

## Facing the FACT Act: Abortion and Free Speech (Part II)

Updated July 26, 2019

*Update: For a discussion of the Supreme Court’s June 26, 2018 decision in [NIFLA v. Becerra](#) holding that the FACT Act likely violated the First Amendment, see [CRS Report R45316](#), Supreme Court October Term 2017: A Review of Selected Major Rulings, coordinated by Andrew Nolan. On October 26, 2018, the parties in NIFLA stipulated to an injunction and dismissal of the case, and the district court permanently enjoined the state and local defendants from enforcing the FACT Act. No. 3:15-cv-02277 (S.D. Cal. Oct. 26, 2018), ECF No. 76.*

*The original post from January 10, 2018 is below.*

As explained in [Part I](#) of this Sidebar, the parties in [National Institute of Family and Life Advocates \(NIFLA\) v. Becerra](#) dispute whether California’s Reproductive [FACT Act](#) is a viewpoint- or content-based restriction on speech subject to [strict scrutiny](#) (and thus presumptively invalid) or a professional or commercial regulation subject to less exacting [scrutiny](#). The path the Court chooses could have implications for lawmakers both in the context of family planning or pregnancy-related services and, more broadly, in the regulation of professional and commercial activities.

***Informed Consent v. Other Informational Disclosures.*** As noted in [Part I](#), in *Planned Parenthood v. Casey*, the Supreme Court [rejected](#) a First Amendment challenge to Pennsylvania’s requirement that, before performing an abortion, a doctor inform the patient of, among other things, state publications describing alternatives to abortion. The parties that oppose the FACT Act (i.e., the NIFLA challengers) [argue](#) that Pennsylvania’s law is fundamentally different than the FACT Act because Pennsylvania’s requirement “served a particularized interest in ensuring that ‘relevant’ information is provided to the patient so that a necessary step—*informed consent* for a surgical procedure—is actually obtained.” But California [argues](#) that its notices are likewise “relevant” to a pregnant woman’s decisionmaking and not so different in kind from the notice requirement at issue in *Casey*.

Whether the Court can distinguish *Casey* from the issues raised in *NIFLA* could have broad consequences for abortion regulations. Some [legal commentators](#) have posited that if the Court rules in favor of the NIFLA challengers, the decision could render notice and disclosure requirements championed by abortion opponents susceptible to invalidation as well. Some of those laws, however, may be distinguishable based on the type of information they convey. For example, it is unclear whether the Court would view a law that requires the disclosure of medical risks before undergoing a procedure on the same plane as a law

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that requires the dissemination of informational material more generally. Likewise, how the information is expressed may be dispositive. For example, the Ninth Circuit in *NIFLA* distinguished the FACT Act's notice about the existence of public programs from statements invalidated in the Second and Fourth Circuits that expressly "encourage[d]" pregnant women to consult with a licensed provider, reasoning that the FACT Act does not suggest California's "preferences regarding prenatal care."

In the realm of informed consent laws, it appears that at least twenty-seven states require abortion providers to offer or provide to patients *state-published* materials on alternatives to abortion or medical assistance benefits for childbirth. These provisions differ in substance, however, with many of them requiring abortion providers to describe the state's materials at a high level, a few that expressly allow the providers to distance themselves from the state's materials or comment on them, and at least one that requires abortion providers with websites to post a "prominent link" to the state's abortion alternatives website on their homepages. The state publications themselves also differ, with some listing potential resources without endorsement, and others expressing or suggesting the state's preference for childbirth over abortion. In deciding *NIFLA* against the backdrop of these informed consent requirements, the Supreme Court may need to consider whether the First Amendment permits judicial line-drawing based on the speaker (e.g., abortion provider versus pregnancy center), the context in which the information is provided (e.g., abortion procedure versus other medical procedure versus non-medical service), or what those resources say (e.g., availability of abortion versus availability of alternatives to abortion).

***Scrutiny for Content-Based Restrictions.*** As discussed in Part I, in 2015, the Supreme Court ruled in *Reed v. Town of Gilbert* that a content-based restriction on speech, such as a law that regulates speech based on its subject matter, must withstand strict scrutiny regardless of any neutral justification for the law. In a separate opinion, Justice Kagan, on behalf of herself and Justices Ginsburg and Breyer, noted that in prior cases, the Court had considered not only the wording of the challenged law, but also whether it has "the intent or effect of favoring some ideas over others." These Justices expressed concern that applying strict scrutiny to all ostensibly content-based laws would invalidate some "entirely reasonable" ones. The majority in *Reed* rejected this argument, favoring a clear rule that leaves room for content-neutral distinctions and sufficiently tailored content-based ones.

In the wake of *Reed*, some lower courts have distinguished the 2015 case, noting that regulations of certain categories of speech, such as commercial speech, should not be subject to strict scrutiny even when the law is content-based. The Ninth Circuit appears to have taken this approach in *NIFLA* when, while acknowledging that the FACT Act was a "content-based" law, it nevertheless declined to apply strict scrutiny to the notice requirement for licensed pregnancy centers because "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished." Accordingly, *NIFLA* may present the Supreme Court with an opportunity to weigh in on the scope of *Reed*.

***Implications for Professional Speech Regulations.*** If the Supreme Court agrees with the Ninth Circuit that the FACT Act regulates at least some aspect of professional speech, the test it applies could have ramifications beyond the realm of family planning and pregnancy-related services. That is, the decision could influence how the courts apply First Amendment principles to future cases involving medical provider-patient relationships or even other professional engagements such as attorney-client and financial advisor-client relationships.

A case that has worked its way through the Eleventh Circuit illustrates the uncertain state of the law at the juncture of professional regulations and speech that the *NIFLA* Court could potentially clarify.

*Wollschlaeger v. Governor of Florida* concerned the constitutionality of a Florida law that, among other provisions, prohibited doctors from asking their patients about firearm ownership, except when relevant to the patient's medical care or safety or the safety of others. A group of physicians and medical associations brought suit to challenge the law on First Amendment grounds. In a December 2015 decision upholding the law, a divided panel of the Eleventh Circuit noted that the "Supreme Court has never

precisely addressed the proper level of scrutiny for professional speech.” The panel declined to decide whether the inquiry provision warranted a less stringent standard of review than strict scrutiny because it [found](#) that the law survives even that test given what the panel viewed as the important interests at stake (i.e., Second Amendment rights) and the narrow scope of the regulation (i.e., barring only medically irrelevant inquiries). The full Circuit, however, vacated the panel’s decision. Although the en banc court [rejected](#) the “rational basis standard” (the least stringent test) that some courts have applied to professional regulations based on the *Casey* plurality opinion, as with the panel decision, the court [declined](#) to resolve what level of scrutiny to apply in the case. Instead, the court [held](#) that the inquiry provision failed both strict scrutiny *and* a less exacting standard, thus leaving the question of the appropriate test for professional speech regulations largely unsettled in that circuit.

**Implications for Commercial Speech Law.** As noted in Part I, *NIFLA* could also implicate whether commercial speech cases like *Zauderer v. Office of Disciplinary Counsel*—which upheld a rule requiring the disclosure of “purely factual and uncontroversial” information that was “reasonably related” to preventing consumer deception in the context of attorney services—should be extended to the regulation of nonprofit groups like the NIFLA challengers, or cabined to its facts. The Fourth Circuit [has noted](#) that whether an entity is engaging in commercial speech is often a close and fact-laden question, and in 2013, it [remanded](#) a case to the district court for discovery on whether a pregnancy center engaged in commercial speech. The court [reasoned](#) that “the potential commercial nature of speech does not hinge solely on whether [a pregnancy center] has an economic motive” because the court also must take into consideration the viewpoint of the consumer.

Concluding that the FACT Act regulates commercial speech would not end the Court’s inquiry, however. To apply *Zauderer*’s lower standard of review, the Court would first need to find that the notice requirements concern “[purely factual and uncontroversial](#)” information. For example, the Second Circuit has [held](#) that a requirement that pregnancy centers disclose whether or not they provide or refer for abortion services, did not concern “uncontroversial” information because it “requires centers to mention controversial services that some pregnancy services centers . . . oppose.” Assuming one or both of the notice requirements in the FACT Act could be deemed purely factual and uncontroversial, the Court would then need to examine whether the disclosures are reasonably related to California’s asserted interest in preventing consumer deception. In upholding California’s requirement for *unlicensed* pregnancy centers, the Ninth Circuit [referenced](#) the legislature’s findings regarding the deceptive practices of some pregnancy centers. Because the court applied strict scrutiny to this requirement (as the [Second](#) and [Fourth](#) Circuits had done in upholding similar requirements), it presumably would have upheld the law under a rational basis standard as well. The Supreme Court [has not yet opined](#) on whether *Zauderer*’s rationale applies in compelled disclosure cases involving state interests *other than* preventing consumer deception (e.g., [California’s interest](#) in “ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion”).

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With such uncertainty over the various First Amendment issues raised by *NIFLA*, [some amici](#) have urged the Supreme Court to opine on the broader questions the cases raises. It remains to be seen whether the Court will take up these issues at oral argument, which has not yet been scheduled, or in the Court’s ultimate decision, which is expected to be issued in June 2018.

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