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Erwin Chemerinsky
Berkeley Law

Michelle Goodwin
UC Irvine

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CONSTITUTIONAL GERRYMANDERING AGAINST ABORTION RIGHTS: *NIFLA V. BECERRA*

ERWIN CHEMERINSKY† & MICHELE GOODWIN‡

In National Institute of Family Life Advocates v. Becerra*, the Supreme Court said that a preliminary injunction should have been issued against a California law that required that reproductive healthcare facilities post notices containing truthful factual information. All that was required by the law was posting a notice that the state of California makes available free and low-cost contraception and abortion for women who economically qualify. Also, unlicensed facilities were required to post a notice that they are not licensed by the state to provide healthcare.*

In concluding that the California law is unconstitutional, the Court's decision has enormously important implications. It puts all laws requiring disclosures in jeopardy because all, like the California law, prescribe the required content of speech. All disclosure laws now will need to meet strict scrutiny and thus are constitutionally vulnerable. Moreover, the ruling is inconsistent with prior Supreme Court decisions that allowed the government to require speech of physicians intended to discourage abortions. The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech.

But NIFLA v. Becerra *is only secondarily about speech. It is impossible to understand the Court's decision in* NIFLA v. Becerra *except as a reflection of the conservative Justices' hostility to abortion rights and their indifference to the rights and interests of women, especially poor women. In this way, it is likely a harbinger of what is to come from a Court with a majority that is very hostile to abortion.*

† Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law.

‡ Michele Goodwin, Chancellor's Professor of Law & Director, Center for Biotechnology & Global Health Policy, University of California, Irvine School of Law. We wish to thank Jonathan Huang for his excellent research assistance.

INTRODUCTION

Forty-five years after the Supreme Court's landmark decision in *Roe v. Wade*,[1] the Supreme Court declared unconstitutional a California law meant to help ensure that women are provided accurate information about reproductive health services available to them, including but not exclusively about abortion.[2] In the aftermath of the Court's decision, numerous prominent women's rights organizations issued statements, declaring that the Court endangered the future of women's reproductive autonomy and health.[3] Catholics for Choice

[1] 410 U.S. 113 (1973).

[2] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[3] For example, after the Court's ruling, the National Women's Law Center issued a statement, calling the opinion "damaging" and "infuriating," explaining, "We should all be able to agree that pregnant women deserve timely and accurate information about their pregnancies and the full range of options available to them, but instead, the Court struck down a California law which did just that." *See* Heather Shumaker, NIFLA v. Becerra*: SCOTUS Fails to Protect Women from Deceptive Practices of Anti-Abortion Counseling Centers*, NAT'L WOMEN'S L. CTR. (June 28, 2018), https://nwlc.org/blog/nifla-v-becerra-scotus-fails-to-protect-women-from-the-deceptive-practices-of-anti-abortion-counseling-centers/; *see also Supreme Court Decision Awards Free Pass to Deceptive Crisis Pregnancy Centers*, CTR. FOR REPROD. RTS., (June 26, 2018), https://www.reproductiverights.org/press-room/supreme-court-decision-awards-free-pass-to-deceptive-crisis-pregnancy-centers ("We disagree . . . that fake health centers have a free speech right to dress up like medical centers and deceive pregnant women. . . . [T]he anti-choice movement relies on deceptive

issued a statement describing the Court's ruling as disappointing, and noting that it is "morally bankrupt to deceive poor women."[4] Glenn Northern, the Domestic Program Director for the organization, put it this way: "It is simply immoral and unkind to present yourself as a source of help for a woman only to drive her toward a decision that only she will have to move forward with."[5]

At issue in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*[6] was the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act).[7] The FACT Act required crisis pregnancy centers (CPCs) to provide notices to women that visit their clinics that California provides free or low-cost reproductive health services.[8] The law also mandated that unlicensed CPCs notify women that California had not licensed the clinics to provide medical services.[9] No one working in the clinics was required to say anything, let alone provide contraception, abortion services, or referrals. The FACT Act was supported by detailed legislative history documenting that women often did not know or have access to this critical information concerning their reproductive choices.[10]

Justice Clarence Thomas wrote for the Court in a 5–4 decision split along familiar ideological lines, joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch. Justice Thomas either overlooked or disregarded the well-documented realities the FACT Act sought to address. For example, the chilling accounts by pregnant women of deception, coercion, distress, and confusion at CPCs, which

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tactics like fake health centers to pursue their aim of denying the right to decide to end a pregnancy."); Kelly Blanchard, *Ibis Responds to* NIFLA v. Becerra, IBIS REPROD. HEALTH (June 2018), https://ibisreproductivehealth.org/news/ibis-responds-nifla-v-becerra ("The Supreme Court's decision to allow crisis pregnancy centers to deliberately mislead women about abortion and contraception services endangers women's lives, specifically and significantly impacting low-income women. This decision undermines women's ability to make decisions that are best for them and their loved ones.").

[4] *See* Casey Baker, *It's Morally Bankrupt to Deceive Poor Women* – NIFLA v. Becerra *Ruling*, CATHOLICS FOR CHOICE (July 26, 2018), http://www.catholicsforchoice.org/morally-bankrupt-deceive-poor-women-nifla-v-becerra-ruling/ ("We are deeply disappointed with today's ruling. At the heart of our Catholic faith is the belief that every individual is endowed with the inherent dignity to make their own moral decisions and not be coerced into a predetermined path.").

[5] *Id.*

[6] 138 S. Ct. 2361 (2018).

[7] Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act, Cal. Health & Safety Code Ann. §§ 123470–123473 (West 2018) [hereinafter FACT Act], invalidated by Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[8] *Id.* § 123472(a)(1).

[9] *Id.* § 123472(b).

[10] *See infra* Section I.A.

primarily solicit their services to poor pregnant teens and women.[11] According to an investigation conducted by NARAL Pro-Choice America (NARAL) in California, 40% of the CPCs in their study "advised that hormonal birth control increases the risk of infertility and breast cancer;"[12] 60% warned that "condoms are ineffective in reducing pregnancy and the transmission of certain STDs;"[13] and a confounding 70% made the ridiculous assertion that "abortion increases the risk of breast cancer."[14]

Even more chilling, "85% of the CPCs investigated in California misled women to believe that abortion is both traumatizing and dangerous."[15] Such patently false claims obscure the fact that an American woman is fourteen times more likely to die in pregnancy and childbirth than by terminating her pregnancy.[16] However, these claims have the intended purpose—and undoubted effect—of coercing women's reproductive decision-making, and steering women

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[11] *See infra* Section I.A; *see also* U.S. HOUSE OF REPRESENTATIVES COMM. ON GOV'T REFORM—MINORITY STAFF SPECIAL INVESTIGATIONS DIV., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 1 (2006), https://fedupburlington.files.wordpress.com/2011/07/congressional-report-cpcs.pdf ("Pregnancy resource centers often mask their pro-life mission in order to attract 'abortion-vulnerable clients.'") (quoting Kurt Entsminger, *Building a Successful Internet Advertising Campaign for Your Pregnancy Center*, CARE NET REPORT (Mar.–Apr. 2007), http://carenet-test.digiknow.com/uploads/report_date/cnrMarApril07.pdf); NARAL PRO-CHOICE AM., CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM (2015), https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf; Beth Holtzman, Note, *Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive FACT Act*, 12 NW. J.L. & SOC. POL'Y 78 (2017); Allison Yarrow, *The Abortion War's Special Ops*, NEWSWEEK (Aug. 20, 2014), https://www.newsweek.com/2014/08/29/inside-covert-abortion-war-265866.html (detailing the experience of a visitor to a CPC, who said they told her "an abortion could cause scarring, fertility problems and something they call post-abortion syndrome, a cocktail of depression, regret and suicidal thoughts"); *'Misconception': New Documentary Exposes the Dark, Deceptive World of Crisis Pregnancy Centers*, PUBLICHEALTHWATCH (Sept. 24, 2014), https://publichealthwatch.wordpress.com/2014/09/24/misconception-new-documentary-exposes-the-dark-deceptive-world-of-crisis-pregnancy-centers/ ("CPC's [sic] are widely known for using highly deceptive tactics to mislead women and scare them away from making an informed choice to have a legal abortion.").

[12] NARAL PRO-CHOICE CAL. FOUND., UNMASKING FAKE CLINICS: THE TRUTH ABOUT CRISIS PREGNANCY CENTERS IN CALIFORNIA 2 (2010), https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf.

[13] *Id.*

[14] *Id.*

[15] NARAL PRO-CHOICE AM., *supra* note 11, at 9.

[16] *See* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012).

into continuing unwanted pregnancies that may threaten their lives.[17] According to NARAL, "[a]fter a year investigating crisis pregnancy centers across California, it became clear that CPCs only have one agenda: stop any woman from accessing abortion care, regardless of her situation."[18]

Nevertheless, the Court ruled that the FACT Act violates the First Amendment. We find several flaws with the Court's analysis and ultimate ruling. First, as Justice Breyer explains in a dissenting opinion, the Court erroneously relied "on cases that prohibit rather than require speech."[19] Second, the majority ignores Supreme Court precedent, including cases where the Court previously ruled that an entity's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[20] Third, the Court undermines poor women's reproductive health rights as well as their interests as healthcare consumers. Finally, the Court further weaponizes the First Amendment, and in the process opens an avenue to challenge notice requirements on free speech grounds.[21]

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[17] CPCs have long had connections to anti-abortion violence; one study found the mere presence of a CPC near an abortion clinic increased the risk of violence against clinics, including invasions, bombings, arson, and gunfire. Kathryn Joyce, *The Anti-Abortion Clinic Across the Street*, Ms. Mag. (Fall 2010), http://www.msmagazine.com/Fall2010/CPCExcerpt.asp. Today, the strategies are different; CPCs deploy more sophisticated tactics based largely on luring women into their facilities and discouraging them from ending pregnancies through deception and coercion. Heartbeat International, which credits itself with serving over 1.5 million pregnant women each year, articulates its vision as "mak[ing] abortion unwanted today and unthinkable for future generations." Heartbeat Int'l, https://www.heartbeatinternational.org/ (last visited Oct. 3, 2018). The National Institute of Family and Life Advocates (NIFLA) proclaims its mission as providing legal counsel and training to "protect the work of these life-affirming centers." *About NIFLA*, Nat'l Inst. Fam. & Life Advocs., https://nifla.org/about-nifla/ (last visited Oct. 3, 2018); *see also infra* notes 188–92. According to NARAL, "[a]t every visit, our investigator reported that CPC workers repeated a similar set of lies and myths, noting, 'it was scary how they all said the same things, it was like it didn't matter who I was, they only had one script.'" NARAL Pro-Choice Cal. Found., Unmasking FAKE Clinics: An Investigation into California's Crisis Pregnancy Centers (2015), https://www.prochoiceamerica.org/wp-content/uploads/2018/03/NARAL-Pro-Choice-CA-Unmasking-Fake-Clinics-2015.pdf.

[18] NARAL Pro-Choice Cal. Found., *supra* note 17.

[19] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2387 (2018) (Breyer, J., dissenting).

[20] Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

[21] In fact, countless laws at state and federal levels of government require disclosure of accurate information to patients, consumers, and others. *See infra* Section III.A. Thus, on one hand, by its decision, the Supreme Court opens the door to challenges of numerous laws and regulations requiring disclosures. On the other hand, if its holding applies only to shield anti-abortion organizations and deny protections to pregnant women, Justice Thomas and the Court expose their selective and targeted hostility toward women.

As we show in this Article, *NIFLA v. Becerra* is inconsistent with other Supreme Court precedents concerning notice requirements, including decisions upholding requirements that lawyers disclose pertinent information to potential clients[22] and that mandate doctors provide information to women seeking abortions.[23] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld a law that required doctors to provide information to a woman deciding whether to proceed with an abortion.[24] The Court rejected a challenge that this was impermissible compelled speech.[25]

Yet the errors of the case extend beyond its disregard of precedent, precisely because the Court's majority "contorts the law to fit [its] anti-choice objective."[26] In *Casey*, the Supreme Court ruled, "we . . . see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials," including those related to consequences of the pregnancy such as fetal development, "even when those consequences have no direct relation to her health."[27] Justice Thomas did not apply the Court's *Casey* standard and by failing to do so, he ensured an outcome consistent with anti-abortion ideological leanings of the majority. This is what we call constitutional gerrymandering against abortion rights. The problem is in and of the Court's line drawing, which colors the majority's holding and ultimately results in an opinion that is contrary to and conflicting with established law. As one commentator explains, "*Casey* is the big elephant in the room; it is standing in the way between Clarence Thomas and sound logic, and he can't get around it."[28]

Put this way, *NIFLA v. Becerra* is only secondarily about speech. Instead, we believe this case is primarily about five conservative Justices' hostility to abortion rights. The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech. Mere months after Justice Thomas' great protection for free speech in *NIFLA*, he

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[22] *See, e.g.*, *Zauderer*, 471 U.S. at 651; Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978).

[23] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *see also infra* text accompanying notes 313–25 for further discussion of the *Casey* decision.

[24] *Id.*

[25] *Id.* at 882.

[26] Imani Gandi, *The Supreme Court Just Gave Crisis Pregnancy Centers a License to Lie*, REWIRE.NEWS (June 26, 2018), https://rewire.news/ablc/2018/06/26/supreme-court-gives-crisis-pregnancy-centers-license-lie/.

[27] *Casey*, 505 U.S. at 882.

[28] Gandi, *supra* note 26. This commentator also observed that "[t]he rules that normally apply apparently don't apply to evangelicals who are looking to impose their will on vulnerable people." *Id.*

issued a blistering attack on *New York Times v. Sullivan*,[29] an iconic free speech case,[30] referring to it and its progeny as "policy-driven decisions masquerading as constitutional law."[31] Such inconsistencies in Justice Thomas' First Amendment jurisprudence are ironic at best. Unless the Court is willing to invalidate disclosure laws across a vast array of consumer protections, the Court seems to be uniquely unprotective of women's reproductive rights.

It is impossible to understand the Court's decision in *NIFLA v. Becerra* except as a reflection of the conservative Justices' hostility to abortion rights and their indifference to the rights and interests of women, especially poor women. A simple hypothetical powerfully reveals this hostility. Imagine if state *X* were to adopt a law that required two things:

First, any facility where women might be seeking any abortion, including any doctor, must tell the woman the health risks of abortion and of childbirth, communicate the "probable gestational age of the unborn child," and make available printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion).

Second, facilities must post a notice that women who economically qualify can receive free or low-cost contraceptives and abortions paid for by the state, and unlicensed facilities must post that fact.

The first part of the law seems much more intrusive than the latter: It requires that doctors actually engage in speech and is unquestionably motivated by a desire to discourage women from exercising their constitutional rights. Yet it is clear that the first part of the law is constitutional, having been expressly upheld in *Planned Parenthood v. Casey*.[32] However, the second part of the law is exactly what the Court declared unconstitutional in *NIFLA v. Becerra*. In other words, a state can compel speech intended to discourage abortions, but not speech meant to inform women of their rights with regard to abor-

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[29] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[30] *See* Adrienne Stone, *Defamation of Public Figures: North American Contrasts*, 50 N.Y.U. L. REV. 9, 9 (2005) (referring to *New York Times v. Sullivan* as an iconic First Amendment case).

[31] McKee v. Cosby, No. 17-1542, 2019 WL 659764, at *1 (Feb. 19, 2019) (Thomas, J., concurring).

[32] *Casey*, 505 U.S. at 838–39.

tion.[33] At the very least, such a content-based approach to speech is inconsistent with a core principle of the First Amendment.[34]

In this Article, we argue *NIFLA v. Becerra* was incorrectly analyzed and decided. As such, we predict the case will lead to pernicious results.[35] First, the case lays the groundwork for burdening and discriminating against speech that protects reproductive rights. This is what Justice Elena Kagan has referred to as "weaponizing" the First Amendment.[36]

Second, the case ignores and ultimately undermines women's informational interests as consumers of reproductive health services. Finally, the case will likely upend disclosure laws nationally. That is, because this case is written as a First Amendment decision, it opens the door to challenges to a myriad of laws that require disclosures. Most importantly, the opinion reflects a Court prepared to dramatically diminish reproductive freedom for women.

This Article proceeds in three parts. Part I establishes the facts of the case. It describes the California statute, articulates what was at stake for the litigants, and summarizes the Court's decision. In Part II, we analyze how and why the Court got it wrong in *NIFLA v. Beccera.* We turn to the empirical record, identifying health, safety, and economic interests that undergirded and justified the law's enactment. In this Part, we argue that the Court failed to balance interests, departed from its own precedent, and dispensed with even-handed decision-making. In Part III, the Article forecasts the implications and potential consequences of this decision for the future, including jeopardizing reproductive rights vis-à-vis other types of protections and the potential weakening or eradication of disclosure laws.

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[33] Justice Breyer framed it this way: "If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?" Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2385 (2018) (Breyer, J., dissenting).

[34] *See, e.g.*, Police Dep't of the City of Chi. v. Moseley, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.").

[35] Sadly, barely six months after the Supreme Court issued its *NIFLA v. Becerra* ruling, our prediction is manifesting. On January 31, 2019, the Ninth Circuit *en banc* declared unconstitutional an ordinance requiring disclosures for sugar-sweetened beverages. The court relied on *NIFLA v. Becerra*. Am. Beverage Ass'n v. City & Cty. of S.F., 916 F.3d 749, 753 (9th Cir. 2019).

[36] *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy").

I
STATUTE, CONTEXT, AND DECISION IN *NIFLA V. BECERRA*

In Part I, we turn to the underlying controversy, the litigation brought by three crisis pregnancy centers with the National Institute of Family and Life Advocates as their named plaintiff. We begin by carefully examining the statute at issue before the Court: the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act—the FACT Act. Next, we explain why California lawmakers enacted the law, turning to both the legislative record and empirical research related to CPC practices to weave together a more holistic account about the underlying justifications for law. Finally, we describe the Supreme Court's reaction to the statute.

As we show, much was at stake in California, including addressing and stemming high rates of maternal mortality, unintended pregnancies, and sexually transmitted diseases among women and teens in the state. These important health concerns were compounded by glaring economic considerations.

A. The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act

The legislative path to the FACT Act began five years before the law's enactment; even a few years before its eventual sponsor, David Chiu, was an elected member of the California Assembly.[37] In the fall of 2009, the California legislature's committee on Business, Professions and Consumer Protection commissioned a report about CPCs' practices.[38] According to the legislative record, the Committee was concerned "that CPCs throughout California were disseminating medically inaccurate information about pregnancy options available in the state . . . ."[39] The California Assembly's Committee on Health reported that both licensed and unlicensed CPCs "present themselves as comprehensive reproductive health centers, but are commonly affil-

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[37] *See* Press Release, NARAL Pro-Choice Cal., Assemblymembers Chiu & Burke Introduce the Reproductive FACT Act (Apr. 13, 2015), https://prochoicecalifornia.org/2015/04/13/assemblymembers-chiu-burke-introduce-the-reproductive-fact-act/.

[38] *Reproductive FACT Act: Hearing on A.B. 775 Before the Assemb. Comm. on Health*, 2015 Leg., 2015–16 Sess. 4 (Cal. 2015) [hereinafter *FACT Act Assembly Hearing*]. The report, completed in December of 2010 and published by the Public Law Research Institute, discusses several options for regulating CPCs, including creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute. *See* CASEY WATTERS ET AL., U.C. HASTINGS COLL. OF THE LAW PUB. LAW RESEARCH INST., PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 1 (2011).

[39] *FACT Act Assembly Hearing*, *supra* note 38, at 4.

iated with, or run by organizations whose stated goal is to prevent women from accessing abortions."[40] These developments particularly alarmed California lawmakers, who noted that existing state law "[g]rants a specific right of privacy under the California Constitution and provides that the right to have an abortion may not be infringed upon without a compelling state interest."[41]

Further adding to their concern, in California, as in much of the United States generally, CPCs outnumbered abortion clinics by a significant margin. According to a study by the Guttmacher Institute, in 2014, a year before the FACT Act was signed into law, there were 152 clinics that provided abortion services in California,[42] while there were about 200 CPCs operating in the state.[43] Research reviewed by the California Assembly showed that CPCs strategically set up their operations throughout the state.[44] Then and now, their online platforms used algorithms to steer women searching the term "abortion" to their CPCs.[45] Moreover, "79 percent of the crisis pregnancy centers that advertised on Google indicated that they provided medical services such as abortions, when, in fact, they are focused on counseling services and on providing information about alternatives to abortion."[46] According to NARAL, these organizations "employ a number of tactics to get women in their doors, including strategically . . . locat[ing] near comprehensive women's health-care clinics . . . ."[47]

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[40] *Id.* at 3.

[41] *Id.*

[42] *See State Facts About Abortion: California*, GUTTMACHER INST. (2018), https://www.guttmacher.org/sites/default/files/factsheet/sfaa-ca.pdf (describing how some forty-three percent of California counties lacked clinics providing abortions).

[43] *See* WATTERS ET AL., *supra* note 38, at 4. Heartbeat International provides search tools to locate CPCs in areas around the world. Using its database, we were able to determine that at least 331 CPCs are located in California today and more than 4115 are operating in the United States. The database alerts users, "some help centers choose not to have their locations made public for security reasons." *See Worldwide Directory of Pregnancy Help*, HEARTBEAT INT'L, https://www.heartbeatservices.org/worldwide-directory (last visited Oct. 4, 2018).

[44] *See, e.g.*, *FACT Act Assembly Hearing*, *supra* note 38, at 3–4; NARAL PRO-CHOICE AM., *supra* note 11, at 14 (describing CPCs co-locating in medical buildings).

[45] *See, e.g.*, Sam Levin, *Google Search Results for Abortion Services Promote Anti-Abortion Centers*, GUARDIAN (Feb. 13, 2018), https://www.theguardian.com/world/2018/feb/13/abortions-near-me-google-search-results-anti-pro-life-groups-promote ("Google searches for abortion services direct users to anti-abortion centers across the US, according to a new report that has sparked concerns from reproductive rights' groups."); Hayley Tsukayama, *Google Removes "Deceptive" Pregnancy Center Ads*, WASH. POST (Apr. 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads/ (describing Google's removal of CPC advertisements which violate their factually supportable advertising policy, following NARAL investigation report).

[46] Tsukayama, *supra* note 45 (citing statistics provided by NARAL).

[47] NARAL PRO-CHOICE AM., *supra* note 11, at 2.

The Committee on Health found CPCs in California operated "to interfere with women's ability to be fully informed and exercise their reproductive rights . . . ."[48] Based on their review of various reports and one California-focused study, the Committee concluded that CPCs' "intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical healthcare."[49] In 2015, lawmakers set about addressing these alarming trends by enacting the FACT Act.[50]

At the final senate hearing before the bill's enactment, lawmakers hailed California's "proud legacy of respecting reproductive freedom and funding forward-thinking programs to provide reproductive health assistance to low income women."[51] However, as Assembly Member David Chiu explained, "[t]he power of the law is only fully realized when California's women are fully informed of the rights and services available to them."[52] Lawmakers sought to place notices in CPCs, "[b]ecause family planning and pregnancy decisions are time sensitive," and they sensibly believed "California women should receive information that helps them make decisions and access financial support at the sites where they seek care."[53] Chiu summed up the importance of the law as a matter of the best interest of patients, providers, and the state "that women are aware of available assistance for preventing, continuing or terminating a pregnancy."[54]

The law was straightforward. The preamble states the law's intended purposes and the legislature's goal. The law had two components.[55] The first required CPCs to provide notices to women who visit their clinics, including that California provides free or low-cost reproductive health services.[56] The second mandated that unlicensed CPCs notify women that California did not license the clinics to provide medical services.[57]

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48 *FACT Act Assembly Hearing*, *supra* note 38, at 3.

49 *Id.*

50 FACT Act, *supra* note 7.

51 *Reproductive FACT Act: Hearing on A.B. 775 Before the S. Comm. on Health*, 2015 Leg., 2015–16 Sess. 5 (Cal. 2015) [hereinafter *FACT Act Senate Hearing*] (quoting Assembly Member David Chiu, author of the FACT Act).

52 *Id.*

53 *Id.*

54 *Id.*

55 A.B. 775, 2015–16 Sess. (Cal. 2015).

56 *See id.*

57 *See id.*

1. Licensed Facilities

The law required that all licensed covered facilities must disseminate a notice stating: "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]."[58]

The Act also defined a licensed covered facility as "a facility licensed under [state health and safety codes] or an intermittent clinic operating under a primary care clinic pursuant to [state health and safety codes], whose primary purpose is providing family planning or pregnancy-related services," and that also satisfies two or more of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.[59]

The Act required that the "Licensed Notice" be disclosed by licensed facilities in one of three possible manners:

> A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22–point type.
>
> A printed notice distributed to all clients in no less than 14–point type.
>
> A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures.[60]

Clearly and quite importantly in terms of the issue of compelled speech, the law did not require anyone in the facility say anything. The state simply required that CPCs post a notice on the wall, providing individuals factual information about services California provides.[61]

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[58] FACT Act, *supra* note 7, § 123472(a)(1).

[59] *Id.* § 123471(a).

[60] *Id.* § 123472(a)(2).

[61] *See generally id.* § 123472.

2. *Unlicensed Facilities*

Finally, the California legislature also enacted a disclosure requirement for unlicensed facilities. This was particularly important, given the misleading appearance of unlicensed CPCs, which deceptively portray themselves as medical clinics. According to the California law, an unlicensed clinic is "a facility that is not licensed by the state of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services" and that also satisfies two of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.[62]

The law required that unlicensed clinics must disseminate a notice (the "Unlicensed Notice") stating: "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."[63] The Unlicensed Notice must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites."[64] Information in advertising material must be "clear and conspicuous," and the onsite notice must be "at least 8.5 inches by 11 inches and written in no less than 48–point type, and . . . posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services."[65]

The FACT Act was consistent with existing California law. California already licensed and regulated clinics, including primary care and surgical clinics, through its Department of Public Health (DPH).[66] The state required the DPH to inspect licensed health facilities, "including but not limited to clinics."[67] California provided a mechanism for exemptions from licensing requirements for certain types of clinics, including those federally operated, community clinics, free clinics, and local government primary care clinics.[68] And, like

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[62] *Id.* § 123471(b).
[63] *Id.* § 123472(b)(1).
[64] *Id.* § 123472(b).
[65] *Id.* § 123472(b)(2)–(3).
[66] *See FACT Act Assembly Hearing*, *supra* note 38, at 2.
[67] *FACT Act Senate Hearing*, *supra* note 51, at 1.
[68] *See id.*

other notice requirements mandated by the state, California enforced its law through the imposition of civil penalties. All violators of the Act were "liable for a civil penalty of five hundred dollars . . . for a first offense and one thousand dollars . . . for each subsequent offense."[69]

The CPC notice requirement was not unlike other California notice requirements intended to protect the public. For example, to address workplace conditions in barbershops and beauty salons, California enacted two laws that provide salon employees, including nail salon workers, "with information on their employment rights."[70] One of the laws requires educational information for all licensees and the other mandates that barbering establishments and salons post specific information. Similar to the FACT Act, the "barber shop" legislation "requires any establishment that is licensed by the Board of Barbering and Cosmetology (BBC) (e.g., hair salons, nail salons, estheticians, etc.) to post a notice regarding workplace rights and wage-and-hour laws."[71]

The law also requires that businesses post the notices in four languages.[72] According to the California Chamber of Commerce, "both bills are intended to educate business owners and workers about existing labor laws that they may be unaware of and violating."[73] Similarly, California mandates poster requirements regarding domestic violence. If an employer employs more than twenty-five persons, she or he must provide new employees with a written notice about the rights of victims of domestic violence, sexual assault, protected time off, and medical treatments.[74] These two laws reflect the

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[69] FACT Act, *supra* note 7, § 123473(a). The law permitted the state attorney general, city attorney, or county counsel "to bring an action to impose a civil penalty" against a noncompliant facility when two conditions were met: (1) the facility was provided reasonable notice of noncompliance (informing the facility of liability if no remedial action was taken within 30 days of the notice being sent), and (2) the enforcing authority verified that the violation was not corrected within the 30-day period. *See id.*

[70] *See* Gail Cecchettini Whaley, Cal. Chamber of Commerce, *Mandatory Poster and Education Requirements for California Barbering and Cosmetology Licensees July 1*, HRWATCHDOG (June 26, 2017), https://hrwatchdog.calchamber.com/2017/06/mandatory-poster-education-barbering-cosmetology/.

[71] *Id.*

[72] The Barbering and Cosmetology Act, CAL. BUS. & PROF. CODE § 7353.4 (West 2018).

[73] Whaley, *supra* note 70.

[74] CAL. LAB. CODE § 230.1(h)(1) (West 2018). All California employers with twenty-five or more employees must provide reasonable accommodations for victims of domestic violence provide victims of domestic violence, sexual assault, and stalking the opportunity to be released from work in order to seek medical attention, psychological counseling, safety planning, and other services from a domestic violence shelter, program, or rape crisis center. *Id.* § 230.1(a).

myriad notification or poster requirements imposed by California legislators on businesses operating in that state. In short, there was nothing particularly unusual about the notice requirement in the case at hand, except that the state sought to protect pregnant women, which CPCs found objectionable.

There were compelling concerns undergirding the law that extended beyond the crafty, deceptive messaging of CPCs.[75] The crisis centers' corrosive practices interfered with the state's broader public health agenda related to women's health. Lawmakers discovered that a great number of California women were unaware of the existence of state-sponsored healthcare programs.[76] This mattered, because California experienced one of the highest rates of unplanned and unintended pregnancies in the United States.[77]

California's unintended pregnancy rate—just as those in all states and elsewhere—was associated with known health risks, including maternal deaths.[78] Such problems were not unique to California. Based on the nation's high rates of maternal injury and mortality, the United States has been called "the most dangerous place to give birth in the developed world."[79]

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[75] For instance, CPCs in California have falsely informed pregnant women that abortion is both traumatizing and dangerous. They have also inaccurately warned clients that abortions are high-risk procedures that could well result in infection and death. Frequently, these clinics parade as actual medical centers; employees dress in medical scrubs and white medical laboratory coats, even when sometimes the staff lack more than high school education and have no medical training. *See, e.g.*, NARAL PRO-CHOICE AM., *supra* note 11, at 7, 9; *'Misconception': New Documentary Exposes the Dark, Deceptive World of Crisis Pregnancy Centers*, *supra* note 11.

[76] A.B. 775, 2015–16 Sess. (Cal. 2015).

[77] ADAM SONFIELD & KATHRYN KOST, GUTTMACHER INST., PUBLIC COSTS FROM UNINTENDED PREGNANCIES AND THE ROLE OF PUBLIC INSURANCE PROGRAMS IN PAYING FOR PREGNANCY-RELATED CARE: NATIONAL AND STATE ESTIMATES FOR 2010 (2015), https://www.guttmacher.org/sites/default/files/report_pdf/public-costs-of-up-2010.pdf.

[78] *See* Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 STUD. FAM. PLAN. 18, 28 (2008) (discussing that although there have been few studies of the relationship between unintended pregnancy and maternal mortality, there is likely to be a relationship because by definition, pregnancy increases risk of maternal death and is likely to occur in the very young or old, for whom pregnancy risks are greater). *See also* RACHEL BENSON GOLD, LESSONS FROM BEFORE *ROE*: WILL PAST BE PROLOGUE?, GUTTMACHER REP. PUB. POL'Y 8 (2003), https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue (linking unintended pregnancy to illegal abortion and mortality).

[79] *U.S. "Most Dangerous" Place to Give Birth in Developed World, USA Today Investigation Finds*, CBS NEWS (July 26, 2018) [hereinafter *U.S. "Most Dangerous"*], https://www.cbsnews.com/news/us-most-dangerous-place-to-give-birth-in-developed-world-usa-today-investigation-finds/; *see also* CENT. INTELLIGENCE AGENCY, *World Factbook–Country Comparison: Maternal Mortality Rate*, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html (last visited Oct. 4, 2018) (ranking 184 nations based on their maternal mortality rates). Equally horrific are the rates of infant mortality in the United States; infants are just as likely to survive if they are born in an

The difference between California and other states was that lawmakers actively sought to address these problems.

B. The Statute's Purpose: Addressing Sexual Health, Unintended Pregnancies, Sexually Transmitted Diseases, and Costs in the United States and California

In this section, we examine California's justifications for enacting the FACT Act by turning to the glaring problems of maternal deaths, unintended pregnancies, and unplanned births. We provide an empirical account of the reproductive health challenges faced by women in California. By engaging this approach, we distill a more nuanced account of what was and remains at stake in California. Empirical accounts of women's lived lives, especially in reproductive health contexts, deserve greater attention within legal literature, especially as they provide a more accurate portrait of women's experiences than fallible anecdotal presentments.[80]

Our conclusion is that the FACT Act served California's health and safety interest by preemptively protecting women in its state from known, and in some cases deadly, reproductive health risks. Secondly, we show the FACT Act served the state's economic interests. These important, if not compelling, concerns were not addressed by Justice Thomas and the majority in *NIFLA v. Becerra.*

1. Maternal Mortality

The United States is now the deadliest nation in the developed world for a woman to give birth.[81] In 2000, countries around the world responded to the United Nations Millennium Development Goals (MDGs), one of which directly addressed reducing pregnancy related deaths.[82] One hundred ninety-one member state nations and nearly two dozen international organizations committed to achieve eight goals, which included eradicating extreme poverty; achieving universal

economically distressed and formerly war-torn nation such as Serbia as they are in the United States. *See* CENT. INTELLIGENCE AGENCY, *World Factbook–Country Comparison: Infant Mortality Rate*, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2091rank.html (last visited Oct. 13, 2018).

[80] An evidence-based approach also helps to contextualize arguments and theories related to abortion rights, debunk the false assumption that pregnancies are by default safe and safer than abortions, and demonstrate how the chipping away of reproductive rights actually harms the health interests of women.

[81] *See supra* note 79 and accompanying text.

[82] INDEP. EVALUATION GRP., DELIVERING THE MILLENNIUM DEVELOPMENT GOALS TO REDUCE MATERNAL AND CHILD MORTALITY: A SYSTEMATIC REVIEW OF IMPACT EVALUATION EVIDENCE (2016), https://www.oecd.org/derec/norway/WORLDBANK DeliveringtheMDGtoreducematernalandchildmortality.pdf.

primary education; promoting gender equality and women's empowerment; and improving maternal mortality among other goals.[83] All but a handful of nations showed progress.[84] The United States was among the few nations to regress, showing an increase in the maternal mortality rate of nearly 140%.[85] As one reporter explained, "[j]ust as the world turned its attention to this matter with marked success, the United States stopped offering data and began moving backward."[86]

Texas, a state where some lawmakers express pride in enacting the nation's most restrictive anti-abortion regulations,[87] now holds the dubious distinction of being the deadliest place in the developed world for women to give birth.[88] Close behind are Mississippi[89] and Louisiana,[90] states marked by deliberate legislative evisceration of

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[83] Jessica Ravitz, *Maternal Deaths Fall Across Globe but Rise in US, Doubling in Texas*, CNN (Apr. 17, 2018), https://www.cnn.com/2016/08/24/health/maternal-mortality-trends-double-texas/index.html.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See, e.g.*, Press Release, Office of the Tex. Governor, Governor Abbott Signs Pro-Life Insurance Reform (Aug. 15, 2017), https://gov.texas.gov/news/post/governor-abbott-signs-pro-life-insurance-reform ("As a firm believer in Texas values, I'm proud to sign legislation that ensures no Texan is required to pay for a procedure that ends the life of an unborn child."); *see also* Alex Zielinski, *The Growing List of Anti-Abortion Bills Texas Conservative Lawmakers Hope to Pass This Year*, SAN ANTONIO CURRENT (Jan. 25, 2017), https://www.sacurrent.com/the-daily/archives/2017/01/25/the-growing-list-of-anti-abortion-bills-texas-conservative-lawmakers-hope-to-pass-this-year ("In the past few months, state lawmakers have filed no less than 17 anti-abortion bills (and judging by past legislative sessions, more are on the horizon).").

[88] Sophie Novack, *Texas' Maternal Mortality Rate: Worst in Developed World, Shrugged off by Lawmakers*, TEX. OBSERVER (June 5, 2017), http://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities (reporting the doubling of the rate of maternal mortality in Texas and how it "now exceeds that of anywhere else in the developed world"); Katha Pollitt, *The Story Behind the Maternal Mortality Rate in Texas Is Even Sadder than We Realize*, NATION (Sept. 8, 2016), http://www.thenation.com/article/the-story-behind-the-maternal-mortality-rate-in-texas-is-even-sadder-than-we-realize ("Unbelievably, Texas now has the highest rate of maternal mortality in the developed world."). *But see* Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447, 453 (2016) (expressing skepticism in the accuracy of the data showing the mortality rate doubled in just a two year period).

[89] *See* Danielle Paquette, *Why Pregnant Women in Mississippi Keep Dying*, WASH. POST: WONKBLOG (Apr. 24, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/24/why-pregnant-women-in-mississippi-keep-dying/ (reporting that "Mississippi's maternal mortality rate, one of the highest in the country, has been climbing for more than a decade" and that "[f]rom 2010 to 2012, the last measure, an average of nearly 40 women died for every 100,000 births").

[90] Louisiana exceeds the nation's maternal mortality rate by a dramatic proportion. In particular, while maternal mortality is dire among Black women in the United States generally, in Louisiana the incidences of death are far greater. The average maternal mortality for white women is 18.1 in the United States and 27.3 in Louisiana. For Black women, the U.S. incidence of maternal mortality is 47.2 and in Louisiana 72.6. *See, e.g.*,

reproductive rights and access, leaving 1.5 and 2.4 million female residents, respectively, with only one abortion clinic remaining in their states.[91] Staggering maternal mortality rates in these states and others come as little surprise considering that dozens of clinics that provided contraceptive care, breast, ovarian, and cervical cancer screenings, and testing for sexually transmitted diseases, shuttered in the wake of anti-abortion lawmaking.[92] When clinics closed, many women in those regions had no other health providers and only crisis pregnancy centers.[93]

The dangers of pregnancy facing Black women in particular have attracted recent media attention. One pundit ran a piece titled, *Childbirth Is Killing Black Women in the US, and Here's Why*.[94] The *New York Times Magazine* ran a cover story on this grave matter, *The Hidden Toll: Why Are Black Mothers and Babies in the United States Dying at More than Double the Rate of White Mothers and Babies?*[95] just weeks before the Court's ruling in *NIFLA v. Becerra*. Shortly after the Court's decision, Senator Kamala Harris (D-California) fur-

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United Health Found., *Maternal Mortality in Louisiana in 2018*, AMERICA'S HEALTH RANKINGS, https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality/state/LA (last visited Oct. 4, 2018).

[91] *See, e.g.*, Jenny Jarvie, *In a State with Only One Clinic, Mississippi Approves the Most Restrictive Ban in the U.S.*, L.A. TIMES (Mar. 8, 2018), http://www.latimes.com/nation/la-na-mississippi-abortion-20180308-story.html; *Data Center*, GUTTMACHER INST., https://data.guttmacher.org/states (last visited Oct. 29, 2018).

[92] Michele Goodwin, *Dismantling Reproductive Injustices: The Hyde Amendment & Criminalization of Self-Induced Abortion*, 18 GEO. J. GENDER & L. 279, 282 (2017) (explaining that Texas legislators' efforts to restrict funding to Planned Parenthood led to the closure of eighty-two family planning clinics); Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 NEW ENG. J. MED. 853, 853 (2016) ("[T]he exclusion of Planned Parenthood affiliates from a state-funded replacement for a Medicaid fee-for-service program in Texas was associated with adverse changes in the provision of contraception.").

[93] *See* Carolyn Jones, *Anti-Abortion Pregnancy Centers Thrive in Texas as Real Clinics Close*, AL JAZEERA (Jan. 2, 2014), http://america.aljazeera.com/articles/2014/1/2/as-texas-abortionclinicscloseunregulatedpregnancyclinicsflourish.html (discussing how clinic closures in a Texas town left women with few options, including pregnancy centers with no doctors employed); Mary Tuma, *Millions for Propaganda . . . Nothing for Women's Health*, AUSTIN CHRON. (Apr. 17, 2015), https://www.austinchronicle.com/news/2015-04-17/millions-for-propaganda-nothing-for-womens-health/ (discussing how clinic closures affected access to reproductive health).

[94] Jacqueline Howard, *Childbirth Is Killing Black Women in the US, and Here's Why*, CNN (Nov. 15, 2017), https://www.cnn.com/2017/11/15/health/black-women-maternal-mortality/index.html.

[95] Linda Villarosa, *The Hidden Toll: Why Are Black Mothers and Babies in the United States Dying at More than Double the Rate of White Mothers and Babies?*, N.Y. TIMES MAG., Apr. 15, 2018, at 31.

ther elevated the issue by introducing new legislation, The Maternal Care Act, and a resolution, Black Maternal Health Week.[96]

Sadly, health organizations are reaching the same dramatic conclusion: Birthing in the United States has become a dangerous, if not deadly, proposition for Black women.[97] According to the Centers for Disease Control and Prevention (CDC), the nation's leading public health authority, "[t]he risk of pregnancy-related deaths for black women is 3 to 4 times higher than those of white women" in the United States.[98]

Despite rising maternal death rates nationwide, California achieved a decrease in maternal deaths.[99] In fact, California's maternal mortality was reduced by half, "while deaths rose across most of the country."[100] Very likely California's success can be attributed to strategic efforts to implement safety measures, notification requirements, and other policies to protect the reproductive health and rights of women in its state.[101] According to a four-year investigative report released in July 2018 by *USA Today*, "[a]t least as far back as 2010, researchers in California began promoting 'tool kits' of childbirth safety practices . . . [that] were made up of policies, procedures

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[96] Press Release, Sen. Kamala D. Harris, Sen. Harris Introduces Bill Aimed at Reducing Racial Disparities in Maternal Mortality (Aug. 22, 2018), https://www.harris.senate.gov/news/press-releases/sen-harris-introduces-bill-aimed-at-reducing-racial-disparities-in-maternal-mortality ("This bill is a step towards ensuring that all women have access to culturally competent, holistic care, and to address the implicit biases in our system."); *see also* Jennifer Haberkorn, *Maternal Mortality Rates in the U.S. Have Risen Steadily. Sen. Kamala Harris Has a Plan to Change That*, L.A. TIMES (Aug. 22, 2018), http://www.latimes.com/politics/la-na-pol-congress-harris-maternal-health-20180822-story.html ("Sen. Kamala Harris says she wants to force the medical community to address an uncomfortable reality: Black women in the United States are three to four times more likely than white women to die immediately before or after childbirth.").

[97] *See, e.g.*, CTRS. FOR DISEASE CONTROL & PREVENTION, PREGNANCY-RELATED DEATHS (2018), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm. Senator Harris also received broad support for her bill from the American College of Obstetricians and Gynecologists; the Association of Maternal & Child Health Programs; the Association of Women's Health, Obstetric and Neonatal Nurses; Black Mamas Matter Alliance; the Black Women's Health Imperative; the Center for Reproductive Rights; and many other organizations that warn about the failure of states to take account of maternal deaths. *See* Press Release, Sen. Kamala D. Harris, *supra* note 96.

[98] CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 97.

[99] *See* MacDorman et al., *supra* note 88, at 447; Ravitz*, supra* note 83.

[100] Alison Young, *Hospitals Know How to Protect Mothers. They Just Aren't Doing It.*, USA TODAY (July 27, 2018), https://www.usatoday.com/in-depth/news/investigations/deadly-deliveries/2018/07/26/maternal-mortality-rates-preeclampsia-postpartum-hemorrhage-safety/546889002/ (noting that California is an exception in the United States, "where safety experts and hospitals worked together to implement practices that are now endorsed by leading medical societies as the gold standard of care"); *see also U.S. "Most Dangerous*," *supra* note 79.

[101] *See, e.g.*, Young, *supra* note 100.

and checklists that, pursued together, appeared to save mothers' lives."[102]

2. *Unintended Pregnancies*

The rate of unintended pregnancies in the United States is at crisis levels. Despite a recent decline, the rate of unplanned pregnancies and births remains incredibly high,[103] posing physical and psychological risks to the women who experience them.[104] As with maternal deaths, the United States also outpaces many other developed nations in its rate of unintended pregnancies.[105] According to researchers at the Guttmacher Institute, nearly forty-five percent of pregnancies in the United States are unintended—a decrease from 2008.[106]

In addition, nearly seventy-five percent of pregnancies in women and girls under age twenty are unintended.[107] There are about forty-five unintended pregnancies per 1000 girls and women aged fifteen to forty-four—a significantly higher rate than many developed countries.[108]

In California, nearly half of all pregnancies are unintended and unplanned.[109] California experiences one of the highest rates of annual pregnancies, with "more than 700,000 California women becom[ing] pregnant every year."[110] Not all of these pregnancies will result in birth, but over forty percent will, and in 2010, a year after California lawmakers began investigating CPCs, almost sixty-five percent of California's unplanned births were publicly funded.[111] The same year, among women and girls aged fifteen to forty-four,

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[102] *Id.*

[103] *See* Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 347 NEW ENG. J. MED. 843, 843 (2016).

[104] *See infra* notes 117–27 and accompanying text.

[105] *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Sept. 2016) (citing Susheela Singh et al., *Unintended Pregnancy: Worldwide Levels, Trends, and Outcomes*, 41 STUD. FAM. PLAN. 241 (2010)), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states.

[106] GUTTMACHER INST., STATE FACTS ABOUT UNINTENDED PREGNANCY: CALIFORNIA 1 (2017), https://www.guttmacher.org/sites/default/files/factsheet/up-ca.pdf; *see also* Finer & Zolna, *supra* note 103, at 843.

[107] GUTTMACHER INST., *supra* note 106, at 1.

[108] *Id.*

[109] *See, e.g.*, KATHRYN KOST, GUTTMACHER INST., UNINTENDED PREGNANCY RATES AT THE STATE LEVEL: ESTIMATES FOR 2010 AND TRENDS SINCE 2002, at 8 tbl.1 (2015), https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf (noting that forty-eight percent of pregnancies in California are unintended).

[110] FACT Act, *supra* note 7, § 1(b); *see also* KOST, *supra* note 109, at 8.

[111] GUTTMACHER INST., *supra* note 106, at 2.

"California's unintended pregnancy rate . . . was 50 per 1,000 women."[112]

Those most impacted by unintended pregnancies are among the poorest of American women. According to a study published in the *New England Journal of Medicine* in 2016, the unintended pregnancy rate among women who fall below the federal poverty designations is two to three times the national average.[113] By comparison to their wealthier counterparts, American women living with a family income below the federal poverty level were more than five times more likely to experience an unintended pregnancy than women with income that was double the poverty level.[114]

Unintended pregnancies can be devastating in the lives of women and girls, especially those who are most economically and socially vulnerable.[115] For example, "[c]hild-rearing is time-consuming and is spread out over a number [of] years after a child is born," and because of this, "a woman's ability to accumulate human capital may be substantially constrained for some time after her first birth."[116] For these economic reasons and others, a woman may desire not to carry through with an unintended pregnancy.

The negative impacts can be economic, physical, and psychological. As one study found, "research 'indicate[s] that teen pregnancy interferes with young women's ability to graduate from high school and enroll in and graduate from college.'"[117] Another study conducted by the economist Heinrich Hock, an expert on quantitative evaluation of unemployment, education, and training, suggests that the advent of oral contraceptives—the pill—also benefited men. That is, men who were more likely to have dropped out of school, because of unwanted

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[112] *Id*. California is not alone in its high rate of unintended pregnancies. Some states, such as Mississippi, Alabama, Louisiana, and Arkansas, experience even higher rates of unintended pregnancies. *See, e.g.*, KOST, *supra* note 109, at 8 tbl.1. Meanwhile some states have lower rates. For example, the rate of unintended pregnancies among fifteen- to forty-four-year-old teens and women was as low as 32 in 1000 in New Hampshire, 36 in 1000 in Vermont, and 38 in 1000 in Wisconsin. KOST, *supra* note 109, at 8 tbl.1; *see also* GUTTMACHER INST., *supra* note 106.

[113] Finer & Zolna, *supra* note 103, at 843.

[114] GUTTMACHER INST., *supra* note 106, at 1.

[115] *See* ADAM SONFIELD ET AL., GUTTMACHER INST., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 4 (2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf ("[E]conomically disadvantaged women continue to have fewer opportunities than higher income women to realize the benefits linked to using effective contraception, specifically educational and economic achievement, stable marriages and success for their children.").

[116] Heinrich Hock, The Pill and the College Attainment of American Women and Men 1 (Sept. 15, 2005) (unpublished manuscript) (on file with authors).

[117] SONFIELD ET AL., *supra* note 115, at 29.

fatherhood, were able to avoid that fate because their girlfriends and wives used contraception.[118] In other words, "male college completion suggest[s] that the schooling options for men might also have been constrained by undesired early fertility among their female partners."[119]

Well documented are the numerous hardships and burdens on girls and women who endure unintended pregnancies, non-married births, teen pregnancies, and Medicaid-funded births. Not only are there economic consequences, but also physical and psychological ones. For example, "unplanned births are tied to increased conflict and decreased satisfaction in relationships."[120] Unintended births are also connected with "depression, anxiety and lower reported levels of happiness."[121]

In fact, research has long shown that unplanned births increase the risks that relationships between the biological parents will fail.[122] Conversely, studies find "planning, delaying, and spacing births appears to help women achieve their education and career goals."[123] Access to contraception, such as oral medicines and long-acting devices may positively "affect mental health outcomes by allowing couples to plan the number of children in their family."[124] Empirical research supports the conclusion that there is a link between "state laws granting unmarried women early legal access to the pill (at age 17 or 18, rather than 21), and their attainment of postsecondary education and employment."[125] In addition, early access to contraception is historically linked to increased financial stability, "a narrowing of the gender gap in pay, and later, more enduring marriages."[126] Moreover, "[d]elaying a birth can also reduce the gap in pay that typically exists

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118 *See, e.g.*, Hock, *supra* note 116, at 2 ("Compared to the previously prevailing reversible methods of contraception, the pill reduced the risk of an unwanted pregnancy by more than five-fold.").

119 *Id.* at i.

120 SONFIELD ET AL., *supra* note 115, at 29; *see also* NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, UNPLANNED PREGNANCY AND FAMILY TURMOIL 5 (2008) https://www.dibbleinstitute.org/Documents/SS34_FamilyTurmoil.pdf ("Parents who have a birth resulting from unplanned pregnancy are less likely to be in a committed relationship, less likely to move into a more formal union, and more likely to have high levels of relationship conflict and unhappiness.").

121 SONFIELD ET AL., *supra* note 115, at 21

122 *Id.* at 29; NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *supra* note 120, at 5 ("In fact, the majority of single and cohabiting parents having an unplanned birth do not move into closer parental unions (marriage in particular) and a large share of cohabiting parents' relationships dissolve.").

123 *Id.* at 1.

124 *Id.*

125 *Id.*

126 *Id.*

between working mothers and their childless peers and can reduce women's chances of needing public assistance."[127]

Whether planned or not, researchers are undivided on the urgent need for comprehensive medical services and accurate information to assist pregnant adolescents.[128] The World Health Organization (WHO) underscores the critical importance of this. In their report, *Pregnant Adolescents: Delivering on Global Promises of Hope*, the WHO emphasizes that pregnant adolescents require a "continuum of care," which includes care provided at health facilities from medical providers.[129] Because unlicensed CPCs are not health facilities and cannot legally perform medical tests, administer medications, or treat illnesses and diseases, they lack the capacity to provide the type and quality of care that pregnant teens need and deserve. The problem is that teens may not be aware of this, especially when CPCs are cloaked in the garb and messaging of a health facility. As important as actual medical care, the WHO also stresses the importance and value of clear, accurate information for "families and communities."[130] Pregnant adolescents in particular "are unprepared for the birth and out of touch with services" despite the fact that they are "the most likely to need support."[131]

Even while we flag these matters here, they are not new; Justice Blackmun and *Roe*'s 7–2 majority spoke poignantly to the plight of women who endure unintended and unwanted pregnancies. In 1973, when the Supreme Court decriminalized abortion in *Roe v. Wade*, the Court cited to extensive scientific evidence explicating that motherhood and childbearing could be harmful to women's physical and

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[127] *Id.*

[128] *See* Nathalie Fleming et al., *Adolescent Pregnancy Guidelines*, 37 J. OBSTETRICS & GYNAECOLOGY CAN. 740, 740–42 (2015), https://www.jogc.com/article/S1701-2163(15)30180-8/pdf (reporting the recommendations of adolescent health societies, which say that "[c]ounselling about all available pregnancy outcome options (abortion, adoption, and parenting) should be provided to any adolescent with a confirmed intrauterine gestation" as well as STI testing, nutritional assessments, and more); Theresa O. Scholl et al., *Prenatal Care and Maternal Health During Adolescent Pregnancy: A Review and Meta-Analysis*, 15 J. ADOLESCENT HEALTH 444, 444 (1994) (concluding that prenatal care that includes medical care and social services could improve the health outcomes for the pregnancy and mother).

[129] WORLD HEALTH ORG., PREGNANT ADOLESCENTS: DELIVERING ON GLOBAL PROMISES OF HOPE 19 (2006), http://apps.who.int/iris/bitstream/handle/10665/43368/9241593784_eng.pdf ("A pregnant adolescent . . . requires opportunities to learn about immunization, hygiene, infant feeding and neonatal care and about the prevention of sexually transmitted infections (STIs) and HIV and AIDS. A pregnant adolescent should know how, where and when to seek care, and should make a birth plan . . . .").

[130] *Id.* at 19.

[131] *Id.* at 20 (also noting pregnant adolescents "are less likely to have social support" and "may lack access to care").

emotional health.[132] The Court concluded that to force women into potentially detrimental motherhood, which they did not want, violated autonomy and the constitutional right to privacy. Justice Blackmun movingly wrote:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[133]

In *Roe*, the Court at last acknowledged the "detriment" and various harms that states had long imposed on women by denying them any voice or choices about their reproductive destinies.[134] Justice Blackmun explained that "[s]pecific and direct harm medically diagnosable even in early pregnancy" are among the consequences forced upon vulnerable women when states force them to bear children.[135] *Roe*'s turn to empirical evidence, including social science, represented a fundamental shift; Justice Blackmun consulted sociology, history, Christian theology, and science.[136] Sadly, the social burdens and economic consequences associated with unwanted and unintended pregnancies remain.

3. *Economic Costs of Unintended Pregnancies, Unwanted Births, and Other Reproductive Health Concerns*

In 2010, almost sixty-five percent of unplanned births in California were publicly funded.[137] The costs were extraordinary. The state and federal governments expended $1.8 billion on unintended pregnancies.[138] The federal government underwrote more than $1 billion of these costs, and California paid the balance of over $689 million.[139] By contrast, federal and state expenditures for family planning such as contraception access and services totaled just over $600 mil-

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132 *See* Roe v. Wade, 410 U.S. 113, 160 (1973).

133 *Id.* at 153.

134 *Id.*

135 *Id.*

136 *See id.* at 130–34.

137 GUTTMACHER INST., *supra* note 106, at 2.

138 *Id.*

139 *Id.*

lion.[140] California contributed roughly $69 million to family planning—about one tenth of what it expended on unplanned births.[141]

Nationwide, unintended pregnancies are costly to federal and state governments, resulting in $21 billion in public expenditures in 2010.[142] The overwhelming majority of these funds are federal expenditures—about $14.6 billion—while $6.4 billion is underwritten by state funds.[143]

In 2010, nearly seventy percent of the nation's 1.5 million unplanned births were funded by public insurance programs, compared to fifty-one percent of all births and thirty-eight percent of planned births.[144] States with the highest rates of federally funded, unplanned births were primarily located in the South and "categorized by the U.S. Census Bureau" as a "region with high levels of poverty."[145] In eight states (and the District of Columbia), roughly seventy-five percent of unplanned births were underwritten by public funds.[146] In Mississippi, a state which has virtually eliminated meaningful access to abortion, eighty-two percent of funding for its unplanned pregnancies comes from public funds.[147]

Clearly, unintended pregnancies are a social, political, and economic challenge in the United States and in California. As dramatic as such costs are, these expenditures might have been even greater in the absence of publicly funded family planning services. One study estimates that "the public costs of unintended pregnancies in 2010 might have been 75% higher" absent state and federal expenditures on family planning.[148] Indeed, research shows that state investment in reproductive health and family planning is prudent, cost effective, and saves lives. In 2010 alone, California's efforts to reduce unintended pregnancies and unplanned births saved the state and federal government nearly $1.3 billion.[149]

Importantly, family planning expenditures helped to avert unintended pregnancies. The Guttmacher Institute estimates that in 2014, the year before California Governor Jerry Brown signed the FACT

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140 *Id.*

141 *Id.*

142 *See generally* SONFIELD & KOST, *supra* note 77, at 8.

143 *Id.*

144 *Id.* at 9–10.

145 *Id.* at 8.

146 *Id.*

147 *Id.*

148 SONFIELD & KOST, *supra* note 77, at 1.

149 *Id.* at 13 tbl.3.

Act, over 320,000 unintended pregnancies were prevented.[150] The organization estimates that those unintended pregnancies might otherwise have "resulted in 156,100 unplanned births and 115,800 abortions."[151]

California's mandate that CPCs post notices related to family planning services—such as the availability of nineteen federally approved methods of birth control—and availability of state resources to subsidize or pay for such medications, was not only fiscally prudent,[152] but also beneficial to the health of California women. That is, "[p]ublic expenditures for the US family planning program not only prevented unintended pregnancies but also reduced the incidence and impact of preterm and [low birth weight] births, STIs, infertility, and cervical cancer."[153]

Further, studies "indicate[ ] that the health impact and public-sector savings of publicly supported family planning services in the United States extend well beyond the impact of preventing unintended pregnancies."[154] This research shows that by enhancing and empowering women's abilities "to plan, delay, and space pregnancies, contraception is linked to improved maternal and child health outcomes."[155] In addition, "pregnancy spacing is linked to better birth outcomes, including the reduced likelihood of babies born prematurely, at a low birth weight (LBW), or small for their gestational age."[156] And for every dollar spent on family planning, more than seven dollars is saved by the state.[157]

4. Sexually Transmitted Diseases

Finally, we turn to what seemingly remains a taboo topic—an epidemic in sexually transmitted diseases.[158] California's FACT Act man-

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150 GUTTMACHER INST., *supra* note 106, at 2. In that same year, over 2.5 million California women aged 13 to 44 needed publicly funded family planning services and half of that population, over 1.3 million girls and women, received birth control of some kind at state funded family planning centers. *Id.*

151 *Id.*

152 *See* Jennifer J. Frost et al., GUTTMACHER INST., *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, 92 MILBANK Q. 667, 667–68 (2014).

153 *Id.*

154 *Id.* at 669.

155 *Id.*

156 *Id.*

157 *Id.* at 667.

158 *See generally* INST. OF MED., THE HIDDEN EPIDEMIC: CONFRONTING SEXUALLY TRANSMITTED DISEASES (Thomas R. Eng & William T. Butler eds., 1997); CTRS. FOR DISEASE CONTROL & PREVENTION, 2016 SEXUALLY TRANSMITTED DISEASES SURVEILLANCE (2017), https://www.cdc.gov/std/stats16/CDC_2016_STDS_Report-for508WebSep21_2017_1644.pdf; Vanessa Romo, *California STDs Raging at All Time*

dated CPCs post notices related to sexual health and, as we show, for very important reasons. Sexually transmitted diseases are an alarming public health threat in California and throughout the United States. The Institute of Medicine (IOM) refers to the crisis of sexually transmitted infections and diseases in the United States as a "hidden epidemic."[159]

The authors of the study report that this epidemic has "tremendous health and economic consequence[s] in the United States."[160] They write that sexually transmitted diseases are particularly problematic because they are hidden from view, "because many Americans are reluctant to address sexual health issues in an open way and because of the biological and social factors associated with these diseases."[161] Of the top ten most frequently reported diseases in this country, five are sexually transmitted.[162] The United States has the highest rates of transmission in the developed world for a number of sexually transmitted diseases.[163] Moreover, the costs of addressing this phenomenon are significant; in 1995, roughly $10 billion was spent in the United States to address this problem.[164] Today, according to the CDC, sexually transmitted infections account for "as much as $16 billion annually" in healthcare costs.[165]

Sadly, since the publication of this landmark IOM study, the rate of sexual transmission of disease in the United States has only become worse.[166] Nearly twenty years ago, the rates of syphilis and gonorrhea were "slowly declining in the United States."[167] Public health officials

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Highs for Third Year in a Row, NPR (May 15, 2018), https://www.npr.org/sections/thetwo-way/2018/05/15/611307046/california-stds-raging-at-all-time-highs-for-third-year-in-a-row; Harriet Rowan & Alex Leeds Matthews, *California's Deadly STD Epidemic Sets Record*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/national/health-science/californias-deadly-std-epidemic-sets-record/2018/05/22/fa6f2caa-59b2-11e8-9889-07bcc1327f4b_story.html.

159 *See* INST. OF MED., *supra* note 158, at 16 (urging that "[a]ll healthcare professionals should counsel their patients during routine and other appropriate clinical encounters regarding the risk of STDs and methods for preventing high-risk behaviors").

160 *Id.* at 1.

161 *Id.* at 300.

162 *Id.* at 19 n.1.

163 *See id.* at 28 (noting also that the rates of transmission also exceed that of "some developing regions").

164 *Id.* at 249.

165 *Sexually Transmitted Diseases*, HEALTHYPEOPLE.GOV, https://www.healthypeople.gov/2020/topics-objectives/topic/sexually-transmitted-diseases (last updated Oct. 25, 2018).

166 *See id.*; Sandee LaMotte, *New STD Cases Hit Record High in U.S., CDC Says*, CNN (Sept. 28, 2017, 10:53 AM), https://www.cnn.com/2017/09/26/health/std-highest-ever-reported-cdc/index.html ("In 2016, Americans were infected with . . . the highest number of . . . sexually transmitted diseases ever reported.").

167 INST. OF MED., *supra* note 158, at 28.

thought the eradication of syphilis in the United States was in sight.[168] Today, that trend has reversed, alarming public health officials and epidemiologists throughout the United States.

Officials at the CDC worry that even the startlingly high rate of sexual disease transmission signifies "only a fraction of America's STD burden."[169] Of course, because untreated sexual infections lead to very serious complications, are communicable, can result in cancer, and can end in death, these are serious matters for state legislatures and public health officials to address. Untreated syphilis can be communicable during pregnancy, developing into congenital syphilis, resulting in low-birth-weight babies and stillbirth.[170]

A 2017 CDC report on congenital syphilis (CS) found, "[a]fter a steady decline from 2008–2012, data show a sharp increase in CS rates."[171] In fact, "[i]n 2017, the number of CS cases was the highest it's been since 1997."[172] Public health officials warn that babies that are not treated develop horrific symptoms later, experience seizures, developmental delays, and sometimes die.[173] For women who contract syphilis, the infection can lead to heart failure, organ damage, blindness, paralysis and dementia.[174]

CPCs may offer sonograms, but that technology does not detect or treat sexually transmitted diseases in women or their babies. As a practical medical and legal matter, these are important health issues that unlicensed CPCs cannot address, because they do not provide screenings for STDs and cannot prescribe medications. For pregnant women who rely on "medical care" and counseling from such CPCs,

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168 *See The National Plan to Eliminate Syphilis from the United States – Executive Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/stopsyphilis/exec.htm (last visited Oct. 26, 2018); *see also* CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL PLAN TO ELIMINATE SYPHILIS FROM THE UNITED STATES 5 (1999), https://www.cdc.gov/stopsyphilis/plan.pdf ("As we approach the end of the 20th century, the United States is faced with a unique opportunity to eliminate syphilis . . . and nationally, it is at the lowest rate ever recorded and it is confined to a very limited number of geographic areas.").

169 *See* CTRS. FOR DISEASE CONTROL & PREVENTION, REPORTED STDS IN THE UNITED STATES, 2017 at 1, *available at* https://stacks.cdc.gov/view/cdc/59579/Share.

170 *See* CTRS. FOR DISEASE CONTROL & PREVENTION, SYPHILIS – CDC FACT SHEET (June 13, 2017) [hereinafter CDC, SYPHILIS], https://www.cdc.gov/std/syphilis/stdfact-syphilis.htm; CTRS. FOR DISEASE CONTROL & PREVENTION, CONGENITAL SYPHILIS – CDC FACT SHEET (Sept. 26, 2017) [hereinafter CDC, CONGENITAL SYPHILIS], https://www.cdc.gov/std/syphilis/stdfact-congenital-syphilis.htm. Moreover, "[w]ithout treatment, syphilis can spread to the brain and nervous system (neurosyphilis) or to the eye (ocular syphilis)." CDC, SYPHILIS, *supra*, at 3. Neurosyphilis and ocular syphilis can occur during any stage of the disease. *Id.*

171 CDC, CONGENITAL SYPHILIS, *supra* note 170, at 2.

172 *Id.*

173 *Id.* at 1.

174 *See* CDC, SYPHILIS, *supra* note 170, at 3.

the probability would be high that any STDs they have would not be detected and thus would remain untreated.

Here is a snapshot of the real-life challenge at hand in California. Vulnerable groups, especially youth, the poor, and communities of color, are more likely to suffer the gravest harms. The data bear this out. Over half of California's reported cases of chlamydia are among people under age 25.[175] The rates of this disease "among females were 60% higher than among males," most notably among 15 to 24 year-olds.[176] Among African Americans, the rates of chlamydia were nearly five times that of their white counterparts.[177] Finally, California's 283 CS cases, "including 30 stillbirths in 2017, [is] an increase of 32% over 2016."[178]

Indeed, nearly half of the nation's incidences of stillbirths due to CS occurred in California.[179] This represents the highest number of stillbirths due to syphilis since 1995.[180] Unfortunately, in California, 2017 marked the "5th consecutive year for increases in the number of infants born with congenital syphilis."[181] In Los Angeles County alone, CS cases jumped "from eight in 2013 to 47" in 2018.[182] Overall, the magnitude of the current rates of sexually transmitted diseases in California was last observed in the 1990s.[183]

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175 CAL. DEP'T OF HEALTH, SEXUALLY TRANSMITTED DISEASES IN CALIFORNIA: 2017 SNAPSHOT 1, https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/STDs-CA-2017Snapshot.pdf.

176 *Id*.

177 *Id.*

178 *Id.* at 2; *see also* Rowan & Matthews, *supra* note 158 ("California has the second-highest rate of congenital syphilis in the country after Louisiana, according to the most recent national data.").

179 JIM BRAXTON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 2017, at 2 (2018), https://www.cdc.gov/std/stats17/2017-STD-Surveillance-Report_CDC-clearance-9.10.18.pdf ("In 2017, there were a total of 918 reported cases of congenital syphilis, including 64 syphilitic stillbirths and 13 infant deaths."); CAL. DEP'T OF PUB. HEALTH, SYPHILIS IN WOMEN AND BABIES: 2017 SNAPSHOT FOR CALIFORNIA 1 (2018), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Syphilis-Women-Babies-2017Snapshot.pdf (finding 283 congenital syphilis cases including 30 stillbirths in 2017).

180 *Id.*

181 *Id.*

182 Christopher Weber, *STDs Reach All-Time High in California, Leading to Spike in Stillbirths Due to Syphilis, State Health Authorities Say*, USA TODAY (May 15, 2018, 9:41 AM), https://www.usatoday.com/story/news/health/2018/05/15/stds-reach-all-time-high-california-leading-spike-stillbirths/610724002/.

183 *See* CAL. DEP'T PUB. HEALTH, SEXUALLY TRANSMITTED DISEASES IN CALIFORNIA: 2017 SNAPSHOT (2018), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/STDs-CA-2017Snapshot.pdf (featuring graphs displaying rates of disease from the 1990s to the present).

In 2016, nearly 630 cases of CS were transmitted to newborns.[184] The rate of congenital transmission of syphilis is so high that public health officials warn, "[f]or the first time in many years, we are now seeing more cases of babies born with congenital syphilis than babies born with HIV."[185] Public health officials attribute the rise in congenital syphilis to "women . . . not getting access to prenatal care, testing, and treatment for syphilis."[186] These are medical concerns that unlicensed CPCs and even some or most licensed CPCs likely cannot address, because their work centers on encouraging women to continue pregnancies. Importantly, women's health is not their stated priority; preventing abortion is their chief goal.[187]

NIFLA's website emphasizes their strategy, which is the recognized "importance of using ultrasound in a pregnancy center setting for reaching abortion-minded women . . . and . . . pioneering," a key tool in "the pro-life movement."[188] In fact, under their banner labeled "medical" on their website, there are no references to women's health, saving women's lives, addressing women's reproductive health concerns, treatment for sexually transmitted infections, assessment of unintended pregnancies, or reference to any other matter relevant to quality of care and health for women.[189] At least according to their website, "medical" does not include women.

Rather, NIFLA's website conveys an important message: ultrasounds are an "important tool" to "offer[ ] a window to the womb" in order to "impact[ ] a woman's decision to choose life."[190] Thus, if a pregnant woman suffering from an untreated sexually transmitted disease consults a CPC, it is possible, particularly at an unlicensed clinic, she might receive an ultrasound—indeed this is likely—but not any care for her life-threatening infection.

The need to address the public health implications of sexually transmitted diseases is urgent. One need not look too far back to reflect on the devastating toll and human suffering associated with lawmakers ignoring the incidences of HIV/AIDS.[191] As Dr. Gail

184 LaMotte, *supra* note 166.

185 *Id.*

186 *Id.*

187 *See About NIFLA*, NAT'L INST. FAM. & LIFE ADVOCS., https://nifla.org/about-nifla/ (last visited Oct. 5, 2018) (describing the purpose of the organization to "protect life-affirming pregnancy centers that empower abortion-vulnerable women and families to choose life").

188 *Id.*

189 *See id.*

190 *Id.*

191 *See* RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC xxii (1987) ("The bitter truth was that AIDS did not just happen to America—it was allowed to happen by an array of institutions, all of which failed to perform their

Bolan, the Director of the CDC's Division of STD Prevention, puts it, "[t]he CDC cannot do this alone and we need every community in America to be aware that this risk is out there and help educate their citizens on how to avoid it."[192] David Harvey, the Executive Director of the National Coalition of STD Directors, which represents state and local health departments, echoed those concerns. He frames it like this: "STDs are out of control with enormous health implications for Americans."[193]

Furthermore, while these diseases can be treated with antibiotics, a lack of public awareness, medical screenings, and education too frequently results in teens and adults being "undiagnosed and untreated."[194] Notably, the United States leads all developed nations in the rate of sexually transmitted infections and diseases.[195] Even with the challenges identified in California, a state with comparatively robust access to sexual health resources,[196] it is not lost on us that the states struggling with the highest rates of chlamydia and gonorrhea are those, such as Mississippi and Louisiana, that have gutted reproductive health rights and services.[197]

All of this explains why California adopted the FACT Act, requiring the posting of disclosure notices. Yet, none of this is discussed, or even acknowledged, in Justice Thomas's majority opinion in *NIFLA v. Becerra*.

C. The Supreme Court's Reaction to California's Statute

In a 5–4 decision split along ideological lines, the Court reversed the Ninth Circuit and held that a preliminary injunction should have been granted on the ground that the law likely violates the First Amendment. Justice Clarence Thomas wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Kennedy, Alito,

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appropriate tasks to safeguard the public health."); German Lopez, *The Reagan Administration's Unbelievable Response to the HIV/AIDS Epidemic*, VOX (Dec. 1, 2016), https://www.vox.com/2015/12/1/9828348/ronald-reagan-hiv-aids (documenting President Reagan's press secretary joking about the AIDS epidemic and the fact that one reporter might have the disease).

192 LaMotte, *supra* note 166.

193 *Id.*

194 *Id.*

195 *See* Warren E. Leary, *Rate of Sexual Diseases in U.S. Is Highest in Developed World*, N.Y. TIMES (Nov. 20, 1996), https://www.nytimes.com/1996/11/20/us/rate-of-sexual-diseases-in-us-is-highest-in-developed-world.html; Lauren Weber, *U.S. Has Highest STD Rates in Industrialized World. Experts Blame a Lack of Resources*, HUFFPOST (Aug. 28, 2018), https://www.huffingtonpost.com/entry/highest-std-rates-sexually-transmitted-diseases_us_5b85856de4b0162f471cf805.

196 *See* Romo, *supra* note 158.

197 *See supra* text accompanying notes 89–91.

and Gorsuch. Justice Kennedy wrote a short concurring opinion joined by Roberts, Alito, and Gorsuch that expressed even stronger reservations about the California statute. The Court held that the California law was compelled speech in violation of the First Amendment. Justice Breyer wrote a vehement dissent, joined by Justices Ginsburg, Sotomayor, and Kagan.

Justice Thomas began his opinion by stating that the California statute was a content-based restriction on speech because it prescribed the content of the disclosures required by the facilities. He wrote: "The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'"[198]

The Court reiterated the familiar principle that content-based restrictions on speech must meet strict scrutiny.[199] That is, such restrictions must be narrowly tailored to achieve a compelling government interest.[200] As discussed below in Part III, this is quite significant because *all* laws requiring disclosure of information, by definition, prescribe the content of what must be disclosed.[201]

The Court rejected the Ninth Circuit's decision that strict scrutiny did not apply because the law is a regulation of professional speech.[202] Judge Dorothy Nelson authored the Ninth Circuit opinion, which concluded that intermediate scrutiny was the proper level of review.[203] Accordingly, Judge Nelson determined, "the district court did not abuse its discretion in finding that [NIFLA] cannot demonstrate a likelihood of success on their free speech claim."[204] As to the license notice, the Ninth Circuit concluded that it "regulates professional speech, subject to intermediate scrutiny, which it survives."[205] With regard to the notice requirement for unlicensed CPCs, the court determined that the notice "survives any level of review."[206]

However, Justice Thomas declared, "this Court has not recognized 'professional speech' as a separate category of speech."[207] He surmised, "[s]peech is not unprotected merely because it is uttered by

198 Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

199 *See id.*

200 *Id.*

201 *See infra* Section III.A.

202 138 S. Ct. at 2371.

203 Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 834–35 (9th Cir. 2016).

204 *Id.* at 844.

205 *Id.*

206 *Id.*

207 Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

professionals."[208] Instead, Thomas claimed the Supreme Court "has been reluctant to mark off new categories of speech for diminished constitutional protection."[209] This sophistry obscured the fact the Court has long upheld states' disclosure requirements, including in relation to licensed entities.[210] In an earlier case, the Court concluded that a lawyer's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal."[211]

Nevertheless, Justice Thomas found that even if the Court were to recognize professional speech as a distinct category, the "dangers associated with content-based regulation[ ]" of it could still trump the state's weighty policy goals.[212] He stated that "[a]s with other kinds of speech, regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[213] Justice Thomas conjectured that medicine is a potent example of state power deployed to manipulate and suppress vulnerable groups through speech regulation. He wrote: "Take medicine, for example. 'Doctors help patients make deeply personal decisions, and their candor is crucial.' Throughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities."[214]

The Court found that the California law failed strict scrutiny. Justice Thomas wrote, "[i]f California's goal is to educate low-income women about the services it provides, then the licensed notice is 'wildly underinclusive.'"[215] He reasoned, "[t]he notice applies only to clinics that have a 'primary purpose' of 'providing family planning or pregnancy-related services' and that provide two of six categories of specific services."[216] In his view, "[o]ther clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women . . . ."[217] According to Justice Thomas, they too "could educate [California women] about the State's services."[218]

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208 *Id.* at 2371–72.

209 *Id.* at 2372 (citations omitted).

210 *See, e.g.*, Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).

211 471 U.S. at 651.

212 138 S. Ct. at 2374.

213 *Id.* (citation omitted).

214 *Id.* (citations omitted).

215 *Id.* at 2375 (citation omitted).

216 *Id.* (citation omitted).

217 *Id.*

218 *Id.*

The Court also found that the law failed strict scrutiny because California could achieve its goal while using alternatives that were less restrictive of speech. The Court stated, "California could inform low-income women about its services 'without burdening a speaker with unwanted speech.' Most obviously, it could inform the women itself with a public-information campaign. California could even post the information on public property near crisis pregnancy centers."[219]

The Court then declared unconstitutional the requirement that unlicensed facilities disclose their unlicensed status to women. Justice Thomas regarded California's interest as searching and theoretical, based purely on conjecture, despite the pressing reproductive public health concerns that California identified. Despite the state's detailed brief and amicus briefs submitted by reproductive health and rights organizations in California,[220] Justice Thomas wrote, "California has not demonstrated any justification for the unlicensed notice that is more than 'purely hypothetical.'"[221]

According to the Court, California failed to prove that women did not know that the facilities were unlicensed, and they further decided that "[e]ven if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech."[222] In what Justice Breyer's dissent referred to as a lack of "evenhandedness," given the differential treatment of abortion providers in *Casey*,[223] the Court averred that the law "imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest."[224] Justice Thomas even criticized the state for applying the law to a "curiously narrow subset of speakers."[225]

It is notable that the Court found both parts of the California law unconstitutional not by denying the sufficiency of the government interest, but by arguing that the means were not necessary to achieve the goals.

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219 *Id.* at 2375–76 (citation omitted).

220 *See, e.g.*, Brief for the State Respondents at 16–27, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1027815, at *16–27; Brief for the Am. Acad. of Pediatrics et al. as Amici Curiae in Support of Respondents at 26–32, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1110040, at *26–32; Brief of the Cal. Women's Law Ctr. et al. as Amici Curiae in Support of Respondents at 27–30, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1156614, at *27–30.

221 *Id.* at 2377 (citation omitted).

222 *Id.*

223 *See id.* at 2385 (Breyer, J., dissenting).

224 *Id.* at 2377.

225 *Id.*

Justice Thomas reached the startling conclusion that "California has offered no justification that the notice plausibly furthers."[226] The all-male majority found that the FACT Act "targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech."[227] The Court ruled, "[t]aking all these circumstances together, we conclude that the unlicensed notice is unjustified and unduly burdensome . . . ."[228]

In what would be one of his last opinions before retiring from the Court, Justice Kennedy expressed even greater hostility to the law than Justice Thomas's majority opinion. In a concurring opinion, Kennedy argued, it "appear[s] that viewpoint discrimination is inherent in the design and structure of this Act."[229]

Joined by Chief Justice Roberts and Justices Alito and Gorsuch, Kennedy described the law as a "paradigmatic example" of the "serious threat" that occurs when "government seeks to impose its own message in the place of individual speech, thought, and expression."[230] For here, he surmised, "the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions," thus compelling "individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these."[231] The next day, Justice Kennedy announced his retirement from the Supreme Court.[232]

II
WHY THE COURT GOT IT WRONG IN *NIFLA V. BECERRA*

In Part II, we explain why, in our view, the Court reached the wrong conclusion in *NIFLA v. Becerra.* As we show, the case departs from other Supreme Court decisions, including those specifically addressing health and speech. Thus, if the case is about speech, it is only secondarily concerned with it. Instead, we believe the case reflects constitutional gerrymandering: five conservative, male judges exercising their hostility toward reproductive rights. Speech serves as a fig leaf in this process.[233] Sadly, such hostility to the reproductive

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226 *Id.* at 2378.
227 *Id*.
228 *Id.*
229 *Id.* at 2379 (Kennedy, J., concurring).
230 *Id.*
231 *Id.*
232 *E.g.*, Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html.
233 As discussed elsewhere, historically, the Court has shown disdain and outright indifference for the interest of poor and working class women. *See* Erwin Chemerinsky &

rights of women is not new to the Court,[234] and now *NIFLA v. Becerra* bears this out. Section II.A provides an overview of the Court's decision and Section II.B unpacks the Court's errors.

A. The Failure to Properly Balance the Competing Interests

Quite crucially, the Court fails to recognize and balance the competing interests in the case. After all, "balancing between individual freedoms and government interests is inevitable in constitutional law."[235] This is because there will always be competing interests in constitutional conflicts. Balancing demands weighing these competing interests and analyzing the relative merits and strengths as well as weaknesses of the interests at stake.[236] But judges are not legislators and therefore direct policymaking is not their function or role.[237] For courts, then, the balance to be struck is whether and under what cir-

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Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189 (2017). In prior cases, poor women's reproductive rights have been truncated or eviscerated altogether. Cases dating back to *Buck v. Bell* evidence our concern. 274 U.S. 200, 205, 207 (1927) (upholding compulsory sterilization of the so-called "feeble-minded," mentally ill, and socially unfit, under the Fourteenth Amendment's Due Process Clause).

234 *See* Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270 (2018); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) ("HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting 'public health' and 'gender equality.' RFRA, however, contemplates a 'more focused' inquiry . . . ." (internal citation omitted)); Harris v. McRae, 448 U.S. 297, 316 (1980) ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."); Maher v. Roe, 432 U.S. 464, 473–74 (1977) (concluding that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds. . . . An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . . "); Beal v. Doe, 432 U.S. 438, 445 (1977) ("[W]e do not agree that the exclusion of nontherapeutic abortions from Medicaid coverage is unreasonable under Title XIX").

235 Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402–03 (2016); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943 (1987) (arguing that it is "undeniable" that balancing "must be a part of any practical legal system"); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1024 (1978) ("Exercise of judgement, including some balancing of underlying values and interests, pervades all constitutional interpretation, such as deciding whether the power given Congress to determine the time, place, and manner of holding elections includes the power to determine qualifications for voting in those elections.").

236 *See* Schneider v. State, 308 U.S. 147, 161 (1939) ("[A]s cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.").

237 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) (finding that an Oklahoma law making it unlawful for anyone other than licensed optometrists or ophthalmologists to fit lenses to a face "may exact a needless, wasteful requirement in

cumstances to defer to the legislature (and therefore the democratic process), or, alternatively, to act unilaterally to protect important values, which may be vulnerable to legislation borne of that democratic process.

Absent justification for distrusting the state, the judiciary should defer to laws and government decisions. Dating back to *Jacobson v. Massachusetts*, the Supreme Court has recognized the authority of the state to enact laws for the protection of the public health and has weighed that against individual freedoms.[238]

In this case, there are three interests to be weighed in evaluating the constitutionality of the California law: the facilities' interest in not having to post the disclosures; the state's interest in making sure that women receive accurate information about state services and about whether a facility is licensed by the state; and the woman's interest in receiving accurate health and service information. The Court overestimates the burden on the facilities, underestimates the state's interest in requiring disclosure, and completely ignores the woman's interest in receiving information.

As to the former, the Court based its decision entirely on the required disclosures being unconstitutional compelled speech.[239] However, it is notable that the employees of the facilities do not have to utter a word; they just have to post notices on their walls.[240] This is significantly less than what was required in earlier cases where the professionals themselves had to engage in speech.[241] Moreover, the notices are entirely factual and contain unquestionably accurate information.[242]

At the same time, the Court gave little weight to the state's important interest in making sure that women in California are provided accurate information about state-provided services and about whether a facility is unlicensed. As to the former, the Court did not deny the importance of the state interest, but insisted that the government could achieve its goal through other means, such as engaging in

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many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement").

238 197 U.S. 11, 30 (1905) ("[T]he function of a court . . . [is not] to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain."); *see also* New York v. Ferber, 458 U.S. 747, 763–64 (1982) (upholding a statute criminalizing the distribution of child pornography, opining "the evil . . . restricted [by the statute] so overwhelmingly outweighs the expressive interests, if any, at stake").

239 *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

240 *Id.* at 2368–70.

241 *See infra* Section II.B.

242 *See supra* Section I.A. *Contra NIFLA*, 138 S. Ct. at 2372.

its own speech. The Court stated: "California could inform low-income women about its services 'without burdening a speaker with unwanted speech.' Most obviously, it could inform the women itself with a public-information campaign. California could even post the information on public property near crisis pregnancy centers."[243]

Quite importantly, the Court does not question the compelling state interest in making sure that women are properly informed. In none of the earlier cases had the Supreme Court considered whether there were other ways of informing the clients of the information.[244] The problem with the Court's approach, as we discuss below, is that virtually every disclosure requirement is then unconstitutional because the government always could find some way on its own to inform people.[245]

Equally as important, this alternative that the Court suggests is unlikely to be a successful alternative and would be a poor strategy for achieving the state's goals. For instance, requiring that a particular facility disclose to women that it is unlicensed cannot be achieved by the state announcing generally that there are some unlicensed facilities in the state providing healthcare services to pregnant women.

The Court's greatest failing, though, was in refusing to recognize the interest of women in receiving accurate information about state services and about whether a facility is licensed to provide healthcare services. The Court often has held that the First Amendment includes a right to receive information. For example, it declared:

> In keeping with this principle, we have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.' This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them: 'The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.' 'The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.' More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.[246]

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[243] 138 S. Ct. at 2376.

[244] *See infra* Section II.B (discussing multiple precedents and the factors that underlay the decisions).

[245] *See infra* Section III.A.

[246] Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982) (citations omitted).

The Court in *NIFLA v. Becerra* never acknowledges this First Amendment interest, let alone explains why it is less important than the First Amendment interests of the healthcare facilities in not posting notices on their walls. In terms of freedom of speech, the Court simply favored the right of the clinics to not speak over the right of women to receive important information, critical to their health and safety.

The Court significantly erred here: The burden on the clinics was minimal, the state's interests significant, and the women's interests should have been overriding. This is especially so because the information related to the women's ability to exercise their fundamental rights with regard to contraception and abortion. Given the Court's history of protecting consumers against the potential for confusion, fraud, and deception, the case is profound for its disregard of women's informational interests and safety as *healthcare consumers*, particularly given the devastating rates of maternal mortality, communicable and congenital sexual diseases, and unintended pregnancies in the United States and California specifically.[247] In *NIFLA v. Becerra*, the Court has essentially decided that readers of newspapers who might become clients of lawyers have a greater informational interest than pregnant women in the medical clinical setting.

B. Selectively Dispensing with Precedent

The Court's errors, though, extend beyond its failure to balance interests. To begin with, the Court's decision in *NIFLA v. Becerra* was inconsistent with its prior decisions.[248] Never before had the Supreme Court held that laws requiring disclosure of information should or must be treated as content-based requirements. Nor had the Court ever held that disclosure laws or those requiring information disclosure must meet notice scrutiny. To the contrary, the Court previously upheld disclosure requirements in two contexts directly relevant to this case: professional services and abortion. Given this, the Court's holding invites vigorous critique and dissent.

First, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Supreme Court held that truthful advertisements are protected by the First Amendment. However, the Court emphasized, the government can punish deception, including that

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[247] *See supra* Section I.B.4.

[248] *See, e.g.*, Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 647 (1985); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

which occurs through omission.[249] The Court characterized the speech interest at stake as "minimal."[250]

In that case, an attorney published two sets of advertisements. The first was a small advertisement that ran in the *Columbus Citizen Journal* for two days, informing readers that the attorney's "law firm would represent defendants in drunken driving cases."[251] The advertisement advised that clients' "[f]ull legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING."[252] This advertisement was withdrawn following a call from the Office of Disciplinary Counsel of the Supreme Court of Ohio, explaining that the advertisement "appeared to be an offer to represent criminal defendants on a contingent-fee basis, a practice prohibited by . . . the Ohio Code of Professional Responsibility."[253]

According to the Court, the lawyer's second advertisement was "more ambitious."[254] The second advertisement offered to represent women injured by the contraceptive device known as the Dalkon Shield Intrauterine Device.[255] The lawyer placed this advertisement in thirty-six Ohio newspapers. This advertisement "featured a line drawing of the Dalkon Shield accompanied by the question, DID YOU USE THIS IUD?"[256] The advertisement stated:

> The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.[257]

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249 471 U.S. at 651–52.

250 *Id.* at 651.

251 *Id.* at 629.

252 *Id.* at 629–30.

253 *Id.* at 630. Following the call, the lawyer "immediately withdrew the advertisement and in a letter . . . apologized for running it, also stating in the letter that he would decline to accept employment by persons responding to the ad." *Id.*

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.* at 631. The "ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for 'free information.'" *Id.*

Subsequently, the lawyer was charged by the Office of Disciplinary Counsel of the Supreme Court of Ohio for violating multiple disciplinary rules.[258]

Four main disciplinary issues were presented for the Supreme Court's review. First, the Office of Disciplinary Counsel disciplined the lawyer for violations associated with the drunken driving advertisement, because, "the [drunken driving] advertisement failed to mention the common practice of plea bargaining in drunken driving cases . . . ."[259] A disciplinary panel found that "it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) *and* be liable for attorney's fees (because they had not been convicted of drunken driving)."[260]

The second reprimand was for violating a rule that prohibited self-promotional advertisements about a specific legal problem.[261] Third, he was punished because his advertisement included an illustration, a drawing of a Dalkon Shield.[262] Finally, he was disciplined for general deception. The Dalkon Shield advertisement stated that the lawyer and his firm would provide representation on a contingency fee basis and that the client would not be required to pay any fee if the case was not won.[263] However, the advertisement did not disclose that the clients were liable for litigation costs.[264]

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258 *Id.* (noting that the Office of Disciplinary Counsel "filed a complaint against appellant charging him with a number of disciplinary violations arising out of both the drunken driving and Dalkon Shield advertisements").

259 *Id.* at 634.

260 *Id.*

261 *See id.* at 633 (alleging that the advertisement violated a regulation prohibiting attorneys from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer").

262 *Id.* at 632. Specifically, the Office of Disciplinary Counsel found that the lawyer violated Disciplinary Rules: DR2-101(B), "which prohibits the use of illustrations in advertisements run by attorneys, requires that ads by attorneys be 'dignified,' and limits the information that may be included in such ads to a list of 20 items . . . ." *Id.*

263 *Id.* at 631. The Court also noted that "[t]he advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement." *Id.*

264 *Id.* at 633. The advertisement allegedly violated DR-2-101(B)(15), "which provides that any advertisement that mentions contingent-fee rates must 'disclos[e] whether percentages are computed before or after deduction of court costs and expenses.'" *Id.* Consequently, the ad's "failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement 'deceptive' in violation of DR-2-101(A)." *Id.*

The Court examined three types of regulations Ohio imposed on attorney advertising.[265] First, "prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems."[266] Second, "restrictions on the use of illustrations in advertising by lawyers."[267] And third, "disclosure requirements relating to the terms of contingent fees."[268]

The Supreme Court rejected the first two grounds for discipline.[269] However, the Court accepted the third.[270] The Court said that a state could not prohibit advertisements that targeted a particular audience or a group of clients with a specific legal problem.[271] Moreover, the Court said that illustrations were allowed in ads unless there was proof in a specific case that they were deceptive or misleading.[272]

However, the Court emphasized that the omission of a statement about the client's liability for litigation costs could be a basis for discipline because its absence was deceptive. Citing *Friedman v. Rogers*,[273] the Court stated, "States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."[274] The Court rejected any claim that the lawyer had a First Amendment right to omit the information. The Court said: "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the infor-

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265 *Id.* at 638.

266 *Id.*

267 *Id.*

268 *Id.*

269 *Id.* at 644, 649, 655–56.

270 *Id.* at 652.

271 Speaking to this, the Court stated, "[b]ecause appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest." *Id.* at 641. The Court found this standard unmet, reasoning that because "[t]he State is not entitled to interfere with [civil] access [to the courts] by denying its citizens accurate information about their legal rights . . . it is not sufficient justification for imposing discipline that . . . truthful and nondeceptive advertising ha[s] a tendency to or [does] in fact encourage others to file lawsuits." *Id.* at 642–43. The Court emphasized the difference from in-person solicitations in that "[p]rint advertise[ments] . . . lack the coercive force of the personal presence of a trained advocate." *Id.* at 642. This distinction was relevant because the Court validated other substantial governmental interests in protecting against invasions of privacy and undue influence sufficient to uphold restrictions on in-person legal solicitation were inapplicable in the context of print advertisements. *Id.* at 641–42.

272 *Id.* at 649.

273 440 U.S. 1, 9 (1979) (upholding a state commercial-speech regulation and finding that state restrictions on false, deceptive, and misleading commercial speech are permissible).

274 *Zauderer*, 471 U.S. at 638.

mation such speech provides, [the] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[275] In other words, the Court found that the lawyer could properly be disciplined for the failure to disclose important information.[276] The Court did not apply strict scrutiny[277] and emphasized the importance of consumers receiving accurate information.[278]

In *NIFLA v. Becerra*, the Court poorly attempted to distinguish *Zauderer* and cited to, but did not discuss *Milavetz, Gallop & Milavetz, P.A. v. United States*. Justice Thomas summarized the *Zauderer* decision as follows: "Noting that the disclosure requirement governed only 'commercial advertising' and required the disclosure of 'purely factual and uncontroversial information about the terms under which . . . services will be available,' the Court explained that such requirements should be upheld unless they are 'unjustified or unduly burdensome.'"[279]

Oddly, Justice Thomas concluded that "[t]he *Zauderer* standard does not apply here."[280] For example, he stated, "[m]ost obviously, the licensed notice is not limited to 'purely factual and uncontroversial information about the terms under which . . . services will be available,'" and "[t]he notice in no way relates to the services that licensed clinics provide."[281] Instead, according to Justice Thomas, the notice requirement "requires these clinics to disclose information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic."[282]

In any case, the Court's opinion departs from a line of decisions plainly relevant to *NIFLA v. Becerra*, including the unanimously decided *Milavetz, Gallop & Milavetz, P.A. v. United States*, which

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275 *Id.* at 651.

276 *Id.* at 650–53, 655 (declining to apply heightened scrutiny and affirming the imposition of discipline on the grounds of failure to disclose important information).

277 Strict scrutiny in this context subjects restrictions on free speech to a "least restrictive means" analysis, under which legislation "must be struck down if there are no other means by which the State's purpose may be served." *Id.* at 651 n.14. The *Zauderer* court distinguished disclosure requirements from other legislation which may chill speech and held such requirements to a lower level of scrutiny. *Id.* at 651–52, 651 n.14 ("[W]e hold that an advertiser's rights are adequately protected so long as disclosure requirements are *reasonably related* to the State's interest in preventing deception of customers." (emphasis added)).

278 *Id.* at 651 ("[W]arning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." (internal citation omitted)).

279 Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018) (internal citation omitted).

280 *Id.*

281 *Id.*

282 *Id.*

Chief Justice Roberts and Justices Thomas, Kennedy, and Alito joined.[283] In that case, the Court applied *Zauderer* to uphold a federal law—the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—requiring that debt relief agencies, including attorneys, disclose in their advertisements that they are "debt relief agencies."[284]

In *Milavetz*, the Court upheld this disclosure requirement and reasoned that it "share[s] the essential features of the rule at issue in *Zauderer*."[285] The Court explained:

> As in that case, [the] required disclosures are intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs. Additionally, the disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information.[286]

Specifically, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended the Bankruptcy Code to classify a cohort of bankruptcy professionals as "debt relief agencies" in order to "correct perceived abuses of the bankruptcy system."[287] The lawyers who brought the litigation emphatically opposed this disclosure requirement, which mandated that they refer to themselves as "debt relief agencies."[288] The firm "asked the court to hold that it is not bound by these provisions and thus it may freely advise clients to incur additional debt and need not identify itself as a debt relief agency in its advertisements."[289] They believed that debt relief as that term was used in the statute was not an accurate description of their services.[290]

Thus, in *Milavetz*, the new law required several disclosures from "debt relief agencies," including (a) that debt relief agencies "clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general

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283 *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010). Justice Gorsuch was not a member of the Court in 2010.

284 *Id.*; *see also* Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) § 528(a)(4), Pub. L. No. 109-8, 119 Stat. 23 (2005).

285 *Milavetz*, 559 U.S. at 250.

286 *Id.* The Court also upheld a provision of the law prohibiting debt relief agencies from advising clients to take on additional debt. *Id.* at 248. This would seemingly prevent a lawyer from advising a client to get a mortgage, even where it would be lawful and nonfraudulent to do so.

287 *Id.* at 231–32.

288 *Id.* at 232.

289 *Id.* at 234.

290 *Id.*

public;" (b) a disclosure "that the services or benefits are with respect to bankruptcy relief;" and (c) a statement in all advertisements that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."[291] The attorneys petitioned for heightened review, which the Court rejected, explaining "the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech," and thus the "less exacting scrutiny described in *Zauderer* governs . . . ."[292]

Writing for the Court, Justice Sotomayor stated that the "threshold question" was "whether attorneys are debt relief agencies when they provide qualifying services."[293] The Court found that they are, and next considered "whether the Act's provisions . . . requiring them to make certain disclosures in their advertisements . . . violate the First Amendment rights of attorneys."[294]

The Court held that the disclosure requirements were valid, thereby foreclosing Milavetz's argument that the government had "adduced no evidence that its advertisements [were] misleading."[295] Citing *Zauderer*, Justice Sotomayor wrote, "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'"[296] The Court found the congressional record demonstrating "a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential costs . . . is adequate to establish that the likelihood of deception . . . 'is hardly a speculative one.'"[297]

According to the *Milavetz* Court, BAPCPA's notification requirements shared the substantive features of the rule challenged in *Zauderer*.[298] In other words, the "disclosures are intended to combat the problem of inherently misleading commercial advertisements," and they "entail only an accurate statement of the advertiser's legal status and the character of the assistance provided."[299] Additionally, the Court found that the disclosures "do not prevent debt relief agencies," such as the lawyers in question, "from conveying any additional

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[291] *Id.* at 233–34.

[292] *Id.* at 249.

[293] *Id.* at 232.

[294] *Id.*

[295] *Id.* at 251.

[296] *Id.* (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 652–53 (1985)).

[297] *Id.*

[298] *Id.* at 250.

[299] *Id.*

information" through their communications to clients or in advertisements.[300]

Similarly, in *NIFLA v. Becerra*, the disclosures were completely factual: (a) that the state provides free and low-cost contraceptives and abortions to women who economically qualify; and (b) that a particular facility is not licensed. However, the judicial outcome was markedly different. What made this controversial was simply that the clinics did not want to have to make this disclosure. But pushback may occur whenever a professional does not want to disclose certain information or be regulated.[301] Indeed, the Court has not confined its regard to regulating lawyers and shielding the public from potentially harmful conduct by professionals.

In *Williamson v. Lee Optical*, unlicensed optometrists pushed back against a requirement requiring a license to fit glasses. The Court upheld the Oklahoma licensing requirement, finding "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[302] In *Semler v. Oregon State Board of Dental Examiners*, where a dentist challenged the validity of an Oregon statute prohibiting advertisements conveying professional superiority and potentially misleading information, the Court held:

> We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.[303]

The Court's decision in *NIFLA v. Becerra* was also inconsistent with the Court's earlier rulings about disclosure in the abortion con-

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300 *Id.*

301 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (upholding an Oklahoma statute requiring licenses to fit lenses notwithstanding unlicensed optometrists' strong objections); Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 610 (1935) (finding "[p]laintiff is not entitled to complain of interference with the contracts he describes, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State"); Roschen v. Ward, 279 U.S. 337 (1929) (upholding a New York statute making it unlawful to sell eyeglasses at retail in any store unless a duly licensed physician were in attendance and in charge).

302 348 U.S. at 488.

303 294 U.S. 608, 612 (1935).

text. We discussed this in our introduction and it is a key point of Justice Breyer's dissent.[304] Justice Breyer reviewed the Supreme Court's earlier decisions concerning requirements that a doctor must make to a woman seeking an abortion.[305]

Initially, the Court found certain disclosure requirements to be unconstitutional in the abortion context. In *City of Akron v. Akron Center for Reproductive Health*, for example, the Supreme Court declared unconstitutional a part of a city ordinance that required physicians to inform women seeking abortions about fetal development, and that the "unborn child is a human life from the moment of conception."[306] Also, the city mandated that women seeking abortions be informed of "the date of possible viability, [and] the physical and emotional complications that may result from an abortion."[307] The Court reasoned:

> [M]uch of the information required is designed not to inform the woman's consent, but rather to persuade her to withhold it altogether. . . . By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed obstacles in the path of the doctor upon whom the woman is entitled to rely for advice in connection with her decision.[308]

Similarly, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court invalidated a Pennsylvania law that required, in part, that seven different kinds of information be distributed to pregnant women at least 24 hours before they give consent for abortions.[309] This information included telling the woman that there may be unforeseeable "detrimental physical and psychological effects" to having an abortion, that prenatal and childbirth medical care might be available, and that the father is required to pay child support.[310]

In addition, the law required that physicians inform women of the availability of printed materials that describe the anatomical and physiological characteristics of the "unborn child" at "two-week gestational increments."[311] The Court held, as in *Akron*, that the Pennsylvania law was unconstitutional because it was motivated by a desire to discourage women from having abortions and because it

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304 *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2383 (2018) (Breyer, J., dissenting).

305 *Id.* at 2383–92.

306 462 U.S. 416, 444 (1983).

307 *Id.* at 442.

308 *Id.* at 444–45 (citations omitted).

309 476 U.S. 747, 760 (1986).

310 *Id.* at 760–61.

311 *Id.* at 761.

imposed a rigid requirement that a specific body of information be communicated regardless of the needs of the patient or the judgment of the physician.[312]

Notably, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, however, the Court upheld a provision virtually identical to that invalidated in *Thornburgh*. The joint opinion in *Casey* said:

> To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.[313]

The shift from *Akron* and *Thornburgh* to *Casey* reflects the Court's abandoning the position that the state may not regulate abortions in a way to encourage childbirth. Specifically, the Court upheld a section of the statute that required that women be told information. The Court found it permissible that women be informed of the availability of materials that describe the fetus, be provided information about medical care for childbirth, and that they receive a list of adoption providers.[314]

In *Casey*, the Court explicitly considered whether the required disclosure was impermissible compelled speech in violation of the First Amendment. The joint opinion of Justices O'Connor, Kennedy, and Souter declared:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[315]

In *NIFLA v. Becerra*, Justice Thomas's majority opinion struggled to distinguish *Casey* by saying that it was an "informed-consent" requirement.[316] But as the joint opinion in *Casey* acknowledged, the Pennsylvania law compelling speech by doctors went far beyond informed consent, such as by requiring doctors to inform the woman

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312 *Id.* at 762.

313 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

314 *Id.* at 881.

315 *Id.* at 884 (citations omitted).

316 Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018).

about the availability of a list of adoption providers.[317] Plainly stated, adoption has nothing to do with a woman's health; suggestions otherwise are disingenuous and inaccurate. The justices in *Casey* recognized and approved the Pennsylvania regulations as a law designed to discourage abortions.

Justice Breyer made exactly this point in his dissent in *NIFLA v. Becerra*: "If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?"[318] He further observed that the Court failed to offer any "convincing reason to distinguish between information about adoption and information about abortion in this context."[319] Indeed, there is no legal justification for distinguishing the information in question.

Further, Justice Breyer responded directly to the majority's contrived attempt to distinguish *Casey* as concerning a regulation of professional conduct that only incidentally burdened speech.[320] Specifically, he wrote, "*Casey*, in [the majority's] view, applies only when obtaining 'informed consent' to a medical procedure is directly at issue. This distinction, however, lacks moral, practical, and legal force."[321] This is because the CPCs "are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey*."[322] Justice Breyer brought further clarity to the matter:

> After all, the statute here applies only to "primary care clinics," which provide "services for the care and treatment of patients for whom the clinic accepts responsibility." And the persons responsible for patients at those clinics are all persons "licensed, certified or registered to provide" pregnancy-related medical services. . . . If the law in *Casey* regulated speech "only 'as part of the practice of medicine,'" so too here.[323]

Justice Breyer pointed to the majority's sophistry when it asserted that the FACT Act's disclosure requirement "is unrelated to a 'med-

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317 505 U.S. at 881.

318 138 S. Ct. at 2385 (Breyer, J., dissenting).

319 *Id.*

320 *See id.* at 2373–74 (characterizing the law in *Casey* as primarily regulating the practice of medicine rather than speech).

321 *Id.* at 2385 (Breyer, J., dissenting).

322 *Id.*

323 *Id.* at 2385–86 (Breyer, J., dissenting) (citations omitted) (first quoting CAL. CODE REGS. tit. 22, § 75026(a) (2018); then quoting CAL. CODE REGS. tit. 22, § 75026(c); and then quoting *NIFLA*, 138 S. Ct. at 2373).

ical procedure,' unlike that in *Casey*, and so the State has no reason to inform a woman about alternatives to childbirth (or, presumably, the health risks of childbirth)."[324] Simply stated, the majority's justifications distinguishing *Casey* from *NIFLA v. Becerra* stretch their holding's credibility. Justice Breyer put it this way, "Really? 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."[325]

Thus, it is clear that the Court has abandoned its precedents in holding that the California law should have been enjoined as violating the First Amendment. The distinctions of the earlier cases, namely *Zauderer* and *Casey*, are specious.

C. Creation of Content-Based Restrictions on Speech

Finally, Justice Thomas began his majority opinion by saying that the California law was a content-based restriction on speech because it prescribed the required content of the disclosures, and thus it had to meet strict scrutiny.[326] This, of course, is consistent with the well-established principle that content-based restrictions on speech must meet strict scrutiny. For example, the Court has declared that "[c]ontent-based regulations are presumptively invalid."[327]

In *Turner Broadcasting System v. FCC*, the Court reaffirmed the general rule that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations need only meet intermediate scrutiny.[328] Justice Kennedy, writing for the Court, explained that "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."[329] Justice Kennedy thus noted, "[f]or these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[330] In countless cases, the

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[324] *See id.* at 2386 (Breyer, J., dissenting).

[325] *Id.* (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2315 (2016)).

[326] *Id.* at 2371.

[327] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *see also* United States v. Alvarez, 567 U.S. 709, 716–17 (2012) (plurality opinion) ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid and that Government bear the burden of showing their constitutionality." (quotation marks omitted)).

[328] 512 U.S. 622, 642 (1994).

[329] *Id.* at 641.

[330] *Id.*

Supreme Court has reaffirmed that content-based restrictions on speech must meet strict scrutiny.[331]

But in this case, the Court has done exactly what its prior First Amendment jurisprudence says the government cannot do, in two ways. First, it has created a content-based rule with regard to speech. The government can require disclosure of information by a professional if the information is "factual and uncontroversial,"[332] but not otherwise. That, by its very definition, makes the inquiry turn on the content of the speech. Moreover, the Court offers no criteria for what is factual and uncontroversial except for its own perceptions. There is no escaping the conclusion that five male justices find women's reproduction and healthcare options to be controversial precisely because of their own hostility to abortion rights.

Second, by approvingly citing to the disclosure requirements that had been upheld in *Casey* and by striking down those in the FACT Act, the Court is saying that a state may compel speech intended to discourage abortions, but it may not require speech designed to provide women information concerning the availability of contraception and abortions. This is not simply a content-based restriction on speech, but it is based on viewpoint. And viewpoint restrictions on speech are never allowed.[333] It is ironic that Justice Kennedy's concurring opinion sees the California law as viewpoint-based while joining a majority opinion that embraces an approach that permits the government to act to discourage abortions, but not to provide women accurate information about their rights. It is hard to imagine clearer viewpoint discrimination than what a state can and cannot do after *NIFLA v. Becerra*.

III
The Implications of *NIFLA v. Becerra*

As we outlined in Part II, the Court significantly erred in *NIFLA v. Becerra.* Its decision implicates broad areas of law where states and the federal government mandate disclosures in the realms of medicine, law, business, education, child welfare, banking, alcohol and drugs, and even barbering and cosmetology. We see the possibility of

331 *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

332 138 S. Ct. at 2376.

333 *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 364, 394 (1993) ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" (quoting Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984))).

two outcomes. The first is that this case weakens notification laws or makes them vulnerable to constitutional challenges. This concern is materializing in the very circuit that previously upheld California's FACT Act. Most recently, the Ninth Circuit en banc struck down a California ordinance that requires warnings on specific sugar sweetened beverages. The plaintiffs claimed that the ordinance violated their First Amendment free speech rights. In ruling the ordinance unconstitutional, the Court stated:

> The Ordinance requires health warnings on advertisements for certain sugar-sweetened beverages ("SSBs"). Plaintiffs argue that the Ordinance violates their First Amendment right to freedom of speech. Relying on the United States Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*") . . . we conclude that Plaintiffs will likely succeed on the merits of their claim that the Ordinance is an "unjustified or unduly burdensome disclosure requirement[ ] [that] might offend the First Amendment by chilling protected commercial speech."[334]

Or, second, this case will establish a unique disregard for laws that seek to protect women's reproductive rights relative to other interests. In Part III, we analyze the implications of the decision. In Section III.A, we examine the future of disclosure laws. In Section III.B, we turn to the Court's unclothed hostility to abortion rights.

A. The Future of Disclosure Laws

The majority's hostility toward women's reproductive rights is poorly concealed in *NIFLA v. Becerra.* Beyond that, the Supreme Court's decision opens the door to challenges to the myriad of laws that require disclosure of information to patients, to consumers, to employees, and to others. The Court expressly says that a law requiring disclosure of specific information is a content-based restriction on speech because it prescribes the content of the expression and thus it must meet strict scrutiny.[335] However, by this approach, *every* law requiring disclosure would be a content-based restriction on speech because each prescribes the required content of expression.

To appreciate the breadth of the implications of this, consider a narrow sample of the laws requiring disclosure. The 1968 Federal Truth in Lending Act was enacted to enable an awareness of the cost of credit to allow "informed use of credit" by consumers.[336] The Truth in Lending Act is codified at 15 U.S.C. §§ 1601–1667 and originally

[334] Am. Beverage Ass'n v. City & Cty. of S.F., 916 F.3d 749, 753 (9th Cir. 2019).
[335] 138 S. Ct. at 2371.
[336] 15 U.S.C. § 1601(a) (2012).

authorized the Federal Reserve Board, and now the Consumer Financial Protection Board, to issue regulations to implement the Act.[337] These regulations are mostly found in Regulation Z.[338] Regulation Z contains a variety of disclosure requirements.

For instance, regarding open-end credit, Regulation Z requires that disclosures generally must be made in writing in a form the consumer may retain,[339] that disclosures required to be made in tabular form must use the specific term "penalty APR,"[340] that disclosures be made before the first transaction or as soon as reasonably practical if opened over the phone,[341] that they must describe the legal obligations between the parties "based on the best information reasonably available,"[342] and that new disclosures may be required should the old ever become inaccurate.[343] Regarding closed-end credit, Regulation Z similarly dictates that the disclosure must be in written form and retainable by the consumer,[344] that disclosure must occur "before consummation of the transaction,"[345] and that there can be delays for disclosure in certain circumstances.[346] Regulation Z contains similar provisions for certain home mortgage transactions,[347] private education loans,[348] and credit offered to college students,[349] typically requiring prior disclosure and laying out the required format and content of the disclosures.

Likewise, the Residential Lead-Based Paint Hazard Reduction Act of 1992 contains a provision that requires the disclosure of lead-based paint hazards for all houses built before 1978 before a purchaser or lessee is obligated under any contract of purchase or lease.[350] The Act requires that contracts of purchase and sale include a statement

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337 *Id.* § 1604.

338 *See* 12 C.F.R. § 226 (2018).

339 *Id.* § 226.5(a)(1)(ii) (noting some limited exceptions in which disclosures need not be in writing or retainable by the consumer).

340 *Id.* § 226.5(a)(2)(iii).

341 *Id.* § 226.5(b)(1)(i), (iii).

342 *Id.* § 226.5(c).

343 *Id.* § 226.5(e).

344 *Id.* § 226.17(a)(1).

345 *Id.* § 226.17(b).

346 *Id.* § 226.17(g).

347 *See id.* § 226.31 (requiring that written disclosures be provided at least three business days before consummation of a mortgage transaction).

348 *See id.* § 226.46 (requiring certain written disclosures to be provided at the time of any application, solicitation, or approval for private education loans).

349 *See id.* § 226.57 (requiring card issuers who have college credit card agreements to submit annual reports to the Board of Governors of the Federal Reserve System detailing, among other items, the amount of money paid by the card issuer to the college and the total number of credit card accounts opened under the agreement).

350 *See* 42 U.S.C. § 4852d(a)–(c) (2012).

that the purchaser received a lead warning statement and information pamphlet, understands the warning, and had opportunity to assess the risk before purchase.[351] Moreover, the Act requires a lead warning statement, to be "printed in large type on a separate sheet of paper attached to the contract," that warns of the permanent neurological hazards of lead poisoning in children, warns of the risk of lead to pregnant women, and recommends an inspection and risk assessment of lead-based hazards prior to purchase.[352]

Consider just some of the various other disclosure laws in California. California requires that real estate agents disclose their names, license identification numbers, unique identifiers, and the identities of the responsible brokers in all publications.[353] This requirement applies to all solicitation materials, including business cards, stationary, flyers, TV ads, any print or electronic media, real estate-related signs, and any "other materials designed to solicit the creation of a professional relationship between the licensee and a consumer."[354]

California also requires that unaccredited law schools provide students with a disclosure statement specifying that the school is unaccredited prior to the payment of any registration fee.[355] The law also requires disclosure of the school's first year exam and bar exam passage rates from the last five years, the amount of legal volumes in the school's library, the qualifications of the faculty, the student-faculty ratio, the status of any applications for accreditation submitted by the school within the last five years, and a notice that the education may not satisfy the requirements of other states for practicing law.[356] This disclosure agreement must be signed by each student, and the student should be given a copy of that signed disclosure.[357] A law school's failure to comply entitles a student to a full refund of all fees.[358]

Contractors in California must provide a disclosure document if they have had their license suspended or revoked twice or more within eight years.[359] The disclosure document must be "either in capital letters in 10-point roman boldface type or in contrasting red print

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351 *Id.* § 4852d(a)(2).

352 *Id.* § 4852d(a)(3).

353 CAL. BUS. & PROF. CODE § 10140.6 (West 2018).

354 *Id.* § 10140.6(b)(2).

355 *Id.* § 6061; *see also* COMM. OF BAR EXAM'RS, STATE BAR OF CAL., GUIDELINES FOR UNACCREDITED LAW SCHOOL RULES 4–5 (2018), http://www.calbar.ca.gov/Portals/0/documents/admissions/GuidelinesforUnaccreditedLawSchoolRules.pdf.

356 CAL. BUS. & PROF. CODE § 6061 (West 2018).

357 *Id.*

358 *Id.*

359 *Id.* § 7030.1(a).

in at least 8-point roman boldface type," and it must be provided prior to contracting to work on a residential property with four or fewer units.[360]

California solar energy system companies are required to prepare a "solar energy system disclosure document" that discloses, "in boldface 16-point type" on the front page of any solar energy contract, the total cost and payments for the system, information on filing complaints, and the consumer's right to a three-day cooling off period.[361]

California public accountants who are paid a commission for recommending a product or service are required to disclose to clients the fact that they will be paid a commission when they recommend the product or service.[362]

California "invention developer[s]" who charge any fee or who "require[ ] any consideration" for their "invention development services" must disclose that fact in all advertisements of their services.[363]

California licensed midwives must provide to prospective clients both oral and written disclosure containing, among other requirements: a statement that the midwife is not a certified nurse-midwife and is unsupervised by a physician or surgeon; the midwife's licensure status and number; the midwife's practice settings; any lack of liability coverage; an acknowledgement that failure to consult a physician or surgeon when advised to do so limits the client's legal rights; the specific arrangements for referral to a physician and surgeon; the specific arrangements for the transfer of care; recommendations for preregistration at a hospital with obstetric emergency services; and a statement that laws governing midwifery and the procedures for filing complaints may be found on the Medical Board of California's website.[364] The statute authorizes the Medical Board of California to dictate the form of the disclosure, and the disclosure and consent must be signed by both the licensed midwife and the client.[365]

California landlords are required to provide several disclosures to tenants before they sign. For instance, California requires that a clause, dictated by statute, must be placed in rental agreements informing the lessee that information about registered sex offenders is available in a statewide database at a particular website, though landlords have no further obligation to provide information on sex

360 *Id.*

361 *See id.* § 7169 (requiring the development of a standardized disclosure document for use by solar energy companies).

362 *Id.* § 5061(d).

363 *Id.* § 22380.

364 *Id.* § 2508(a).

365 *Id.* § 2508(b)–(c).

offenders.[366] California landowners are also required to provide written notice to both potential tenants and affected current tenants if the landlord knows or has reasonable cause to believe that mold exceeds permissible exposure limits or poses a health threat.[367] This notice must also come with a California Department of Public Health approved booklet disclosing the health risks of mold exposure.[368] California landowners who have "actual knowledge" of any former federal or state ordinance locations within one mile of the dwelling in question must disclose the locations before a lease can be signed.[369]

Consider another state: New York requires healthcare practitioners with financial ties to healthcare providers to disclose such financial relationships to patients before the practitioner may refer a patient to the provider.[370] New York requires that this disclosure also inform the patient of the right to utilize a "specifically identified alternative healthcare provider."[371]

If an out-of-state camp solicits enrollment of children residing in the state, New York requires anyone operating that camp to complete a "disclosure statement" in the form prescribed by the Commissioner of Public Health, that must include, at least, the name and mailing address of the camp, form of the owners and directors, name of the owners, financial stability statements, political subdivision of the camp, physical features of the camp, provisions for sanitation and water supply, staffing ratios, living and sleeping and food arrangements, occupancy limits, insurance coverage, emergency and medical services, and recent inspection results.[372] This disclosure statement must be filed annually with the Department of Health prior to any solicitation or acceptance of money[373] and must be mailed or delivered to the parents or guardians of children sought for enrollment.[374]

Public vending machines in New York are required to have prominently affixed notices that indicate the name, address, and phone number of the owner and operator of the machine.[375]

New York also requires pet dealers who sell animals under the representation that the animal is "registered or registrable with an animal pedigree registry organization" to provide a written disclosure

366 CAL. CIV. CODE § 2079.10a(3) (West 2018).
367 CAL. HEALTH & SAFETY CODE § 26147 (West 2018).
368 *Id.* § 26148.
369 CAL. CIV. CODE § 1940.7(b) (West 2018).
370 N.Y. PUB. HEALTH LAW § 238-d(1) (McKinney 2018).
371 *Id.* § 238-d(2).
372 *Id.* § 1400(2).
373 *Id.* § 1401.
374 *Id.* § 1402(1).
375 N.Y. GEN. BUS. LAW § 399-t(2) (McKinney 2018).

with language largely dictated by statute, that must be signed by the purchaser in acknowledgement.[376]

A New York statute requires that "video tape service provider[s]" provide "informed, written consent of the consumer" prior to furnishing any "video tape services," to give consumers the choice of whether their personally identifiable information will be disclosed.[377] The disclosure is dictated by statute and must be made in the form of a written notice on all membership agreements in "at least ten point bold face type," as well as posted "in full and clear view of the consumer at the point of rental transaction."[378]

Even New York restaurants that serve margarine "in such a manner that the customer cannot identify it" must give consumers notice that reads as "[o]leomargarine served here" or "margarine served here."[379] The notice must be on signs readily visible by all customers or given on menus.[380]

The New York City Housing Maintenance Code contains a provision that requires landlords to disclose, in a form approved by the state division of housing and community renewal, the bedbug infestation history of both the particular unit being rented and the building.[381] The provision requires owners of multiple dwellings to provide all new and renewing tenants both the infestation history and information about preventing and dealing with bedbug infestation, or to post this information in a prominent place.[382]

Make no mistake, the foregoing narrow sampling of disclosure laws across the fields of education, health, environment, credit lending, real estate, housing, and even vending machines is not exhaustive; we could expand it, state-by-state, listing thousands of disclosure requirements. Each and every one of them now will have to meet strict scrutiny. The only guidance the Court provided in *NIFLA v. Becerra* was to say that it is different if it is "purely factual and uncontroversial information about the terms under which . . . services will be available."[383] However, the Court offers no criteria for determining what is "factual and uncontroversial."

Ultimately, to satisfy its problematic hunger to upend women's reproductive rights, the Supreme Court has placed in jeopardy count-

376 *Id.* § 753-c(3)(b)–(c).
377 *Id.* § 672(6).
378 *Id.*
379 N.Y. AGRIC. & MKTS. § 61(3)(b), (d) (McKinney 2018).
380 *Id.* § 61(3)(c).
381 NEW YORK CITY, N.Y., HOUS. MAINT. CODE subch. 2, art. 4, § 27-2018.1(a) (2018).
382 *Id.* § 27-2018.1(c).
383 138 S. Ct. 2361, 2372 (2018).

less consumer protection efforts designed to benefit the elderly, children, first-time home buyers, student loan borrowers, patients, and numerous others through notifications regarding their rights. Anyone who objects to a disclosure requirement will argue that it is controversial. More importantly, the legal test to be applied is strict scrutiny. The Court has said that a disclosure law is unconstitutional so long as the government has a way of informing people that is a less restrictive alternative and that virtually always exists.

Finally, doctrines announced by the Supreme Court must be applied by lower courts. Justice Thomas's opinion in *NIFLA v. Becerra* now suggests that they must subject all of these disclosure laws to strict scrutiny. Ultimately, the Court now will need to figure out a principle for which disclosure laws are unconstitutional compelled speech and which are permissible. But until then, the Court has invited enormous litigation.

B. Hostility to Abortion Rights

Our central thesis is that the only way to understand the Supreme Court's decision in *NIFLA v. Becerra* is that it reflects the hostility of the Court's majority to reproductive rights and its indifference towards the rights and interests of women. The Court's abandonment of precedent, its ignoring the interests of women in receiving accurate information, its creating a content-based restriction on speech, its opening the door to challenging all disclosure laws must been seen as being about five justices being very hostile to abortion rights and thus women's reproductive health and rights.

For example, shortly after penning the Court's decision in *NIFLA v. Becerra*, expressing great solicitude for the First Amendment to protect CPCs, Justice Thomas then, in *McKee v. Cosby*, voiced deep ambivalence about speech protections in defamation cases.[384] We find Justice Thomas's current ambivalence regarding First Amendment protections for defamation cases ironic in light of his solicitude for First Amendment rights in *NIFLA v. Becerra.*

As such, *NIFLA v. Becerra* should not only be recognized as a conceptually shortsighted and legally flawed decision, but also one that reflects a dangerous turn in the Court for which we should all be concerned. The majority's decision is not grounded in precedent as we discuss in Section II.A, nor in advancement of civil liberties, protection of civil rights, or response to Americans' views on abortion. Only eighteen percent of Americans believe abortion should be illegal in all circumstances, and seventy-nine percent support abortion rights to

[384] *See supra* Introduction (quoting Justice Thomas's concurrence).

varying degrees with fifty percent supporting abortion in all circumstances.[385]

Rather, the decision evinces an anti-reproductive rights agenda harbored by the Court's all male, conservative guard. Consequently, protecting First Amendment interests simply serves as a fig leaf. In essence, the Court manipulates the boundaries of constitutional jurisprudence to favor their distaste for reproductive rights. Importantly, this hostility to abortion rights directly bears on women's health as discussed in Part I, and as pointed out forty-five years ago by Justice Blackmun in *Roe*.

Justice Blackmun emphasized, "[t]he detriment that the State would impose upon the pregnant woman by denying this choice" is significant.[386] The harms to women are not secret or hidden, but rather, "altogether . . . apparent."[387] Those harms have not been eradicated; rather, the Court exacerbates them.

The *Roe* Court sought to correct a glaring record of indifference to women and their reproductive privacy. He wrote, that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[388] The Court recognized that "[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved" in continuing a pregnancy—whether it is intended or unintended.[389] Justice Blackmun demonstrated great sensitivity to the real, lived lives of women:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.[390]

Additional harms also include the shaming of pregnant women, which is alive in the Court's decision in *NIFLA v. Becerra.* When Justice Thomas proposes that California lawmakers abandon medical facilities as places to notify poor pregnant women of the medical services available to them as well as their rights and choose instead random billboards to convey this information, he makes a statement

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385 *Abortion: Gallup Historical Trends*, GALLUP, https://news.gallup.com/poll/1576/abortion.aspx (last visited Aug. 21, 2018).

386 Roe v. Wade, 410 U.S. 113, 153 (1973).

387 *Id.*

388 *Id.*

389 *Id.*

390 *Id.*

about the dignity of poor women and that they are less deserving as consumers and rights bearers.

The impression imparted by Justice Thomas and his brethren in the majority is that poor, pregnant women do not deserve immediately available information, reasonably communicated, in the dignity of the clinics that service them. Instead, they are to assemble their medical knowledge and information on the streets and boulevards. The notion that poor, pregnant women should or could roam the streets of California to ascertain their reproductive healthcare rights and discover the affordable services available to them is not only unreasonable, but also ludicrous. It is hard to read this case in any other way than the majority's inhumanity toward and contempt for poor, pregnant women.

In this way, the greatest significance of *NIFLA v. Becerra* likely will be in what it tells us about how the Court is likely to treat other laws concerning abortion and even contraception. In light of *Burwell v. Hobby Lobby Stores, Inc.*,[391] even access to contraceptive medicines could be in jeopardy for poor and working class women. For example, only months after assuming office, the Trump Administration expanded the "rights of employers to deny women insurance coverage for contraception and issued sweeping guidance on religious freedom."[392]

The Departments of Labor, Treasury, and Health and Human Services issued interim final rules that accommodate vague and ill-defined moral and religious objections to mandated, preventative services, including contraceptive coverage under the Patient Protection and Affordable Care Act (PPACA) otherwise known as Obamacare. The rules are so vague that in one section they refer to "items or services believed to involve abortion," failing to identify whose beliefs count in such scenarios.[393]

The new regulations raise the question: Is it permissible to deny women contraception so long as an employer believes it involves abortion? The Trump Administration seems to think so. The Trump Administration argues the federal government's compelling interest is in protecting the rights of businesses that articulate "religious beliefs." Therefore, their answer seems to be yes. According to the new rules,

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391 134 S. Ct. 2751 (2014).

392 Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html.

393 Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,793 (Oct. 13, 2017) (to be codified in scattered sections of C.F.R.).

the departments may exercise their "discretion to reevaluate these . . . accommodations" and take into account "protection of the free exercise of religion in the First Amendment and by Congress in the Religious Freedom Restoration Act of 1993."[394]

With the enactment of the new rules, which carry out President Trump's agenda to "not allow people of faith to be targeted, bullied, or silenced anymore,"[395] millions of women could be in serious jeopardy of losing the basic, long overdue protections mandated by the PPACA.

If regulations such as these are challenged, a case may make its way to the Supreme Court. If that happens, the law could encroach even further on contraceptive coverage.

Further, between 2011 and 2015, state legislatures adopted almost 290 new laws restricting abortion.[396] Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito have voted to uphold every restriction on abortion that has come before them.[397]

At the very least, these Justices are certain votes to uphold the almost infinite variety of state laws that have been or will be adopted to impose restrictions on abortion and other reproductive health services. Upholding these laws will make abortion unavailable to most women in the United States even if *Roe v. Wade* is not overruled. In fact, there is nothing in the writings or opinions of Roberts, Thomas, and Alito that causes reason to doubt that they will overrule *Roe v. Wade* if given the chance. Neil Gorsuch will likely be with them.

As we put forth in previous work, in light of Justice Gorsuch's recent appointment to the Court, "his record on women's rights while sitting on the Tenth Circuit Court of Appeals causes deep concern,"[398] including on issues of "contraceptive care access,"[399] "defunding

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394 *Id.*

395 Pear, Ruiz & Goodstein, *supra* note 392 (quoting President Donald Trump).

396 Lauren Kelley, *Nearly 400 Anti-Abortion Bills Were Introduced Last Year*, ROLLING STONE (Jan. 4, 2016, 6:27 PM), http://www.rollingstone.com/politics/news/nearly-400-anti-abortion-bills-were-introduced-last-year-20160104 ("[S]tates adopted nearly as many abortion restrictions during the last five years (288 enacted 2011–2015) as during the entire previous 15 years (292 enacted 1995–2010).").

397 *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321, 2330 (2016) (Thomas, J., dissenting; Alito, J., dissenting, joined by Roberts, C.J. and Thomas, J.); Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding federal Partial-Birth Abortion Ban Act of 2003). *But see* June Med. Servs., LLC v. Gee, No. 18A774, 2019 WL 488298 (U.S. Feb. 7, 2019) (Mem.) (Chief Justice Roberts joining the majority in temporarily blocking implementation of a Louisiana abortion law virtually identical to a Texas regulation struck down by the Court in 2016).

398 Chemerinsky & Goodwin, *supra* note 233, at 1194.

399 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1157 (10th Cir. 2013) (Gorsuch, J., concurring) (referring to the Religious Freedom Restoration Act (RFRA) as "something of a 'super-statute'" which trumps all other legislation, including federal laws

Planned Parenthood,"[400] and "discrimination against pregnant women."[401] Furthermore, his "statements on privacy rights indicate

like the Affordable Care Act, which mandates contraceptive health coverage for women (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995))); *see also* Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315 (10th Cir. 2015) (then-Judge Gorsuch dissenting from a denial of en banc review, where a Tenth Circuit panel ruled that the government's "accommodation scheme relieves [nursing home owners] of their obligations under the [Affordable Care Act's contraceptive mandate] and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights." Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1160 (10th Cir. 2015)). Even though the plaintiffs did not issue a petition for rehearing, then-Judge Gorsuch urged and voted for an en banc review of the court's decision because he believed, as his fellow dissenting judge wrote, that the opinion was "clearly and gravely wrong." *Little Sisters of the Poor Home for the Aged*, 799 F.3d at 1316.

400 Sitting as a judge on the Tenth Circuit Court of Appeals, then-Judge Gorsuch wrote an opinion dissenting from the denial of en banc review in a case where the circuit court upheld an injunction against Utah Governor Gary Herbert's attempt to defund Planned Parenthood. Planned Parenthood Ass'n v. Herbert, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting). Then-Judge Gorsuch recommended an en banc rehearing in the case (although the Governor did not appeal the court's decision). *Id.* at 1307, 1308 n.1. The court denied the en banc rehearing, and in Gorsuch's dissent, he wrote that, "[i]f the Governor discontinued funding," because he believed Planned Parenthood affiliated with illegal fetal tissue sellers, "as he said he did" then "no constitutional violation had taken place." *Id.* at 1307. Troublingly, Gorsuch's dissenting opinion gave judicial authority to Governor Herbert's unsubstantiated claims that illegally obtained, surreptitiously filmed, and deeply edited videos purporting to show Planned Parenthood staff negotiating over fetal body parts were credible evidence against the organization. *See id.*

401 Justice Gorsuch has denied claims that he has stated or indicated that women abuse maternity leave policies, thereby harming the interests of employers—and that women engage in such behavior with alarming frequency. Sean Sullivan, *Gorsuch Denies Former Student's Allegation on Maternity Benefits Question*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-denies-former-students-allegation-on-maternity-leave-question/ [https://perma.cc/UK5D-K5S9]. Specifically, when asked by Senator Richard J. Durbin (D-Ill.) whether he asked "students in class . . . to raise their hands if they knew of a woman who had taken maternity benefits from a company and then left the company after having a baby," Gorsuch answered, "No." *Id.* However, Justice Gorsuch refused to clarify his position as to whether he believes women abuse maternity leave policies or whether employers should be entitled to ask family planning questions that currently violate federal law. *Judge Gorsuch Confirmation Continues*, CNN: TRANSCRIPTS (Mar. 21, 2017), http://transcripts.cnn.com/TRANSCRIPTS/1703/21/wolf.01.html [https://perma.cc/432L-SBCD]. For example, when Senator Durbin asked, "[w]hether employee[s] should or should not make inquiries into whether an applicant or employee intends to become pregnant," Justice Gorsuch deflected the question, quoting Socrates. *Id.* He told Senator Durbin that "it sounds like you're asking me about a case or a controversy" and, "with all respect, when we come to cases [and] controversies, a good judge will listen." *Id.* For a discussion of Justice Gorsuch's former clerks' positions on the allegations, see Arnie Seipel & Nina Totenberg, *Amid Charges by Former Law Student on Gender Equality, Former Clerks Defend Gorsuch*, NPR (Mar. 20, 2017), http://www.npr.org/2017/03/20/520743555/former-law-student-gorsuch-told-class-women-manipulate-maternal-leave.

enmity and opposition to women's reproductive rights."[402]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Anthony Kennedy was the fifth vote to reaffirm *Roe v. Wade*.[403] As has been widely reported, he initially voted with the conservative justices and then changed his mind and saved *Roe*.[404] In 2016, in *Whole Woman's Health v. Hellerstedt*, Justice Kennedy was the fifth vote to strike down a Texas law restricting abortions that would have closed most facilities in state.[405]

Justice Kavanaugh has not yet participated in an abortion case on the Supreme Court. But his record as a judge on the United States Court of Appeals for the District of Columbia provides a clear indication that he is likely to be with the conservatives in abortion cases. In *Garza v. Hargan*, Judge Kavanaugh wrote a vehement dissent from an en banc decision that recognized the right of a teenager in detention custody to have access to an abortion.[406] The tone of his dissent left no doubt where he stands on abortion issues. He said that the majority's decision was:

> [B]ased on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision. The majority's decision represents a radical extension of the Supreme Court's abortion jurisprudence. It is in line with dissents over the years by Justices Brennan, Marshall, and Blackmun, not with the many majority opinions of the Supreme Court that have repeatedly upheld reasonable regulations that do not impose an undue burden on the abortion right.[407]

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[402] Chemerinsky & Goodwin, *supra* note 233, at 1194–95. We have also had the opportunity to read a 1996 amicus brief written by Justice Gorsuch before he entered the bench. In the brief, Justice Gorsuch expressed that countless problems "plagued the Court's abortion jurisprudence." Brief for the Am. Hosp. Ass'n as Amicus Curiae Supporting Petitioners, Washington v. Glucksberg, 521 U.S. 702 (1997) (Nos. 96-110, 96-1858), 1996 WL 656278, at *8. He surmised that *Planned Parenthood v. Casey* was a case rooted in stare decisis rather than the Court affirmatively upholding abortion rights. *Id.* at *7 ("[T]he plurality's opinion [in *Casey*] rests at heart upon stare decisis principles, upholding the abortion right largely because of the need to protect and respect prior court decisions in the abortion field . . . .").

[403] 505 U.S. 833 (1992).

[404] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 203–04 (2005); Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAG. (Apr. 10, 2005), http://www.nytimes.com/2005/04/10/magazine/10BLACKMUN.html.

[405] 136 S. Ct. 2292 (2016).

[406] 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[407] *Id.*

With Kennedy having retired from the Court, the law of abortion is about to change dramatically. There likely will be five votes to uphold all restrictions on abortion and to overrule *Roe v. Wade*. In this sense, *NIFLA v. Becerra* is likely a harbinger of what is to come: a Court that will treat abortion differently from other constitutional rights. Laws designed to help women exercise their rights will be unconstitutional; laws designed to limit these rights will be upheld. It is the beginning of a time of the Court gerrymandering abortion rights out of the Constitution.

Conclusion

In *Janus v. American Federation*, Justice Elena Kagan in dissent spoke of the Court "weaponizing the First Amendment."[408] She was referring to conservatives turning to the First Amendment to strike down economic and social regulations that they don't like. That is exactly what happened in *NIFLA v. Becerra*: A Court majority that is hostile to reproductive rights used the First Amendment to invalidate a law that clearly should have been upheld.

There is no way to understand the Court's decision in *NIFLA v. Becerra* other than as a reflection of the conservative Justices' views on abortion rights. With Justice Kennedy retiring, it is likely that the Court will be upholding far more laws restricting abortion and striking down more protecting women's reproductive rights. Almost thirty years ago, Justice Harry Blackmun wrote: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[409] Above all, *NIFLA v. Becerra* shows that in 2018 that chill wind indeed blows.

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[408] Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[409] Webster v. Reprod. Health Servs., 492 U.S. 490, 560 (1989) (Blackmun, J., dissenting).