NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech

by Robert McNamara[*] and Paul Sherman[**]

National Institute of Family and Life Advocates v. Becerra (*NIFLA*) had all the hallmarks of a classic culture-war showdown. On one side was a coalition of so-called crisis-pregnancy centers—organizations that provide certain prenatal services and counseling to pregnant women but do not perform or recommend abortions. On the other side were pro-choice groups that accused the pregnancy centers of misleading or outright deceiving pregnant women about the availability and possible risks of abortion or birth control.

So far, so familiar. But what sets *NIFLA* apart is not its well-trod battle lines between pro-life and pro-choice factions, but the unusual approach that the state of California took in mediating this dispute. California wanted pregnant women to know about the availability of state-financed abortions—and if crisis-pregnancy centers would not voluntarily give this information to their clients, California would force them to do so. What followed was a lawsuit that raised some of the most important unanswered questions in First Amendment law. What protection does the First Amendment afford to speech by "professionals"? How much power does the government have to compel truthful speech that it believes will benefit consumers? And what should courts do when economic or social regulation trenches upon an individual's free-speech rights?

The Supreme Court answered these questions, and its decision was a blockbuster. *NIFLA* is one of the most important First Amendment rulings in a generation, clarifying decades of muddled precedent and significantly expanding protection for speech in the commercial marketplace. Indeed, it is no exaggeration to say that *NIFLA* cements

[*] Senior Attorney, Institute for Justice.

[**] Senior Attorney, Institute for Justice.

the Roberts Court as the most libertarian in our nation's history on free-speech issues.

Below, we begin by summarizing the facts of *NIFLA* and the broader legal controversy surrounding crisis-pregnancy centers, which was by no means limited to California. We then explain the Ninth Circuit's ruling and compare that ruling to the approach other circuits had taken in cases with similar facts or raising similar issues of "professional speech." In the final two sections, we discuss the Supreme Court's ruling and its implications for future litigation over the abortion debate and beyond.

I. Facts of the Case and the Broader Controversy over Crisis-Pregnancy Centers

Although they have garnered increased attention in recent years, crisis-pregnancy centers are not a new phenomenon. The first appears to have been founded in California in 1968. Typically, these centers provide prenatal services, such as pregnancy testing, obstetric ultrasounds, and pregnancy counseling. And their numbers have grown rapidly; today, crisis-pregnancy centers outnumber abortion providers by nearly 1,000.[1]

For as long as they have existed, crisis-pregnancy centers have also drawn criticism from pro-choice groups for their tactics. Abortion-rights supporters say that these centers are rooted in deception, providing scientifically questionable information to their clientele and falsely holding themselves out as full-service medical clinics to draw in women who would otherwise seek abortions.

Only in 2015, however, did California, acting in response to these complaints, adopt the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act.[2] The FACT Act imposed two notice requirements on facilities that provide pregnancy-related services—one for licensed facilities and one for unlicensed facilities. (Licensed facilities are those that the state licenses to provide primary or specialty care and that have the "primary purpose" of "providing family planning or pregnancy-related

[1] Family Research Council, A Passion to Serve: How Pregnancy Resource Centers Empower Women, Help Families, and Strengthen Communities (2d ed.), https://downloads.frc.org/EF/EF12A47.pdf (last visited Aug. 1, 2018).

[2] Cal. Health & Safety Code Ann. § 123470 et seq. (West 2018).

services."[3]) Additionally, the act covers only licensed facilities that engage in at least two enumerated activities, which include offering obstetric ultrasounds, offering pregnancy testing, collecting health information from clients, or advertising pregnancy-options counseling.[4]

The act contained several exemptions from this definition. Most notably, it did not apply to "clinic[s] that [are] enrolled as . . . Medi-Cal provider[s] and in the Family Planning Access, Care, and Treatment Program [Family PACT program]."[5] This exemption could never apply to crisis-pregnancy centers, however, because to participate in the Family PACT program a clinic must offer "the full scope" of family planning services, including sterilization and emergency contraception.[6]

Licensed clinics subject to the FACT Act had to provide a government-drafted notice to their clients. This "Licensed Notice" stated, "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. To determine whether you qualify, contact the county social services office at [insert the telephone number]."[7] Clinics had to print the notices in English and any other languages identified by state law.[8] In most counties throughout California this meant the notice must be printed in both English and Spanish, though some counties required translation into many additional languages. Los Angeles County, for example, required the notice in 13 different languages.[9]

The act also required disclosures by unlicensed facilities. These included any facility that the state did not license, that did not have a licensed medical provider on staff or under contract, and that had the "primary purpose" of "providing pregnancy-related services."[10]

[3] *Id.* at § 123471(a).

[4] *Id.*

[5] *Id.* at § 123471(c) (internal quotation marks omitted).

[6] Cal. Welf. & Inst. Code Ann. §§ 24005(c), 24007(a)(1), (2).

[7] Cal. Health & Safety Code Ann. § 123472(a)(1).

[8] *Id.* at § 123472(a).

[9] NIFLA v. Becerra, 138 S. Ct. 2361, 2369 (2018).

[10] Cal. Health & Safety Code Ann. § 123471(b).

As with licensed facilities, unlicensed facilities would be covered only if they engaged in certain conduct, such as offering ultrasounds or collecting client information. And as with licensed facilities, the act excluded unlicensed facilities enrolled in Medi-Cal and the Family PACT program.

The "Unlicensed Notice" required of unlicensed facilities stated that, "This facility 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."[11] The law required clinics to post the notice on site and on all advertising materials and that it be written in at least 48-point type.[12] When included in advertising material, the type had to be the same size or larger than all surrounding text.[13] And, like the Licensed Notice, the Unlicensed Notice had to be in both English and any other language required by state law.

California was not the only state to take issue with crisis-pregnancy centers, nor was *NIFLA* the first case to challenge state regulation of these centers. In 2011, for example, New York City adopted a law requiring facilities that had "the appearance of a licensed medical facility" to post mandatory disclosures for their clients. These disclosures had to inform clients (1) whether the center had a licensed medical provider on staff, (2) that the city's department of health encouraged pregnant women to consult with a licensed medical provider, and (3) whether the center provided referrals for abortion or emergency contraception. The U.S. Court of Appeals for the Second Circuit upheld the law in part and rejected it in part. The court held that the disclosures about whether the center was run by a licensed medical provider would survive even strict scrutiny under the First Amendment, but that the disclosure about abortion services (which "mandate[d] discussion of controversial political topics") and the requirement to convey the government's own message would fail under even intermediate scrutiny.[14]

[11] *Id.* at § 123472(b)(1).

[12] *Id.* at § 123472(b)(2).

[13] *Id.* at § 123472(b)(3).

[14] Evergreen Ass'n v. City of New York, 740 F.3d 233, 246–51 (2d Cir. 2014).

While it was not the first law to regulate crisis-pregnancy centers, the FACT Act was among the broadest. As compared to the New York law, it both required the centers to convey a more substantial government message and applied with a far broader sweep, as it did not hinge on whether a center *seemed* like a fully licensed medical facility. Litigation was inevitable.

II. The Litigation Below

Four days after the FACT Act was signed into law, NIFLA and two crisis-pregnancy centers in California (collectively "NIFLA") sued, alleging that the act violated the First Amendment's Free Speech and Free Exercise Clauses. NIFLA moved for preliminary injunction seeking to halt enforcement of the act during the litigation. The district court denied the injunction on both claims,[15] and NIFLA appealed to the Ninth Circuit, which affirmed the district court's ruling.[16]

The Ninth Circuit's analysis of NIFLA's religious-liberty claim was unremarkable and merits little discussion. Under the Supreme Court's 1990 ruling in *Employment Division v. Smith*, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[17] Such facially neutral laws will survive constitutional scrutiny so long as they satisfy the rational-basis test. The Ninth Circuit easily concluded that the FACT Act satisfied this deferential standard.[18]

Far more significant was the Ninth Circuit's ruling on NIFLA's free-speech claim, which held that the notice requirements for both licensed and unlicensed clinics survived First Amendment scrutiny.

[15] NIFLA v. Harris, No. 15cv2277, 2016 WL 3627327 (S.D. Cal. Feb. 9, 2016).

[16] NIFLA v. Harris, 839 F.3d 823 (9th Cir. 2016).

[17] 494 U.S. 872, 879 (1990) (cleaned up).

[18] NIFLA, 839 F.3d at 844–45. We note in passing that NIFLA also contended that the law was motivated specifically by hostility to the centers' religious beliefs, a contention that ultimately played little role in the resolution of this case but that does have elements in common with this term's decision in *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

Before starting its analysis of the notice requirements' constitutionality, the Ninth Circuit first examined whether the requirements were "content-based" or "content-neutral." This is a crucial distinction in First Amendment law, because content-based speech restrictions—with few exceptions—are subject to strict scrutiny, the most searching form of judicial review. Content-neutral regulations, by contrast, are typically subject to a lower level of scrutiny.

Here, the Ninth Circuit split the difference, concluding that the act was indeed content-based but that the notice requirement for licensed pregnancy centers was not subject to strict scrutiny. To justify this result, the court invoked a rule that had become known as the "professional speech doctrine."[19]

Before describing the professional-speech doctrine, it helps to know a bit of background about the how the Supreme Court has treated other categories of lesser-protected speech. Although the general rule, again, is that content-based regulations of speech are subject to strict scrutiny, the Court has long recognized some categories of speech to which this does not apply. The most commonly cited are those categories of speech, "long familiar to the bar," that fall outside the scope of the First Amendment.[20] These categories include, among other things, true threats, child pornography, and defamation. Because these forms of speech have been treated as unprotected "from 1791 to the present," content-based regulation of such speech triggers no First Amendment scrutiny.[21]

In addition to these narrow categories of wholly unprotected speech, there is one other category of speech for which the Supreme Court has held that content-based restrictions do not trigger strict scrutiny: commercial advertising. Although the Court at first treated commercial speech as wholly unprotected, it reversed course in the 1970s.[22] Under the modern commercial-speech doctrine, government may regulate commercial speech based on its content, and these regulations are subject to only intermediate scrutiny. This standard

[19] NIFLA, 839 F.3d at 838–41.

[20] United States v. Stevens, 559 U.S. 460, 468 (2010).

[21] *Id.*

[22] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

is more easily satisfied than strict scrutiny, but it is not a rubber stamp; it imposes a meaningful burden on government to justify its restrictions.[23]

Absent from this list of second-class speech is what some courts have called "professional speech" (or what we prefer to call "occupational speech").[24] This is speech—often, though not exclusively, in the form of advice—between an expert speaker and a client. Examples abound: A lawyer advising a client is engaged in occupational speech, as is a tour guide describing points of interest, or a health coach recommending recipes. Or—to bring things back to *NIFLA*—a volunteer at a crisis-pregnancy center discussing prenatal health.

If the default rule in First Amendment law is that content-based restrictions on speech are subject to strict scrutiny, and if the Supreme Court has never held that occupational speech is an exception to this rule, then one would expect that burdens on occupational speech would get strict scrutiny. So how could the Ninth Circuit escape this conclusion? Enter: The Professional Speech Doctrine.

Although its formulation and scope vary from circuit to circuit, the professional-speech doctrine, at its base, is simply a rule that provides reduced protection for speech in a professional/client relationship. The Ninth Circuit first adopted this doctrine in *National Association for the Advancement of Psychoanalysis v. California Board of*

[23] See, e.g., Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (noting that the government's burden under intermediate scrutiny "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). Many commentators have questioned the validity of commercial speech's second-class status, and at least one Supreme Court justice has argued that the commercial-speech doctrine should be abandoned, and that content-based restrictions on commercial speech be subject to the same strict scrutiny as content-based restrictions on political speech. See, e.g., Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech, 76 Va. L. Rev. 627 (1990); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.").

[24] We prefer the term "occupational speech" because it reflects more accurately the breadth of speech potentially affected by the professional speech doctrine. As we will discuss in more detail, *infra*, courts that have invoked "professional speech" have not limited the doctrine to speech occurring in what would commonly be understood as "professions." See, e.g., Moore-King v. Cty. of Chesterfield, 708 F.3d 560 (4th Cir. 2013) (applying the professional speech doctrine to regulation of fortune tellers).

Psychology, in which the court upheld California's licensure of psychologists against a First Amendment challenge.[25] More recently, the Ninth Circuit refined the doctrine in *Pickup v. Brown*, in which the court upheld a California law that prohibited licensed mental health professionals from engaging in any conduct—including speech, such as talk therapy—designed to change a minor's sexual orientation or gender expression.[26]

Under the Ninth Circuit's current statement of the professional-speech doctrine, speech uttered by "professionals" exists on a continuum of First Amendment protection. At one extreme is speech directed to the public at large, such as a public lecture, which receives full First Amendment protection. At the other extreme, is speech that is so integrally tied to professional conduct that it is the functional equivalent of conduct itself. In the Ninth Circuit's view, this speech is no different from performing brain surgery or dispensing medication and so receives no First Amendment protection.[27] In the middle is an ill-defined class of speech that occurs within a professional/client relationship, but that is more like speech than conduct. This speech receives some First Amendment protection—but not strict scrutiny. And it is into this category that the Ninth Circuit placed the notice requirement for licensed pregnancy centers.

The Ninth Circuit concluded that the Licensed Notice easily satisfied intermediate scrutiny. First, the court noted that California had "a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion."[28] The court also credited the California legislature's finding that "a substantial number of California citizens may not be aware of, or have access to, medical services relevant to pregnancy."[29]

Having found the state's interest substantial, the court next looked at the tailoring of the Licensed Notice. With seemingly little regard for the effect that compelled speech about the availability of state-funded abortion would have on NIFLA's ability to convey its pro-life

[25] 228 F.3d 1043 (9th Cir. 2000).

[26] 740 F.3d 1208 (9th Cir. 2014).

[27] *Id.* at 1227.

[28] NIFLA, 839 F.3d at 841.

[29] *Id.*

message, the court held that the Licensed Notice did not "contain any more speech than necessary." Instead, the notice merely informed readers of "the existence of publicly-funded family-planning services," without encouraging, suggesting, or implying that women should use those services.[30] Concluding that there was no reason to believe this notice would be ineffective, the court found the Licensed Notice was appropriately tailored to the state's interest.

In reaching this conclusion, the court dismissed the most obvious, narrower approach California might have taken: distributing information about family-planning services directly, rather than making NIFLA its unwilling mouthpiece. And this is where the shift from strict to intermediate scrutiny perhaps had its largest impact. For although strict scrutiny requires that government use the least-restrictive means of regulating speech, intermediate scrutiny imposes no such requirement.[31] Thus, the Licensed Notice survived.

The Ninth Circuit next turned to the notice requirement for unlicensed clinics. Unlike in its analysis of the requirement for licensed clinics, the court found it unnecessary to decide whether unlicensed clinics were engaged in professional speech. This is because the Ninth Circuit thought the notice required of unlicensed clinics survived even under strict scrutiny.[32]

For those who are familiar with the Supreme Court's strict-scrutiny jurisprudence, this conclusion is somewhat shocking. Although the cliché that strict scrutiny is "strict in theory but fatal in fact" is an overstatement,[33] strict scrutiny still places a heavy burden on the government. This is particularly true in the First Amendment context. Only twice in our nation's history has the Supreme Court upheld a speech restriction under strict scrutiny, and those cases involved concerns of national security and the integrity of the judiciary.[34]

Even so, the Ninth Circuit concluded that the Unlicensed Notice was narrowly tailored to serve a compelling government interest in ensuring that women are aware of whether a facility in which

[30] *Id.* at 842.

[31] *Id.*

[32] *Id.* at 843.

[33] See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793 (2006).

[34] See Holder v. Humanitarian Law Project, 561 U.S. 1 (2010); Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015).

they are receiving prenatal care is subject to the same level of state oversight as other facilities with which they may be familiar.[35] Absent from the court's analysis was any discussion of less-restrictive alternatives the state might have employed, such as maintaining a publicly available database of licensed and unlicensed clinics. The court seems to have concluded that, because the Second and Fourth Circuits had upheld similar notices in unlicensed clinics, it need not independently consider whether the state might achieve its goals equally well without compelling speech.

Having determined that NIFLA was unlikely to prevail on any of its First Amendment claims against either of the notice requirements, the Ninth Circuit denied NIFLA's motion for preliminary injunction.

III. How the Ninth Circuit's Ruling Fits in with Other Occupational-Speech Cases[36]

A. Origins of the Professional Speech Doctrine

The Ninth Circuit did not invent the professional-speech doctrine. The intellectual roots of the doctrine stretch back to a concurring opinion by Justice Robert Jackson in *Thomas v. Collins* in 1945. Agreeing with the Court's majority that the government could not require a speaker to get a license before giving a public speech endorsing membership in a labor union, Justice Jackson opined that "a rough distinction always exists" between the permissible regulation of a vocation and the impermissible regulation of speech.[37] For Justice Jackson, that distinction should be based on the presence or absence of an (unidentified) "other factor which the state may regulate so as to bring the whole within official control."[38]

No member of the Court took up the task of identifying what that factor might be until 1985. The case was *Lowe v. SEC*, in which the U.S. Securities and Exchange Commission brought an enforcement action against Christopher Lowe, a disgraced former investment adviser who had lost his registration and been prohibited from acting

[35] NIFLA, 839 F.3d at 843.

[36] Portions of this section are adapted from Paul Sherman, Occupational Speech and the First Amendment, 128 Harv. L. Rev. F. 183 (2015), https://harvardlawreview.org/2015/03/occupational-speech-and-the-first-amendment.

[37] 323 U.S. 516, 544–48 (1945) (Jackson, J., concurring).

[38] *Id.* at 547.

as an investment adviser following a conviction on various felony offenses.[39] Despite his conviction, Lowe continued to publish a newsletter that provided investing advice. The SEC believed this to violate the securities laws and filed a complaint against Lowe in federal court.

The SEC lost before the district court, but prevailed before the Second Circuit, after which the Supreme Court granted certiorari to consider "the important constitutional question whether an injunction against the publication and distribution of petitioners' newsletters is prohibited by the First Amendment."[40] But the Court never reached this constitutional question. Instead, in an opinion by Justice John Paul Stevens, a majority of the Court found on statutory grounds that the registration requirement did not apply to newsletter publishers.[41]

Justice Byron White, however, disagreed. Writing for himself, Chief Justice Warren Burger, and Justice William Rehnquist, White concluded that it was necessary to reach whether requiring newsletter publishers to register with the SEC violated the First Amendment.[42] In doing so, he laid out a test that would prove to have an outsized influence on the development of occupational-speech jurisprudence in lower federal courts.

The crux of Justice White's concurrence is a distinction between speech targeted at the public at large and speech targeted at specific individuals. As Justice White saw it, "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."[43] In this context, a professional's speech is incidental to the conduct of his profession, "[j]ust as offer and acceptance are communications incidental to the regulable transaction called a contract."[44] White therefore saw no First Amendment problem with "generally applicable licensing provisions limiting the class of persons who may practice [a] profession," even where the practice of that profession consists entirely of speaking.[45]

[39] 472 U.S. 181 (1985).

[40] *Id.* at 188–89 (majority opinion).

[41] *Id.* at 210–11.

[42] *Id.* at 212–13 (White, J., concurring in the result).

[43] *Id.* at 232 (footnotes omitted).

[44] *Id.*

[45] *Id.*

White expressly contrasted these "professionals" with speakers who do not have a "personal nexus" with their clients and who do not "purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted."[46] In that setting, White believed that "government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech" and instead becomes "regulation of speaking or publishing as such," and, hence, subject to the First Amendment.[47]

White's concurrence is unusual in at least two respects. The first is that his extended discussion of why the government may permissibly regulate occupational speech in which there is a "personal nexus" between speaker and listener was unnecessary to the disposition of the case. There was no dispute that, with regard to the newsletters at issue, Christopher Lowe had no personal nexus with his readers. The second is that White drew his personal-nexus test almost entirely from his own imagination. White does not cite a single controlling opinion of the Supreme Court that supports the existence of a "personal nexus" exemption to the First Amendment, relying instead on Justice Jackson's concurring opinion in *Thomas v. Collins*.

Since Justice White's 1985 concurrence, neither the U.S. Supreme Court nor any individual justice has ever cited its personal-nexus test. But because it was the clearest statement that any justice had made on the intersection of occupational licensing and the First Amendment, it had a disproportionate influence on lower courts, which, until recently, have tended to accept uncritically Justice White's personal-nexus test as the law.[48]

Troublingly, this uncritical acceptance of Justice White's test had largely ignored his admonition that speech falls outside the First Amendment only when the speaker "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of

[46] *Id.*

[47] *Id.*

[48] See, e.g., Locke v. Shore, 634 F.3d 1185, 1191 (11th Cir. 2011); Accountant's Soc'y of Va. v. Bowman, 860 F.2d 602, 604 (4th Cir. 1988); Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 466–67 (D. Md. 2011); Accountants' Ass'n of La. v. State, 533 So. 2d 1251, 1254–55 (La. Ct. App. 1988); In re Rowe, 604 N.E.2d 728, 731 (N.Y. 1992); cf. Nat'l Ass'n for the Advancement of Psychoanalysis, 228 F.3d at 1053–55 (dismissing, based on Justice Jackson's concurrence in *Thomas v. Collins*, First Amendment challenge to California's licensing requirement for psychologists).

the client."[49] Justice White seems to have intended this limitation to protect consumers who enter into fiduciary relationships. Yet lower courts had generally found Justice White's test to be satisfied by the existence of any personal nexus between speaker and listener. As a result, rather than applying only to speakers in a fiduciary or quasi-fiduciary relationship with their listeners, lower courts have expanded Justice White's rule to include, among other things, the aesthetic recommendations of interior designers[50] and even the predictions of fortune tellers.[51]

This is not to say that the consequences of Justice White's concurrence have been wholly negative. Although Justice White was wrong, he was only half wrong: He was surely correct that the First Amendment fully protected Christopher Lowe's newsletters. And that conclusion—as opposed to his more expansive *dicta*—has had some positive consequences. Lower courts have relied on this portion of Justice White's *Lowe* concurrence to strike down registration requirements for people who publish information about commodities trading[52] and prohibitions on operating "for sale by owner" websites without being a licensed real estate broker.[53]

What emerged from these two lines of cases was a fairly consistent rule: The First Amendment prohibits requiring a speaker to secure a government-issued license to engage in speech published to the public at large, no matter how technical the speech's subject matter. But when speech consists of advice or recommendations made in the course of business, and is in any way tailored to the circumstances or needs of the listener, the First Amendment permits its regulation.[54]

B. The Growing Split in the Circuits

Ironically, this trend toward a broad professional-speech doctrine started to shift with *Pickup v. Brown*, the challenge to California's

[49] Lowe, 472 U.S. at 232 (White, J., concurring in the result).

[50] See Locke v. Shore, 682 F. Supp. 2d 1283, 1292 (N.D. Fla. 2010), aff'd, 634 F.3d 1185 (11th Cir. 2011), cert. denied, 565 U.S. 1111 (2012).

[51] See Moore-King v. Cty. of Chesterfield, 708 F.3d 560, 568 (4th Cir. 2013).

[52] See Taucher v. Born, 53 F. Supp. 2d 464, 482 (D.D.C. 1999).

[53] See ForSaleByOwner.com Corp. v. Zinnemann, 347 F. Supp. 2d 868, 876–79 (E.D. Cal. 2004).

[54] Exceptions to this general trend included a handful of cases striking down bans on fortune telling. See, e.g., Argello v. City of Lincoln, 143 F.3d 1152 (8th Cir. 1998).

ban on conversion therapy, which the Ninth Circuit had looked to in deciding *NIFLA*. More precisely, the trend started to shift with an opinion by Judge Diarmuid O'Scannlain, dissenting from denial of rehearing en banc in *Pickup*.[55]

The panel in *Pickup*, applying the professional-speech doctrine, had concluded that talk therapy was simply a form of professional conduct, entitled to no First Amendment protection. But, in Judge O'Scannlain's view, that conclusion could not be squared with modern First Amendment precedent.[56] Most notably, that conclusion was irreconcilable with the Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project*.

Humanitarian Law Project involved an as-applied challenge to a federal statute that "prohibited the provision of 'material support or resources' to certain foreign organizations that engage in terrorist activity."[57] The law defined "material support or resources" to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or other specialized knowledge."[58]

The plaintiffs in *Humanitarian Law Project* included two U.S. citizens and six domestic organizations that wished, among other things, to train members of the Kurdistan Workers' Party (PKK) "on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief."[59] The plaintiffs challenged the prohibition against their doing so on First Amendment grounds.

The government defended the law by arguing that the material-support prohibition was aimed at conduct, not speech, and thus only incidentally burdened the plaintiffs' expression. But the Supreme Court emphatically rejected the government's argument, holding that the material-support prohibition was a content-based regulation of speech subject to strict scrutiny. In doing so, the Court explained that when "the conduct triggering coverage under [a] statute consists

[55] 740 F.3d at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc).

[56] *Id.* at 1216.

[57] Humanitarian Law Project, 561 U.S. at 7.

[58] *Id.* at 12–13.

[59] *Id.* at 10, 14–15.

of communicating a message," applying the statute to that conduct is properly viewed as a content-based regulation of speech.[60] Applying that rule to the case before it, the Court easily concluded that the law was content-based:

> Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.[61]

Applying these principles in turn to California's ban on conversion therapy, Judge O'Scannlain thought it obvious that the ban targeted speech. As he pointed out, the plaintiffs in *Humanitarian Law Project*, who included lawyers and judges, "certainly purported to be offering professional services."[62] Yet the Supreme Court had rejected the government's attempt to relabel this speech as conduct. The same rule, O'Scannlain argued, should apply to talk therapy.

Judge O'Scannlain's dissent did not carry the day in *Pickup*, but it formed a significant basis for the Third Circuit's later decision in *King v. Governor of New Jersey*.[63] *King* involved a virtually identical ban on sexual orientation change efforts aimed at minors.[64] But unlike the Ninth Circuit, the Third Circuit acknowledged that *Humanitarian Law Project* was not distinguishable.[65] The court criticized "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' [as] unprincipled and susceptible to manipulation."[66] Yet the court went on to conclude that occupational speech—while protected by the First Amendment—should receive the same reduced protection as commercial speech.[67] Thus, applying

[60] *Id.* at 28.

[61] *Id.* at 27 (internal citations omitted).

[62] Pickup, 740 F.3d at 1217 (O'Scannlain, J., dissenting from denial of rehearing en banc).

[63] 767 F.3d 216 (3d Cir. 2014).

[64] *Id.* at 220.

[65] See *id.* at 225 (applying *Humanitarian Law Project*).

[66] *Id.* at 228.

[67] *Id.* at 232–33.

the intermediate scrutiny set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission*,[68] the court held that New Jersey's ban on sexual-orientation change efforts was constitutional.[69]

Judge O'Scannlain's dissent would later influence the en banc Eleventh Circuit's ruling in *Wollschlaeger v. Governor of Florida*,[70] which concerned a prohibition on doctors asking their patients about gun ownership when doing so was "not relevant" to their medical care.[71] Responding to the government's reliance on *Pickup v. Brown*, the Eleventh Circuit cited Judge O'Scannlain as having raised "serious doubts about whether *Pickup* was correctly decided."[72] Rejecting this approach, the court followed the lead of the Third Circuit and reviewed the challenged restrictions with intermediate scrutiny, which they could not survive.

Thus, from Judge O'Scannlain's dissent in *Pickup* grew a substantial circuit split. The Supreme Court, having waited 33 years to clarify the First Amendment status of occupational speech, could wait no longer.

C. The Professional Speech Doctrine at the Supreme Court

Despite this considerable doctrinal development in the lower courts, the Supreme Court (as discussed above) was writing on an essentially clean slate in addressing the question, which is reflected in the breadth of approaches suggested by the amicus briefs filed in *NIFLA* itself. Some briefs, like that filed by the United States, argued that the government should be permitted to "regulate speech by members of regulated professions related to their services" subject only to heightened (rather than strict) scrutiny.[73] Others, like Public Citizen, urged the Court to approach the broader professional-speech question with caution but to recognize a limited exception that would afford less-than-strict scrutiny to "disclosure requirements

[68] 447 U.S. 557 (1980).

[69] King, 767 F.3d at 233–40.

[70] 848 F.3d 1293 (11th Cir. 2017) (en banc).

[71] *Id.* at 1302.

[72] *Id.* at 1309. In doing so, the court also subtly criticized its own, earlier precedent in *Locke v. Shore*, which had reached largely the same conclusion as *Pickup*.

[73] Brief for the United States as Amicus Curiae Supporting Neither Party at 15–16, NIFLA v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140).

that relate to the nature of the services to be provided and are material to the client's decision whether to enter into a [professional] relationship."[74] On the more speech-protective side, the Cato Institute urged the Court to strictly cabin any professional-speech exception along the lines suggested by Justice White—permitting the regulation only of "expert knowledge" that is tailored to "a particular client's circumstances."[75] And the Institute for Justice—our firm—argued that the "professional speech doctrine" was, at its core, a deeply dangerous "doctrinal innovation" that should be rejected root and branch.[76]

In short, the breadth of available approaches—not just different outcomes, but fundamentally different rules of law—was strikingly wide, as one would expect after 30 years of silence from the Court. And that meant that the Supreme Court's actual decision could be expected to have consequences that swept far beyond the specific context of crisis-pregnancy centers.

IV. The Supreme Court Decision

In an opinion well worth the wait, the Supreme Court reversed and upended the lower courts' long-standing experiment with the professional-speech doctrine. Laudably, the Court's opinion, written by Justice Clarence Thomas, begins by squarely confronting the doctrinal elephant in the room: Like the Ninth Circuit, the Supreme Court acknowledges that the Licensed Notice was a content-based regulation of speech, given that it compelled individuals to engage in speech of a particular content. Unlike the Ninth Circuit however, the Supreme Court was not bound by any precedent establishing a professional speech exception to ordinary First Amendment doctrine.

Addressing the professional-speech question on a clean slate, the Court began (as it has in so many other cases) by reiterating the doctrinal rule forbidding content-based restrictions on speech. The Court also emphasized that exceptions to that rule

[74] Brief of Amicus Curiae Public Citizen, Inc., in Support of Respondents at 16, NIFLA v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140).

[75] Brief for the Cato Institute as Amicus Curiae in Support of Petitioners at 3–6, NIFLA v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140).

[76] Brief of Amicus Curiae Institute for Justice in Support of Petitioners at 3–4, NIFLA v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140).

cannot be *created*—they can only be *recognized* as already existing based on "persuasive evidence . . . of a long (if heretofore unrecognized) tradition to that effect."[77] While this evidentiary requirement is longstanding, the Supreme Court's restatement of the principle here matters, if only because lower courts have sometimes been reluctant to heed the Court's repeated warnings on this point.[78]

In the face of this evidentiary burden, the professional-speech doctrine fared less well than it had in the lower courts. The Supreme Court not only found no historical support for the doctrine, it determined that the doctrine itself posed a serious threat to speech rights generally. Looking first to its own precedents, the Court could identify only two situations in which it had upheld restrictions on the speech of "professionals": Commercial advertisement by those professionals, and restrictions on professional conduct that nonetheless involved speech.

The first category is epitomized by *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[79] But the Court noted *Zauderer* involved not only commercial advertising but required only the disclosure of "purely factual and uncontroversial information" about the services being advertised.[80] That was far afield from the factual information required by the Licensed Notice, which was both controversial (given that it was about abortion) and not descriptive of the services the centers themselves offered.

The Court's refusal to consider *Zauderer* as embodying a general rule for "professional speech" seems indisputable, particularly because the Court has considered any number of restrictions on professionals' commercial speech and has consistently treated them as restrictions on commercial speech rather than as restrictions on professionals. Just as with any other commercial-speech restriction,

[77] NIFLA, 138 S. Ct. at 2372 (internal quotations omitted).

[78] Compare United States v. Stevens, 559 U.S. 460, 472 (2010) (cautioning that courts do not have "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment") with Pickup, 740 F.3d at 1221 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc) (arguing that the creation of a "professional speech" exception was an exercise of exactly that sort of freewheeling authority).

[79] 471 U.S. 626 (1985).

[80] NIFLA, 138 S. Ct. at 2372 (citing Zauderer, 471 U.S. at 651).

the Court has demanded evidence to justify them, upholding some[81] and rejecting others.[82] These cases fit well into the Court's overall treatment of commercial speech restrictions (of which the modern Court is generally, if not universally, skeptical). It would be odd, then, if these cases were instead an implicit recognition of a broad exemption from First Amendment scrutiny for restrictions on so-called professional speech.

The second category of cases involving "professional" speech, the Court clarified, are regulations of professional *conduct* with an incidental effect on the professional's speech.[83] "While drawing the line between speech and conduct can be difficult," the Court acknowledged, "this Court's precedents have long drawn it."[84]

The primary precedent on speech/conduct confronting the Court in *NIFLA* was *Planned Parenthood of Southeastern Pa. v. Casey*.[85] In that case, the Court rejected some provisions of a Pennsylvania abortion law, but upheld (with little analysis) an "informed consent" requirement that prohibited doctors from providing abortions without first providing a variety of information to the patient. This information ranged from the probable gestational age of the child to information about state-created print-outs detailing assistance programs available to new mothers.[86]

The Court's *NIFLA* opinion dispensed quickly with *Casey*: That case was about obtaining informed consent before performing a medical procedure, while the notice required in *NIFLA* was not connected to any medical procedure whatsoever.[87] As discussed more fully in the next section, this leaves the substantive question of how the First Amendment interacts with informed-consent requirements deeply unsettled. But for purposes of resolving *NIFLA*, the Court found things clear enough: That case was about informed consent

[81] E.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456–57 (1978) (upholding restriction on in-person solicitation by lawyers based on record of long-standing prohibitions on the practice and dangers it posed to consumers).

[82] E.g., Edenfield v. Fane, 507 U.S. 761, 770–73 (1993) (declining to extend *Ohralik*'s holding to accountants without comparable record evidence).

[83] NIFLA, 138 S. Ct. at 2373.

[84] *Id.*

[85] 505 U.S. 833 (1992).

[86] *Id.* at 881.

[87] NIFLA, 138 S. Ct. at 2373.

to a medical procedure, and this case was about hanging unwanted signs in your office lobby.

Having found no support for professional speech in its own cases, the Court also rejected the professional-speech doctrine on its own merits, both because professional speech is important and because a First Amendment exemption for "professional speech" would grant governments new powers of unpredictable and uncontrollable scope.

First, the Court reaffirmed that the core purpose of the First Amendment is to safeguard an "uninhibited marketplace of ideas in which truth will ultimately prevail,"[88] and that so-called professionals have just as much role to play in this search for truth as any other.[89] On a certain level, this seems obvious—perhaps particularly to readers who are themselves professionals and therefore certain of the many important things they have to say. But the true import of this passage of the Court's opinion is the breadth of topics it finds at the heart of the First Amendment—topics ranging from "the ethics of assisted suicide" to "the wisdom of divorce" to "the amount of money that should be devoted to savings."[90] This, in keeping with modern precedent, is a complete rejection of the notion that the First Amendment can protect only "speech that is explicitly political."[91] Instead, the First Amendment protects speech that is *important*—and the measure of importance is not importance to the government or even to democracy. The measure of importance is whether speech is important to the speaker and to the listener. And by that metric, advice from professionals like doctors and lawyers falls at the very heart of the First Amendment.

Beyond the importance of professionals' speech, the Court also noted the danger of excluding "professionals" from the First Amendment, because no one knows quite who they are. The doctrine set forth by the Ninth Circuit in *NIFLA* would cover "doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others."[92] Giving states such a slippery tool to

[88] McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (quotation marks omitted).

[89] NIFLA, 138 S. Ct. at 2374–75.

[90] *Id.* at 2375.

[91] Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana L. J. 1, 20 (1971); accord Robert Post & Amanda Shanor, Adam Smith's First Amendment, 128 Harv. L. Rev. F. 165 (2015).

[92] NIFLA, 138 S. Ct. at 2375.

escape First Amendment scrutiny would invite exactly the kind of invidious discrimination against disfavored speakers that the First Amendment is meant to protect against.[93]

Again, the Court's position here is borne out by lived experience in the lower courts. As noted above, courts and government officials had seized upon the professional speech exception for exactly that purpose: In 2015, for example, the Oregon State Board of Examiners for Engineering and Land Surveyors assessed a $1,000 fine against a private citizen for submitting technical testimony at a public meeting without a license. His "reports, commentary, and testimony," the board ruled, were the acts of a "professional" and thus "clearly not protected speech."[94]

Having determined that no special "professional speech" rule governed, the Supreme Court made short work of both the Licensed and the Unlicensed Notice requirements. The Licensed Notice would fail even intermediate scrutiny because it was "wildly under-inclusive," applying only to a tiny slice of clinics that provided services to pregnant women. Additionally, the state had failed to provide evidence that less-restrictive alternatives (like having the government provide this information to women directly instead of conscripting unwilling clinics as its messengers) would be ineffective.[95]

The Court then found that the Unlicensed Notice would similarly fail any level of scrutiny. While the state asserted an interest in ensuring that crisis-pregnancy centers did not deceive women into thinking they were receiving medical care from licensed professionals, it had failed to adduce evidence (at least at the preliminary-injunction stage) that people were actually being deceived in the first place. And, in any event, the state's remedy—requiring its word-for-word disclosure at every facility, without regard to how clear that facility was in communicating its unlicensed status in the first place—was both unnecessarily burdensome and strangely under-inclusive. Among other things, the FACT Act covered facilities that provided pregnancy tests

[93] *Id.* (cleaned up).

[94] Final Order by Default at 16–17, In the Matter of Dale La Forest, Case No. 2697 (Aug. 14, 2015), available at http://ij.org/wp-content/uploads/2017/04/OR-Math-La-Forest-Default-Order-IJ083240xA6322-1.pdf.

[95] NIFLA, 138 S. Ct. at 2375–76.

but not other unlicensed facilities that could just as easily fool people into thinking they provided licensed medical care.[96]

Beyond the Court's controlling opinion, two other justices filed opinions of their own. First, Justice Anthony Kennedy (joined by Chief Justice John Roberts and Justices Samuel Alito and Neil Gorsuch) wrote a concurring opinion underscoring the dangerous viewpoint discrimination that might lurk at the heart of the challenged law. While careful to note that the record was insufficiently developed to draw any firm conclusions, Justice Kennedy noted that it certainly appeared from the face of the law that California sought to conscript a particular subset of people (pro-life pregnancy centers) into conveying a message directly at odds with their core beliefs (specifically, information about state-subsidized abortions). Far removed from any actual concerns about deception or consumer confusion, Justice Kennedy noted that such a law would represent a serious threat to "freedom of thought and belief" that could not be tolerated in a free society.[97]

Finally, in dissent, Justice Stephen Breyer (joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan) decried the majority opinion for imperiling a wide array of "economic and social legislation" that, in his view, must escape judicial scrutiny at the risk of reviving *Lochner v. New York*.[98] This is not the first time that Justice Breyer has invoked the ghost of *Lochner* to warn against the dangers of scrutinizing restrictions on speech too closely,[99] but the argument here bears examination.

Perhaps the most telling difference between the dissent and the majority opinion in *NIFLA* rests in their disparate treatment of *Casey*. Recall that the majority distinguishes *Casey* on the grounds that *Casey* involved informed consent to a medical procedure and that California's law here was attendant on no such medical procedure.

[96] *Id.*

[97] *Id.* at 2379 (Kennedy, J., concurring). We suspect that Justice Thomas agreed with all this, but of course if he had joined his brethren here, there would have been two majority opinions.

[98] *Id.* at 2381 (Breyer, J., dissenting).

[99] E.g., Sorrell v. IMS Health, Inc., 564 U.S. 552, 585 (2011) (Breyer, J., dissenting); cf. *id.* at 567 (noting that while "the Constitution does not enact Mr. Herbert Spencer's Social Statics[, i]t does enact the First Amendment" (citations and quotation marks omitted)).

Justice Breyer sharply disagrees, noting that the state's interest in disclosure should be equally strong:

> No one doubts that choosing an abortion is a medical procedure that involves certain health risks. But the same is true of carrying a child to term and giving birth. . . . Nationwide, childbirth is 14 times more likely than abortion to result in the woman's death. Health considerations do not favor disclosure of alternatives and risks associated with the latter but not those associated with the former.[100]

The dissent, of course, is not incorrect: Just as abortion comes with potential health implications, so too does carrying a child to term. But that hardly goes far enough. Having sex in the first place has health implications, only some of which are pregnancy-related. Actually having small children has health implications, ranging from lost sleep to the ever-present danger of stepping on toys in the middle of the night.[101] The state's interest in informing us of these potential consequences, then, seems equally strong at any point from puberty to death.

This interest, though, tells us nothing about the First Amendment scrutiny required of any regulation in this area. That is because the initial inquiry in a First Amendment case is not into the government's interest but instead (as the majority in *NIFLA* notes) into what the government is regulating: speech or conduct. That is, the first question is whether the law at issue is one "abridging the freedom of speech."[102] If it is, the First Amendment applies.

Any other test runs the risk of leaving government officials as the final arbiters of what people must (or must not) hear at any particular point in their lives. And that would result in people's ability to engage in conversations about vital life decisions being left up to, in essence, the vicissitudes of geography. Government officials in Alabama will surely have a different view of how best to balance the various health risks surrounding sex and pregnancy than do officials in California. If the democratic process can freely regulate

[100] NIFLA, 138 S. Ct. at 2386 (Breyer, J., dissenting).

[101] See Sonali Kohli, The Science of Why Stepping on Legos Makes You Want to Die, Quartz, Mar. 20, 2015, https://qz.com/366858/legos-are-so-painful-to-step-on-because-of-physics.

[102] U.S. Const. amend. I.

conversations on such weighty topics, we could expect extremely different conversations to be permitted (or required) in each place. But fundamentally, the First Amendment is meant to ensure that government officials with different ideologies cannot control the conversation; only the individuals actually having it can do so.

This does not mean, of course, that governments may not conduct public-information campaigns, regulate misleading commercial speech, or require certain factual disclosures. It simply means that individual Americans must retain the basic right to decide what they want to say and who they want to listen to—a right that cannot be overridden simply because government officials want to make sure we hear the things they want us to hear.

V. Implications for Other Cases, Future Litigation

The impact of the Supreme Court's decision in *NIFLA* will be seismic. As discussed above, the professional-speech exception to the First Amendment had spread widely throughout the lower courts. Indeed, while it is true that no opinion of the Supreme Court had ever endorsed the doctrine, it is equally true that no appellate court had ever rejected it. Courts had disagreed about the scope and nature of the doctrine,[103] but no court had squarely rejected it as the Supreme Court now has. This marks a major change in the law as applied by lower courts.

It does not presage the invalidation of professional licensing as a whole. Most state licensing laws will have no First Amendment applications at all.[104] The First Amendment question, again, boils down to whether the application of a statute or regulation is triggered by *communicating a message*, and most professional regulations will not be. Financial advisers take money from their clients to invest on their behalf; doctors perform surgeries; lawyers prepare and file binding legal documents. Even some regulations of "speech" in the colloquial sense will be regulations of "conduct" under this test. Consider a doctor writing a prescription: The doctor of course writes words on a piece of paper to write a prescription, but the government regulation

[103] Compare King v. Governor of N.J., 776 F.3d 216 (3d Cir. 2014) with Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).

[104] This does not, of course, necessarily mean such laws are constitutional. See St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).

of that act has nothing to do with the message communicated and everything to do with the *legal effect* of the prescription (that is, giving the recipient the legal right to access a controlled substance). In other words, there is a difference between a law preventing a doctor from *saying* "you would benefit from using this substance" and a law preventing a doctor from in effect *giving a patient* that substance.

It is also worth noting that there is a difference between *prophylactic* restrictions on speech and laws that punish speech that actually causes harm.[105] Recognizing that the First Amendment protects professional advice does not mean an end to actions for malpractice. Instead of resulting in the wholesale elimination of these regulations, *NIFLA* will shift the focus to a question of whether particular *applications* of the regulations are infringements on speech rather than restrictions on conduct. And these laws are already being drawn. Just a week before *NIFLA* was handed down, the Rhode Island Supreme Court announced oral argument in a set of three cases exploring the boundaries of the state's unauthorized practice of law rule.[106] These cases will give that court one of the earliest chances to construe *NIFLA*, as it explores whether the state's rules allow punishment of a notary who discusses the substance of legal documents during a real-estate closing.

But *NIFLA* also has implications for the economy far beyond the regulation of traditional professionals like lawyers or doctors. The Supreme Court's elimination of the professional-speech doctrine will mean a sharp reduction in the government's ability to prohibit people from conveying information in the name of economic regulation. This will have enormous implications for the regulation and continued growth of modern technologies, as more and more people earn their living not from their physical conduct but from the information they can provide.

[105] See, e.g., United States v. Alvarez, 567 U.S. 709, 718–19 (2012) (noting that false statements that create a "legally cognizable harm" can be punished consistent with the First Amendment); cf. Paul M. Sherman, Occupational Speech and the First Amendment, 128 Harv. L. Rev. F. 183, 195–96 (2015) (noting that actions for medical and legal malpractice predate both licensing requirements and the First Amendment itself and therefore presumably are not barred by the First Amendment).

[106] See In re William E. Paplauskas, Jr., No. 2018-161-M.P. (June 18, 2018); In re Daniel S. Balkun and Balkun Title & Closing, Inc., No. 2018-162-M.P. (June 18, 2018); In re SouthCoast Title and Escrow, Inc., No. 2018-163-M.P. (June 18, 2018).

Take Vizaline, LLC—a Mississippi startup that uses a computer algorithm to translate publicly available legal descriptions of property (called "metes and bounds") into a line drawing of the property line overlaid onto a satellite image of the area. The service provides an easy way for human beings to visualize abstract legal descriptions, and it is particularly useful for banks making loans on small properties whose cash value does not justify hiring a land surveyor to draw a map.[107] The service drew no complaints from its customers, but it did draw a lawsuit from the state's Board of Licensure for Professional Engineers and Surveyors, which argued that the software constituted the unlicensed practice of surveying and demanded that Vizaline disgorge all the money it earned in the state by satisfying its uncomplaining customers. If occupational licensing were indeed exempt from First Amendment scrutiny, companies like Vizaline could be swept out of business by their pre-internet competitors. In the wake of *NIFLA*, however, states' ability to constrain the flow of this sort of information will be sharply curtailed.

The Court's opinion in *NIFLA* also leaves some unsettled questions, largely about the scope of the government's power to demand disclosures tied to someone's underlying conduct—an uncertainty that rests largely with the Court's relatively brief treatment of *Casey*. *Casey*'s somewhat gnomic reasoning has long puzzled lower courts dealing with medicine-related speech restrictions,[108] and *NIFLA* gives little guidance as to what, exactly, *Casey* continues to mean. Some commentators have suggested that *Casey* is indeed a compelled-speech case and that it can be reconciled with the doctrine on the grounds that an informed-consent requirement is an "easy case" that would satisfy even strict scrutiny under the First Amendment.[109] There is some appeal to this view. After all, there

[107] See generally Institute for Justice, Mississippi Mapping, https://ij.org/case/mississippi-mapping.

[108] Compare Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 575–76 (5th Cir. 2012) (finding that *Casey* establishes a standard of review for abortion-related informed-consent requirements that is "the antithesis of strict scrutiny") with Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014) ("The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here.")

[109] Rodney A. Smolla, Professional Speech and the First Amendment, 119 W. Va. L. Rev. 67, 81 (2016).

seems an extremely compelling interest in ensuring that doctors don't perform tonsillectomies without first telling the patient that the surgery involves removing their tonsils.

The Court's *NIFLA* opinion, though, seems to suggest that *Casey* does not require First Amendment scrutiny at all because informed consent is simply a restriction on the professional *conduct* of performing the underlying medical procedure. This, too, has something to recommend it. The Court's modern free-speech analysis is largely focused on what *triggers* the application of a particular law. If "the conduct triggering coverage under [a] statute consists of communicating a message," then the statute is a restriction on speech subject to First Amendment scrutiny.[110] Under that view (perhaps) the Court is suggesting that the regulation in *Casey* functioned solely as a regulation of the conduct of performing an abortion—that is, that it was the functional equivalent of a regulation that simply said "it is illegal to perform an abortion without the patient's informed consent." This leaves wholly unanswered, though, how much information a patient needs to have to give "informed consent" to any given procedure—and how willing courts will be to police the boundaries of such requirements.

Conclusion

For years, federal appellate courts have disregarded the admonitions of the U.S. Supreme Court and accorded second-class status to the speech and advice of people who talk for a living. The *NIFLA* decision instructs them, in no uncertain terms, to stop. This major shift in the federal courts' approach to occupational speech will have sweeping effects on the ability of entrepreneurs and others to convey their knowledge and opinions to a willing audience—and a concomitant effect on the ability of government officials to control what information can be shared. Whatever one's feelings on the crisis-pregnancy centers at the heart of this case, that is an outcome worth celebrating.

[110] Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).