

The First Amendment of Institute of Family and Life Advocates vs. Medical Expertise

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ABSTRACT

With its decision in National Institute of Family and Life Advocates (NIFLA) vs. Becerra (2018), the then conservative majority on the United States' Supreme Court concluded that the California FACT Act violated NIFLA's right to free speech. The FACT Act an acronym for Freedom, Accountability, Comprehensive Care, and Transparency was put in place to remedy misleading, deceptive, and harmful practices by NIFLA's crisis pregnancy centers and marketplace communications. Ultimately, the 5-4 majority set aside the reasonable arguments put forward by the American Medical Association in a decision that defers to fundamentalist free speech jurisprudence, diminishes the standing of medical experts, and leaves marketplaces for reproductive products and services impoverished by misinformation.

Keywords: Sperm; Infertility; *In vitro* fertilization; Intra cytoplasmic; Sperm injection

INTRODUCTION

Back in June of 2018, the United States Supreme Court (SCOTUS) handed down three vitally important First Amendment decisions. Despite their distinctive constitutional focal points, all three cases weakened or struck down laws enabling economic and social protections for vulnerable people, their families, and their communities. The first gave sanction to expression by a business owner that discriminated against people protected against such treatment by federal law, and the second reversed long-standing precedent bolstering labor union bargaining power by mandating dues from all workers covered by a union's purview [1].

The third, the focus of this commentary, struck down as unconstitutional the California FACT Act, which required that crisis pregnancy centers (CPCs) disclose to potential patients and consumers the full range of reproductive services they provide and the status of medical licenses of CPC staff. In their distinctive ways, each outcome defers to fundamental protections for free individuals enabled by founding documents to make choices about who they want to be as business owners, as workers, and as mothers in their pursuit of life and liberty free from government intrusion. Such majestic guarantees are indeed

at the core of the constellation of rights described by the First and the Fourteenth Amendments of the U.S. Constitution [2-5].

But such rights, particularly when considering marketplace communications for medical products and services within the realm of reproductive healthcare, cannot be realized by freedom as an abstraction and a laissez-faire approach to free-market processes. Under question in the third case, National Institute of Family and Life Advocates (NIFLA) v. Becerra, was the FACT Act, a state law calling for Freedom, Accountability, Comprehensive Care, and Transparency in reproductive services commercial outreach. When this case arrived on petition from the Ninth Circuit, NIFLA initially asked the SCOTUS to recognize that its free exercise of religion and free speech rights had been violated by the FACT Act.

Which mandated two types of disclaimers from its crisis pregnancy clinics, one for those with licensed medical professionals on site and the other for medically unlicensed institutions.

When SCOTUS accepted the case, it lopped off the free exercise question and chose to engage only the free speech question, seeming from the outset to set up an instrumentalist free speech ruling that subsumed other rights such as free exercise. It did indeed ultimately rule that the FACT Act's disclosures had

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violated NIFLA's right to free speech, its freedom to express its pro-life views about abortion and family planning. The then 5-4 majority, and this is before Justices Kavanaugh and Barrett were seated, did not consider the substance of NIFLA's advertising in its analysis, which had been subjected to state-level investigations for decades due to its misleading nature and because of harms caused to women some of which suffered serious medical problems after being misled by CPC staff who had given them faulty advice, these healthcare workers in medical smocks whom they thought were licensed or credentialed medical providers [6,7].

Even though misleading and deceptive advertising has never received protection from the First Amendment, the majority's reasoning, which relies on a commercial speech test to assess the FACT Act's constitutionality, dismisses the FACT Act outright. Justice Thomas argues it cannot survive even the most lenient standard of judicial review because it chills unstated political speech that is otherwise delivered as advertising. The majority does not consider the language of NIFLA's advertising, nor does it consider the ways NIFLA manipulates online searches to direct women to CPCs, which can be found near to full-services reproductive healthcare facilities like Planned Parenthoods, institutions that CPCs have been known to mimic in their architectural facades and with similar fonts and colors [8-10].

Abiding by its longstanding ethical guidelines, the American Medical Association in its brief to SCOTUS in NIFLA argued that the FACT Act can survive any level of judicial review, because NIFLA engages in unethical medical practices at its medically licensed clinics. To support its stance, the AMA references some of the informational literature NIFLA forwards to its patients that draws inconclusive and scientifically questionable conclusions that it argues would be misleading to conflicted patients.

The AMA's message is clear: within the realm of reproductive healthcare, women and their families need full and accurate information to make informed choices that may have long-term effects on their lives, livelihoods, and the very wellbeing of others involved. The AMA argues that any government disclosures in medical contexts should be strictly reviewed, even if their purpose is to remedy unethical conduct by medical professionals in the form of misleading and inaccurate scientific

information. Of primary importance in the AMA's reasoning then is its advocacy for the speech rights of licensed medical professionals, their fiduciary obligations instantiated by licensing statutes and established professional standards, and for the rights of patients to receive full and accurate information about their healthcare and the potential effects of their choices.

CONCLUSION

The Supreme Court reasons otherwise in the face of medical expertise, deferring to a fundamentalist free speech jurisprudence that diminishes the standing of medical experts. In a decision that leaves marketplaces for reproductive products and services impoverished by misinformation, the conservative majority has set aside the longstanding conception of commercial speech as a form that balances speaker rights, the rights of those receiving information, and reasonable interventions by government to remedy deceptive and misleading commercial speech.

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