecting the Licensed Notice's fit into the *Casey* exception, the Court stated:

> The [L]icensed [N]otice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed.[129]

But the Court could have fit the Licensed Notice into the *Casey* exception if it understood informed consent as not necessarily tied to discrete medical procedures. Indeed, the Court should have understood informed consent as embracing a range of treatment options.

In *Casey*, the Court considered a law requiring physicians to inform patients considering an abortion about the nature of the abortion procedure,

125. *Id.* (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)).
126. *Hearing on A.B. 775*, *supra* note 26, at 7.
127. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018).
128. *See id.* at 2373.
129. *Id.* at 2373–74.

the health risks of abortion and childbirth, the probable gestational age of the fetus, the availability of state-published material describing the consequences to the fetus, alternatives to abortion, and a list of public and private agencies that offer financial assistance.[130] Like Plaintiffs, the petitioners in *Casey* argued that the statute violated physicians' First Amendment right "not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State."[131] However, the Court swiftly rejected this claim and upheld the statute:

> To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[132]

In other words, states can constitutionally regulate the practice of medicine.[133] Obtaining informed consent is part of the practice of medicine.[134] Therefore, states can constitutionally regulate informed consent. And regulating informed consent includes requiring physicians to provide certain information—even state-published financial information about childbirth and adoption—when obtaining women's informed consent to abortion.[135]

Becerra held that the Licensed Notice did not fit into this constitutional scheme because it required CPCs to provide certain information regardless of whether a medical procedure was "sought, offered, or performed."[136] This, the Court opined, disqualified the Licensed Notice from being an informed consent regulation.[137] Ergo, in the Court's view, the Licensed Notice was not a constitutional regulation of the practice of medicine, nor of professional conduct generally.[138]

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130. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 879, 881 (1992) (plurality opinion).
131. *Id.* at 884.
132. *Id.* (citations omitted).
133. The states and their medical boards regulate the practice of medicine pursuant to their Tenth Amendment police power. U.S. CONST. amend. X. The Tenth Amendment does not explicitly state that healthcare is an enumerated state power but such power is implied. The Supreme Court interprets the powers reserved for the states as "police powers," which are best exercised by states to protect their citizens' health, safety, and welfare. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203–06 (1824).
134. *See Casey*, 505 U.S. at 884.
135. *Id.* ("Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.").
136. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373–74 (2018). The Licensed Notice was to be "posted in a conspicuous place" like a waiting room, printed and distributed to all clients, or digitally distributed to all clients at check-in. CAL. HEALTH & SAFETY CODE § 123472(a)(2) (West Supp. 2019), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
137. *Becerra*, 138 S. Ct. at 2373–74.
138. *Id.*

However, the Court took an overly narrow view of informed consent to reach this conclusion—one that is contrary to legal and medical informed consent standards. Under legal and medical informed consent standards, informed consent is not triggered when a medical procedure is "sought, offered, or performed." Rather, it is triggered when a patient presents with a medical condition for which there are a number of treatment options.

For example, in *Cobbs v. Grant*, Cobbs had a duodenal ulcer.[139] Dr. Grant advised Cobbs he needed surgery.[140] Dr. Grant explained the nature of the surgery but did not inform Cobbs of the inherent risks of the surgery nor of the other treatment options.[141] Cobbs suffered surgical complications, resulting in the removal of his spleen and half of his stomach.[142] Cobbs sued Dr. Grant for medical malpractice, alleging he did not provide informed consent to undergo the surgery.[143]

The California Supreme Court held that physicians have a duty to disclose all available treatment options and "the dangers inherently and potentially involved in each" one.[144] The court reasoned that patients have the right to control their own bodies and decide for themselves whether or not to submit to one treatment or another.[145] "To enable the patient to chart his course knowledgably," the physician must inform the patient of the various

139. 502 P.2d 1, 4 (Cal. 1972). "Together with companion decisions in other jurisdictions, [Cobbs] is one of the epochal opinions in the legal recognition of the medical patient's protect[a]ble interest in autonomous decisionmaking." Arato v. Avedon, 858 P.2d 598, 605 (Cal. 1993) (citation omitted). Cobbs built upon several out-of-state decisions contouring the scope of informed consent. *Id.* at 604 n.5 (first citing Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); then citing Natanson v. Kline, 350 P.2d 1093 (Kan. 1960); and then citing Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914)). For a description of the origin and development of the informed consent doctrine, see generally Thor v. Superior Court, 855 P.2d 375 (Cal. 1993).

140. *Cobbs*, 502 P.2d at 4.

141. *Id.*

142. *Id.* at 4–5.

143. *Id.* at 5.

144. *Id.* at 10; *see also* Martha Swartz, *Physician-Patient Communication and the First Amendment After* Sorrell, 17 MICH. ST. U. J. MED. & L. 101, 118–21 (2012) (comparing general statutory informed consent requirements, which often go legally unchallenged, to statutory informed consent requirements in the abortion context).

145. *Cobbs*, 502 P.2d at 10.

options.[146] It is insufficient for a physician to only advise the patient of the option the physician prefers.[147]

Informed consent should not operate differently in the unintended pregnancy context. When a patient presents with an unintended pregnancy, she should be informed of all her options and the risks associated with each option. It should not be sufficient for a CPC to only advise her of the option it prefers—continuing the pregnancy to term.

That the unintentionally pregnant woman should be informed of all her options is espoused in nationally-recognized healthcare guidelines. In its Guidelines for Women's Health Care, the American College of Obstetricians and Gynecologists recommends that all women experiencing unintended pregnancy "should be counseled about their options: continuing the pregnancy to term and raising the infant, continuing the pregnancy to term and placing the infant for legal adoption, or terminating the pregnancy."[148] Likewise, the federal government requires Title-X-participating projects to counsel pregnant women regarding each of the following options: prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination.[149] The information about these options is to be provided in a neutral, factual, and nondirective way.[150]

Indeed, requiring the unintentionally pregnant woman to request a medical procedure in order to learn about abortion—and how to financially access abortion—is a catch-22 because continuing a pregnancy to term is not itself a medical procedure. But continuing a pregnancy to term certainly implicates health risks that ought to be compared to those of abortion. For one, the risk of death associated with childbirth is fourteen times higher than the

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146. *Id.* "The scope of the physician's communications to the patient . . . must be measured by the patient's need, and that need is whatever information is material to the decision. Thus[,] the test for determining whether a potential peril must be divulged is its materiality to the patient's decision." *Id.* at 11 (citing Canterbury v. Spence, 464 F.2d 772, 786 (D.C. Cir. 1972)).

147. *See id.* at 10. "In many instances, to the physician, whose training and experience enable a self-satisfying evaluation, the particular treatment which should be undertaken may seem evident, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie." *Id.*

148. Kinsey Hasstedt, *Unbiased Information on and Referral for All Pregnancy Options Are Essential to Informed Consent in Reproductive Health Care*, 21 GUTTMACHER POL'Y REV. 1, 2 (2018), https://www.guttmacher.org/sites/default/files/article_files/gpr2100118.pdf [https://perma.cc/L3L3-ELRR] (quoting AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, GUIDELINES FOR WOMEN'S HEALTH CARE: A RESOURCE MANUAL (4th ed. 2014)). The American College of Obstetricians and Gynecologists is "the specialty's premier professional membership organization dedicated to the improvement of women's health." *About Us*, AM. COLLEGE OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/About-ACOG [https://perma.cc/ET76-SQDQ].

149. 42 C.F.R. § 59.5(a)(5)(i) (2019).

150. *See id.* § 59.5(a)(5)(ii).

risk of death associated with abortion.[151] And as the *Becerra* dissent pointed out, "[P]renatal care often involves testing for anemia, infections, measles, chicken pox, genetic disorders, diabetes, pneumonia, urinary tract infections, preeclampsia, and hosts of other medical conditions."[152] While abortion has its own attending health risks in extremely rare circumstances[153]—like blood clots, bleeding, or infection[154]—it is considered "one of the safest medical procedures out there."[155] Having the health-risk information on both sides—continuing and terminating a pregnancy—is essential for a woman to compare the safety of each option and make an informed, voluntary choice—even if some of those options are not medical procedures per se.

In short, the Court did not fit the Licensed Notice into the *Casey* exception because it was disseminated to all women in a CPC, regardless of whether a medical procedure, like abortion, was "sought, offered, or performed."[156] But the Court could have fit the Licensed Notice into the *Casey* exception if it understood informed consent as not necessarily tied to discrete medical procedures. Rather, to comport with legal and medical conceptions of informed consent, the Court should have understood informed consent as requiring women to be informed of all options, the risks of each option, and how to financially access those options.

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151. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012), http://unmfamilyplanning.pbworks.com/w/file/fetch/119312553/Raymond%20et%20al-Comparative%20Safety.pdf [https://perma.cc/555P-6XFB] ("The pregnancy-associated mortality rate among women who delivered live neonates was 8.8 deaths per 100,000 live births. The mortality rate related to induced abortion was 0.6 deaths per 100,000 abortions.").

152. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2386 (2018) (Breyer, J., dissenting).

153. Less than 2% of abortions yield minor complications and less than 0.25% yield major complications requiring hospital admission, surgery, or a blood transfusion. Laura Kurtzman, *Major Complication Rate After Abortion Is Extremely Low, Study Shows*, U.C.S.F. (Dec. 8, 2014), https://www.ucsf.edu/news/2014/12/121781/major-complication-rate-after-abortion-extremely-low-study-shows [https://perma.cc/5KZX-6PVM]. In terms of major complications, an abortion is as risky as a colonoscopy. *Id.*

154. *How Safe Is an In-Clinic Abortion?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion [https://perma.cc/S89A-7RMB].

155. *What Facts About Abortion Do I Need to Know?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/considering-abortion/what-facts-about-abortion-do-i-need-know [https://perma.cc/FWT6-9D4U].

156. *Becerra*, 138 S. Ct. at 2373 (majority opinion).

V. CONCLUSION

Because the Court did not fit the Licensed Notice into the *Zauderer* exception nor the *Casey* exception, the Licensed Notice is subject to strict scrutiny. In light of this high standard,[157] the Court held that Plaintiffs were likely to succeed on their free speech claim. On remand, the district court will almost certainly issue a preliminary injunction enjoining enforcement of the FACT Act. And the Act will almost certainly be deemed unconstitutional in subsequent litigation. Consequently, CPCs will not have to disseminate the Licensed Notice. This means that women like Donna will remain unaware that CPCs are not their only option.

Even if the Court wanted to limit the circumstances under which speech regulations received diminished scrutiny, it could have done that *and* protected economically disadvantaged women's right to access reproductive healthcare. It could have fit the Licensed Notice into either exception without suppressing unpopular ideas or eroding the marketplace of ideas. The Licensed Notice did not stop CPCs from spreading their message; it provided *more* information to the marketplace. But the Court did not take this route. Perhaps this is yet another abrogation of women's constitutional right to access abortion.[158]

157. Content-based speech regulations subject to strict scrutiny are presumptively unconstitutional. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (first citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992); and then citing Simon & Shuster v. N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)).

158. *See generally* Cheryl E. Amana Burris, *Reproductive Rights Under Attack: Can the Fundamentals of* Roe *Survive?*, 8 N.C. CENT. U. BIOTECHNOLOGY & PHARMACEUTICAL L. REV. 1 (2015).