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Symposium: "Hey California, stop telling us what to say at work!"

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Based on opposition to "crisis pregnancy centers" — which provide pregnancy-related services with the goal of helping women make choices other than abortion — the California legislature passed a law that burdens the centers' speech. Specifically, the new law requires licensed clinics "whose primary purpose is providing family planning or pregnancy-related services" to deliver to each of their clients the following message: "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."

The law has an exception for clinics that actually enroll clients in these public programs, so it targets only businesses that decline to participate in what is supposed to be a voluntary state program.

Several crisis pregnancy centers sued to block the law, arguing that it violates their First Amendment rights by forcing them to express a message to which they are opposed. But the U.S. Court of Appeals for the 9th Circuit rejected their challenge, holding that the statute regulates only "professional speech" and therefore should be reviewed under intermediate First Amendment scrutiny, a relatively deferential standard.

That lower level of scrutiny may well have been outcome-determinative. The 9th Circuit didn't reach the factual question of whether California could have distributed this message itself, but admitted that "even if it were true that the state could disseminate this information through other means, it need not prove that the Act is the least restrictive means possible" in order to satisfy intermediate scrutiny. Yet First Amendment restrictions are typically evaluated under the more rigorous "strict scrutiny" standard of review, with only certain narrow (and controversial) exceptions, such as for "commercial" speech.

Accordingly, in *National Institute of Family and Life Advocates v. Becerra*, the Supreme Court will decide whether licensed professionals can have their speech "commandeered" to advertise services that the government wishes to promote. The definition of professional speech that the lower court applied so it wouldn't have to hold California's feet to the full constitutional fire is dangerously overbroad and requires the court's correction.

No one disputes that the speech of licensed professionals can be legitimately regulated in some circumstances. As relevant here, regulation of patient-physician speech is justified by the notion that when doctors speak to their patients, they assume a special obligation to communicate their expertise fully and truthfully. These regulations protect patients, who can't be expected to have the same specialized knowledge as their medical providers. Medical doctors can be liable for malpractice if they fail to convey a diagnosis to a patient, for example, or if they fail to obtain informed consent before performing surgery. But such regulations can't be extended beyond that bright line of specialized knowledge: If a state can require its doctors to read a pre-written advertisement to their patients, it can force them to say anything the state wants.

Some courts and scholars have argued that speech regulations of this type deserve their own doctrinal category — applicable to professional speech — and that a lower level of scrutiny should be applied to such regulations. Others have argued that no new doctrinal tier is necessary, because the compelling need for malpractice enforcement and informed-consent laws means that laws regulating professional speech would pass strict scrutiny. Rodney A. Smolla, the former dean of the University of Richmond and Washington and Lee Law Schools, argued in the *West Virginia Law Review* last year that "properly applied First Amendment principles would sustain the power of regulators to regulate professional speech in these instances. These are the very regulations that would typically be upheld even under application of the 'strict scrutiny' test."

I tend to agree with Smolla, but that doctrinal debate need not be resolved to decide this case. That's because the quality of true professional speech that justifies those limited regulations — namely, an asymmetry of expert knowledge as to diagnosis, treatment and risks — is entirely absent here. For that reason, the compulsory speech that California has mandated neither qualifies for intermediate scrutiny nor overcomes strict scrutiny.

Translated from legalese to English: (1) There's nothing particularly "professional," in the sense of "special-knowledge-demanding," about the "California offers family-planning programs that include abortion" message that justifies the government's forcing people to communicate it, and (2) even if the message is really, really important, there are other ways of conveying it.

Moreover, the 9th Circuit's test ignores the threat posed by compulsory transmission of government-selected facts. Under that test, a state can compel unwilling physicians to recite any fact that may be relevant to "the health of [the state's] citizens," a definition broad enough to encompass essentially any statement the government chooses. If left to stand, the decision below would allow states to force professionals of all kinds to promote products and services they morally oppose. And, of course, the list of "professionals" would expand over time so that eventually states could claim power to compel any employer (or employee) to say anything in their employment capacity.

Compelling people to speak the government's message at work is dangerous for precisely the reasons that compelled speech is always dangerous. Most importantly, it allows the government to put its thumb on the scale in a social debate, by conscripting individuals to help spread a particular message. (Tellingly, California has no equivalent law forcing clinics to advertise adoption agencies or other options for pregnant women.)

Lower courts have struggled for guidance in formulating the boundaries and definitions of true professional speech. This is the Supreme Court's opportunity to prevent those definitions from being dangerously expanded to the point at which doctors effectively lose their First Amendment rights the moment they walk into their clinics.

Fundamentally, California's law burdens speakers' consciences by forcing them to promote programs that they morally oppose. That's precisely the invasion of "the sphere of intellect and spirit" that Justice Robert Jackson warned of nearly 75 years ago in the first Supreme Court case to strike down a compelled-speech law, *West Virginia Board of Education v. Barnette*. The Supreme Court should reject the 9th Circuit's dangerous professional speech doctrine and apply *Barnette*'s lesson to strike down this noxious law.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. *He filed an amicus brief supporting the cert petition in* NIFLA v. Becerra*, on which this essay is based, and will be doing so again at the merits stage.*