



Abortion and free speech collide at the Supreme Court

Nicole Russell

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On Tuesday, the Supreme Court heard oral arguments in *National Institute of Family and Life Advocates v. Becerra*, a case about two controversial ideas: abortion and free speech. The justices will analyze whether the disclosures required by the California Reproductive FACT Act violate the free speech clause in the First Amendment. This won't be the first time the justices have heard an emotionally-charged case about abortion of course — *Gonzales v. Carhart* comes to mind — but it's rare to find one that juxtaposes issues that are central to the modern day conservative platform intertwined in such a rare way.

The court already determined abortion rights — not just in the most infamous case, *Roe v. Wade*, but in its ugly step sister, *Planned Parenthood v. Casey*. What distinguishes the compelled speech issue in *NIFLA* from the “informed consent” law the Supreme Court upheld in *Casey* is not only different, but, if the case is upheld, will have significant repercussions not just for the abortion issue but free speech in advertising and the public square.

The premise of the case, which is integral to understanding how this is a “free speech” case, goes like this: In 2015, California lawmakers enacted the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act, also known as the Reproductive FACT Act.

It required that nonprofit organizations that are licensed to provide medical services post notices to inform their patients that low-cost or free abortions are available, as well as contact information for those abortion providers. It also required centers that are not licensed to provide medical services must include disclaimers in their ads saying as much. If either organizations failed to comply, the local or state government could sue and apply a fine.

How the 9th Circuit came to the conclusion that advertisements for pregnancy centers, or the advertisements they release, would be professional speech is beyond me. In an *amicus curiae* brief, the Cato Institute's Ilya Shapiro et al. describes the difference between informed consent and compelled speech in *NIFLA*, quoting Mark Rienzi, “While it is entirely consistent with historical practice for state courts and legislatures to dictate the terms on which informed consent must be obtained by a doctor, these courts and legislatures have no similar role in requiring informed consent before merely talking about medical issues, much less as a required step before merely offering support and assistance to help someone through a pregnancy.”

In other words, there is a difference between advice from a doctor about a medical procedure (like an abortion) and a clinic which offers ultrasounds and pregnancy tests, along with

counseling. These clinics don't perform any invasive medical procedures beyond an ultrasound. So that should have been thrown out immediately.

The more pressing issue at hand, particularly since these advertisements are not "professional" speech, is the fact that the California Reproductive FACT Act compels these pregnancy centers to not only say *anything* at all but to say something that directly contradicts with their goal. Imagine a law that required all restaurants that sell salads to advertise to all customers, before purchasing something healthy, where the nearest McDonald's is located? (But with far worse consequences.) The ultimate, obvious litmus test here is the fact that California's Reproductive FACT Act targets only non-medical, unlicensed pro-life organizations; these guidelines have not been imposed on any other organizations, including abortion clinics. Presumably, if the state cared about informed consent for abortion procedures, they would disseminate this information themselves rather than compel a private organization to do so.

The court must ignore the controversial nature of abortion since free speech doctrine is often distorted when the abortion issue is at stake. Most government-compelled speech not only slowly erodes the authority of the First Amendment, but in this case, also hurts the rights of pro-life advocates in their cause. If the former remains authoritative and steadfast, the latter can also remain vigilant.