

DeSoto Times-Tribune

Freedom of speech includes the right to remain silent

George F. Will

March 21, 2018

Governments routinely behave badly, but sometimes their mean-spiritedness comes to the Supreme Court's attention. On Tuesday, it will hear oral arguments concerning the constitutionality of measures that California's government has taken to compel pro-life entities to speak against their own mission.

Crisis pregnancy centers are nonprofit facilities usually owned and operated by people with religious objections to abortion. Some centers are licensed medical facilities providing pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, etc. Other centers are unlicensed because they provide only nonmedical services (self-administered pregnancy testing kits, parenting preparation training, baby clothes, diapers, etc.).

A 2015 California law requires licensed pregnancy crisis centers to tell clients (in pamphlets, in waiting-room signs) this: "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." Unlicensed centers are required to notify clients that the center "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."

So, government compels licensed centers to provide free advertisements for government-provided abortions. And government compels unlicensed centers to say — in large fonts, in as many as 13 languages, even on their own websites — that they do not have medical providers that the government itself says, by not requiring them to be licensed, are not necessary for the services they provide. The government's obvious nasty purpose is to make the unlicensed centers' clients unnecessarily uneasy.

California tailored the law to target only crisis centers: It exempts from the compelled speech requirements all women's health services providers that dispense abortifacients. The crisis centers are incorporated as religious organizations, and their mission is dictated by the content of their beliefs. The pro-choice government is targeting the centers to exercise one-sided influence on some women's choices. The Cato Institute's Ilya Shapiro, author of an amicus brief supporting the crisis centers, says it is telling that California has no comparable law requiring abortion providers to post advertisements for adoption agencies or other alternatives to abortion.

Neither the 2015 law's legislative history nor the state's brief in defense of the law provides any evidence for the state's charge that the centers "confuse," "misinform" or otherwise harm women. And the law clearly has nothing to do with ensuring informed consent by clients of the pregnancy crisis centers.

The U.S. Court of Appeals for the 9th Circuit, whose reasoning is frequently novel and whose rulings are frequently reversed, upheld California's law on the grounds that government often can regulate the practice-related speech of professionals that it licenses. The Supreme Court has never embraced this carve-out from the First Amendment, which would give government an open-ended power to require whomever the government deems a "professional" to communicate whatever message the government favors.

Pro-choice defenders of California's patently content-based and discriminatory law should consider the following: Suppose a pro-life state government were to require all publicly and privately funded abortion providers to advertise on their premises the locations and services of crisis pregnancy centers. Or even to post the following accurate information on their premises, websites and advertisements:

"Eighteen days after conception, the unborn baby's brain begins to form. At about three weeks, the heart begins to beat, circulating the baby's blood. At six weeks, brain waves are detectable and at seven weeks, the baby is kicking. By week nine, the baby can suck his or her thumb and move his or her head. From weeks 10 through 13, bones harden and teeth, fingerprints and fingernails begin to form. At 26 weeks, the spinal cord and pain receptors are in place for pain transmission to the brain."

A pro-life government's point in compelling the placement of this factual notice would be not just to inform women contemplating having an abortion but also to incline them against doing so. The abortion providers would be compelled to disseminate a message contrary to their beliefs about the morality of abortion. This would be (as Shapiro says of California's compelled-speech law targeting the crisis centers) government putting "its thumb on the scale in a social debate, by conscripting individuals to help spread a particular message."

As the Supreme Court has held, freedom of speech means freedom to choose what to say — and what not to say. The pregnancy crisis centers have a right that California's bullying government also has and that it would do well to exercise more often: the right to remain silent.