GUEST COLUMN

Take this free speech case

By Mitchell Keiter

May the state force speakers to express a message they oppose so the public can hear it? May the state burden speakers specifically because they expressed their own (contrary) position? The U.S. Supreme Court meets Thursday to decide whether to review a 9th U.S. Circuit Court of Appeals case presenting these questions, *NIFLA v. Beccera*, 16-1140. Speakers across the ideological spectrum will benefit from the court's reaffirming the range of First Amendment protection.

Speech is most protected when offered "to advance 'beliefs and

See Page 6 — SUPREME

Supreme Court should take up 9th Circuit free speech case

Continued from page 1

ideas,'" and this advancement may occur outside the political arena. *In re Primus*, 436 U.S. 412 (1978). A committed vegan may choose to run a sporting goods store without hunting rifles to promote other outdoor activities, or a restaurant without meat to promote a plant-based diet. Even hunters and carnivores can see the violation that would occur if the state forced the vegan vendor to post on her door directions to the nearest gun store or McDonald's.

California created a comparable burden. Pro-life Californians created pregnancy centers to encourage women to give birth rather than abort. The state enacted the "FACT Act," which required these facilities to inform the women how they could get state-subsidized abortions, prescribing even the compulsory notices' font size.

The Supreme Court in forbidding forced flag salutes explained the First Amendment protects not just a right to speak but, even more strongly, a right not to speak. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The court later rejected a New Hampshire law requiring all drivers to display the motto "Live Free or Die" on their license plates. *Wooley v. Maynard*, 430 U.S. 705 (1977). The law violated the First Amendment by forcing a dissenting driver to "participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." The FACT Act is irreconcilable with these precedents.

The 9th Circuit upheld the requirement without acknowledging either *Barnette* or *Wooley*, but offered several unpersuasive grounds for denying the centers' right not to speak. *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016). It deemed the compelled disclosure as "viewpoint neutral" because it applied to all clinics, "regardless of their stance on abortion." But the unconstitutional New Hampshire law similarly applied to all drivers, regardless of their stance on freedom, and the flag-salute law applied to all students, regardless of their stance on the flag.

KEITER

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Viewpoint discrimination may turn on the nature of the speech (not just the identity of the speaker) compelled by the law. Under the 9th Circuit's reasoning, it would be viewpoint-neutral for the state to compel all drivers to display the motto "Donald Trump is Making America Great Again," so long as the law obligated Democrats and Republicans alike.

The 9th Circuit understood viewpoint-discrimination better in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), where it stuck down a federal law barring doctors from recommending marijuana. The law was viewpoint-discriminatory, because it forbade expressing a particular viewpoint, i.e. that marijuana could be therapeutic, even though the law applied equally to all doctors — those who believed in marijuana's therapeutic potential and those who did not. The law, like the FACT Act, applied universally but burdened asymmetrically.

The *NIFLA* opinion further dismissed the pregnancy centers' First Amendment objection by holding the required notices do not "convey any opinion." But while clinics try to persuade women that protecting life is a moral imperative, the notices convey it is not, and that abortion is an acceptable alternative. Even assuming the 9th Circuit correctly observed the notices expressed not a "preference" for abortion but only the "existence" of that option, the Supreme Court has held the right not to speak applies to not only beliefs or opinions but also "statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

A subordinate issue concerns the proper level of scrutiny. *NIFLA* rejected strict scrutiny, which does not apply to speech where a professional "takes the affairs of a client personally in hand and purports to exercise judgment ... in the light of the client's individual needs and circumstances." *Lowe v. SEC*, 472 U.S. 181 (1985) (White, J. concurring). *Lowe*, which reviewed an investment advisor's right to publish a newsletter, pitted governmental power to regulate professional practice against the professional's freedom of speech. The newsletter did not target particular clients based on their individual circumstances, but expressed ideas more broadly, so it received maximum protection, as strict scrutiny applies "Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual *with whose circumstances he is directly acquainted*." (Emphasis added.)

The mandated notices fit the second definition. They are disclosed to the woman before she even describes her individual circumstances (beyond the pregnancy itself); they involve a fixed wording dictated by the state, which no professional judgment may alter; and they may be posted by even a teenaged intern with no medical knowledge or judgment whatsoever. They do not communicate a professional medical judgment but the legal availability and financial affordability of abortion.

The notices are especially problematic as the duty to post them is a direct consequence of (and serves as an effective penalty for) the clinics' own speech; pro-life individuals may avoid the burden of advertising abortion by not proactively spreading their own message. The burden thus recalls *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where the Supreme Court rejected a Florida law requiring newspapers that criticized a candidate to provide a "right of reply." Like the California law, the reply provision prescribed the location and font of the compelled speech to ensure an "informed" public.

But that rule's flaws apply here too. The scarcity of time and space meant that forcing newspapers to carry the unwanted speech reduced their capacity to express their own preferred ideas. And if papers limited their own initial commentary to avoid the burden of reply space, it would actually diminish debate. Not only the individual interest in conscience but the public interest in information required that speech be voluntary.

A "similar penalty" appeared where a state burdened political candidates whose campaign spending exceeded a certain limit by forcing them to subsidize their opponents as a consequence. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). This violated the constitutional principle "that an individual should not be compelled to 'help disseminate hostile views'" and did so "in a most direct way — his own speech triggers the release of state money to his opponent." The FACT Act creates a more blatant violation; Arizona defended its speech tax by noting that at least no individual was "obliged personally to express a message he disagrees with" — but that is exactly what California's pregnancy centers must do.

The First Amendment's protection of conscience is more important than ever in this polarized age. The political majority can always assert the interest in public awareness justifies conscripting dissenters into expressing a state-mandated message. If California may force pro-life clinics to inform pregnant women how to obtain an abortion, Texas may force firearm opponents to help customers buy a gun. But the Bill of Rights places fundamental rights beyond the reach of the majority. The Supreme Court should review *NIFLA v. Beccera* and protect freedom of conscience for all Americans.

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