

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 NATIONAL INSTITUTE OF FAMILY)
4 AND LIFE ADVOCATES, DBA NIFLA,)
5 ET AL.,)
6 Petitioners,)
7 v.) No. 16-1140
8 XAVIER BECERRA, ATTORNEY GENERAL)
9 OF CALIFORNIA, ET AL.,)
10 Respondents.)
11 - - - - -

12 Washington, D.C.

13 Tuesday, March 20, 2018

14
15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United
17 States at 10:09 a.m.

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1 APPEARANCES:

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13 Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case Number 16-1140, the National Institute of Family and Life Advocates versus Becerra.

Mr. Farris.

ORAL ARGUMENT OF MICHAEL P. FARRIS
ON BEHALF OF THE PETITIONERS

MR. FARRIS: Mr. Chief Justice, and may it please the Court:

California took aim at pro-life pregnancy centers by compelling licensed centers to point the way to an abortion and imposing onerous advertising rules on unlicensed centers that do not provide ultrasounds or any other medical services.

The state then provided exemptions for all other medical providers who serve pregnant women. This law targets a particular topic of discussion, employs compelled speech, and is directed at disfavored speakers with disfavored viewpoints. So for --

JUSTICE GINSBURG: What would be the situation, taking the other side, if the state

1 law were that all women's health providers that
2 perform abortions would have to tell the
3 patients, if you would like to carry the
4 pregnancy to term, you will have access to a
5 clinic that will assist them, provide adoption
6 facilities they might contact, or provide
7 instruction on how to care for infants?

8 Suppose that were the statute. Would
9 that be unconstitutional?

10 MR. FARRIS: No, Your Honor. This
11 Court decided a very similar case in the Casey
12 decision from Pennsylvania. Pennsylvania
13 imposed that requirement in the context of an
14 informed consent discussion. Informed consent
15 is triggered by a doctor proposing to perform a
16 particular medical intervention.

17 Medical interventions are surgeries.
18 Abortion is a medical intervention. And in
19 that case, medical interventions require the
20 discussion of the benefits of the procedure,
21 the risk of the procedure --

22 JUSTICE GINSBURG: But why isn't this
23 also informed consent?

24 MR. FARRIS: Well, Your Honor --

25 JUSTICE GINSBURG: So -- so that the

1 patient will know what are the array of
2 services available to her?

3 MR. FARRIS: Your Honor, the services
4 provided by our licensed centers are not
5 medical interventions. Perhaps the best
6 explanation is a Planned Parenthood center in
7 Pennsylvania did pregnancy tests and
8 ultrasounds but did not perform abortions,
9 requiring that Planned Parenthood center, they
10 talked about abortion, encouraged abortion,
11 that would be unconstitutional to compel them
12 to give this disclaimer because it's not a
13 procedure --

14 JUSTICE KENNEDY: Well, may -- Justice
15 Ginsburg can protect her own question, but I
16 was interested. Her -- her question is a
17 hypothetical case.

18 MR. FARRIS: Yes.

19 JUSTICE KENNEDY: The hypothetical
20 case is doctors who are offering abortion
21 services have to say that if the pregnancy is
22 carried to a full -- full term, there's
23 assistance.

24 MR. FARRIS: Your Honor, that would
25 be --

1 JUSTICE KENNEDY: It's a hypothetical
2 case.

3 MR. FARRIS: I understand, Your Honor.
4 If the state anchors that in the informed
5 consent framework, then it would be considered
6 under the Casey legal principles, because, in
7 Casey, this Court recognized that --

8 JUSTICE GINSBURG: It doesn't anchor
9 it under any -- it's just -- that's what the
10 law is, what it says. If you are an abortion
11 provider, you have to tell patients that if
12 they want to carry the pregnancy to term, they
13 can have assistance, call this number.

14 MR. FARRIS: Your Honor, yes. That is
15 in the context of proposing a medical
16 intervention, describing the alternatives.
17 This Court in Harris versus McRae and in Casey
18 indicated that the state has an additional
19 interest beyond the health of the woman in the
20 interest of advancing the life of the unborn
21 child, to a degree. It can't go too far.

22 JUSTICE KAGAN: But you're -- but
23 you're saying that if there is a non-medical
24 facility -- I mean, I don't want to put words
25 in your mouth. This is a question. If there

1 is a non-medical facility that the state has
2 reason to think is a -- is telling women about
3 only one set of options and not another set of
4 options, but here, the case would be they're
5 only telling women about abortion providers,
6 and they're not telling women about other ways
7 that they may be able to complete their
8 pregnancy, that the state could not impose a
9 requirement that that facility post a notice
10 saying, in fact, there are many kinds of
11 facilities in the world and some are abortion
12 providers and some are crisis pregnancy centers
13 and some are something else, that -- that that
14 would not be permissible?

15 MR. FARRIS: Your Honor, that would be
16 decide -- since it's in an unlicensed facility
17 that the requirement is being framed up, that
18 would be judged under strict judicial scrutiny,
19 and I don't believe it would be required.

20 If in the license context, however, it
21 would still be the same framework, but the
22 analysis would be slightly different because
23 it's -- here, in this case, it's being --

24 JUSTICE KAGAN: I guess I'm not sure,
25 licensed, unlicensed. You -- you were

1 suggesting that everything turned on whether a
2 medical procedure was going to be performed.
3 And my hypothetical was designed to take out
4 the medical procedure; in other words, this is
5 a facility that just refers women, but it
6 refers women only to abortion providers.

7 And the state decides we don't want
8 facilities that refer women only to abortion
9 providers. We want facilities that will tell
10 women about the full range of their options.

11 And so the question is: Would a
12 requirement that such a facility post a notice
13 saying there actually are a lot of options and
14 here's how you can access them, would that be
15 unconstitutional?

16 MR. FARRIS: Yes, Your Honor, because,
17 under your hypothetical, it's a targeted law.
18 It's aimed at particular people, and not given
19 to all doctors who diagnose and confirm
20 pregnancies.

21 JUSTICE ALITO: But what if it wasn't
22 targeted? What if there were a state law that
23 required every doctor or facility that provides
24 medical treatment for pregnant women to post a
25 notice setting out the full range of options

1 available to those women and where they might
2 obtain services at no cost, if those -- if --
3 if those are available?

4 Would there be anything wrong with a
5 law like that?

6 MR. FARRIS: Well, Your Honor, if it's
7 done in a manner similar to what's being done
8 here in California, to require pro-life
9 doctors, whether at a clinic or otherwise, to
10 point the way to an abortion facility and to
11 facilitate abortion would be constitutionally
12 problematic.

13 JUSTICE ALITO: What if it did that to
14 -- what if this notice provided for -- set out
15 all of the options and it applied to everybody,
16 so it would apply to pro-life facilities, but
17 it would also apply to clinics that perform
18 abortions?

19 MR. FARRIS: I understand --

20 JUSTICE ALITO: And provide no other
21 form of assistance for pregnant women?

22 MR. FARRIS: Your Honor, I -- the -- I
23 think the outcome would still be the same.
24 Perhaps it would arise under a free exercise --

25 CHIEF JUSTICE ROBERTS: I'm sorry, the

1 outcome would still be the same as?

2 MR. FARRIS: As my prior answer. I'm
3 sorry, Your Honor.

4 CHIEF JUSTICE ROBERTS: And that was
5 what?

6 MR. FARRIS: And that is it would be
7 unconstitutional to require that statement to a
8 doctor who is pro-life, principally because of
9 the free exercise issues that would arise in
10 that case.

11 But this case is different because not
12 only is the requirements of which doctors have
13 to give the notice gerrymandered, the notice
14 itself is gerrymandered. It is not giving
15 women all their options.

16 The notification required says that
17 the state will pay for abortion services, but
18 it does not tell California women it will pay
19 for pregnancy-related --

20 JUSTICE BREYER: There are a lot of
21 different things, I mean, the simple basic
22 thing, if you can just say it as simply as
23 possible. In law, as you well know, what is
24 sauce for the goose is sauce for the gander.
25 And so I think what's bothering from these

1 questions people, as it bothers me, we -- there
2 -- there are pro-choice states and there are
3 pro-life states. All right? So, if a pro-life
4 state can tell a doctor you have to tell people
5 about adoption, why can't a pro-choice state
6 tell a doctor, a facility, whatever it is, you
7 have to tell people about abortion? See?
8 That's simple.

9 The one we've said you can make a
10 doctor who is very pro-life tell her about
11 abortion, okay, I get it, and why don't we have
12 to say, to keep saucers the same --

13 MR. FARRIS: Well, your Honor --

14 JUSTICE BREYER: -- that you're a
15 pro-choice state, then you can make these
16 people tell them about abortions?

17 MR. FARRIS: Your Honor, if it is
18 simply a line of demarcation about your
19 position on abortion, that would be
20 unconstitutional in any state. But the -- the
21 laws that have been upheld are doctors who are
22 going to perform abortions, not doctors who
23 give a --

24 JUSTICE BREYER: No, I said do you
25 want to draw a line as to whether it's actually

1 the doctor, medical treatment about to do it,
2 as not?

3 MR. FARRIS: Yes.

4 JUSTICE BREYER: Okay, I got it. My
5 other question, and it's the only other one I
6 have, is you have a totally different line in
7 which you are attacking this, and that is, you
8 say, which is certainly a point, that this
9 statute picks out 60 to 70 really pro-life
10 facilities and says you have to post these
11 signs, but nobody else does. Right? Isn't
12 that basic --

13 MR. FARRIS: That's correct, Your
14 Honor.

15 JUSTICE BREYER: Okay. Now what are
16 -- that sounds like you have a point there if
17 that's correct. But doesn't there have to be a
18 trial on that? What did you argue? This is
19 just a preliminary injunction. Don't you have
20 to have a -- a trial or present some evidence?
21 I don't know what your evidence is. I don't
22 know what the evidence is on the other side.

23 And -- and can we decide that without
24 knowing the evidence?

25 MR. FARRIS: Well, Your Honor, the --

1 the gerrymandering of the statute is evidence
2 from the face of the statute. The way the
3 statute works is that it begins by only
4 regulating clinics that are licensed under
5 Section 1204 of the California code.

6 That is limited principally to
7 nonprofit community clinics. So all doctors in
8 private practice are out of the statute to
9 begin with, and the state admits this in its
10 brief.

11 Additionally, among those nonprofit
12 clinics, the clinics that are in general
13 practice are exempted out even though they
14 serve pregnant women.

15 Then you take the class -- the last
16 gerrymandering in this statute is, among those
17 that are principally giving pregnancy services,
18 if you're willing to sign up for the state's
19 family PACT program, which requires you to
20 dispense abortifacient drugs, then you are out
21 of the program as well.

22 So through a clever series of
23 legislative gerrymandering, the state has ended
24 up with a result that only nonprofit pro-life
25 pregnancy centers are required to post the

1 notice. And the notice itself is biased.

2 JUSTICE GORSUCH: Well, along those
3 lines, one other question occurs to me that is
4 similar to Justice Breyer's with respect to the
5 adequacy of the record we have for unlicensed
6 clinics.

7 We don't have a lot of evidence with
8 respect to the nature of the burden that would
9 be imposed by the 48-font requirement on all
10 ads. There's some evidence in the amicus
11 briefs that it might be like a \$9,000 a month
12 tax for advertisements.

13 But what do we do about the lack of a
14 record here and whether we should wait for an
15 as-applied challenge --

16 MR. FARRIS: Your Honor --

17 JUSTICE GORSUCH: -- as the government
18 suggests?

19 MR. FARRIS: Your Honor, this Court
20 faced a similar situation in the Ibanez case
21 where there was a detailed disclosure required
22 in a certain financial profession.

23 And this Court didn't have a financial
24 record. It didn't have a financial record in
25 the Miami Herald case either. We simply read

1 the statute and made comments on its
2 inferences.

3 In the advertising context, the rule
4 is the font must be larger than the main body
5 of the ad or the same size as the main body of
6 the ad with special fonts and colors. If
7 that's the case, think of a Chevrolet ad where
8 the warnings about -- or the disclaimers about
9 financing had to be as big or bigger than the
10 word Chevrolet. That is not an effort to
11 inform people. That's an effort to clutter the
12 ad and drown out the message of the ad.

13 JUSTICE GINSBURG: We don't know what
14 kind --

15 JUSTICE SOTOMAYOR: Can we separate --

16 JUSTICE GINSBURG: We don't know what
17 kind of adjustments might have been made
18 because this case went off without any kind of
19 an evidentiary hearing, as was pointed out.

20 But to -- to test what your position
21 is, suppose the -- the -- the law had been
22 simply the people who don't provide abortions
23 or contraceptive services would have to say we
24 don't perform abortions and we don't provide
25 contraceptive services free. Then that would

1 be -- and everybody would know what is being
2 offered.

3 MR. FARRIS: Well, Your Honor --

4 JUSTICE GINSBURG: Would that be --
5 would that be constitutional?

6 MR. FARRIS: Not if it's under the
7 targeted fashion. Again, if all doctors in
8 California who treat pregnant women are under
9 the same requirements, but when there's special
10 imposition upon a targeted group of people
11 because they don't like their position on
12 abortion, that is the form of targeting that
13 this Court outlawed in Sorrell. And that's
14 what is going on here in --

15 JUSTICE SOTOMAYOR: Counsel, can you
16 please explain to me what the difference is
17 between the licensed and unlicensed in terms of
18 the services?

19 MR. FARRIS: Certainly.

20 JUSTICE SOTOMAYOR: And then I have a
21 question based on that. But you seem to be
22 basing your argument on the point that at least
23 the unlicensed people are not providing
24 procedures, correct?

25 MR. FARRIS: They're not providing any

1 medical services as --

2 JUSTICE SOTOMAYOR: Well, they are
3 advertising themselves. I looked at one -- a
4 few of them. An exemplary of this is the
5 Fallbrook Pregnancy Resource Center website.

6 And it's -- I'm fairly
7 sophisticated -- there is a woman on the home
8 page with a uniform that looks like a nurse's
9 uniform in front of an ultrasound machine. It
10 shows an exam room.

11 The text of the page titled "Abortion"
12 says Fallbrook will educate clients about
13 different abortion methods available, and
14 describe in medical terms different abortion
15 procedures.

16 The website also says clients will be
17 evaluated by nurses and that they follow all
18 HIPAA regulations, which if they're not a
19 medical provider, they don't have to follow
20 HIPAA.

21 If a reasonable person could look at
22 this website and think that you're giving
23 medical advice, would the unlicensed notice be
24 wrong?

25 MR. FARRIS: Your Honor, to answer the

1 first part of your question, our unlicensed
2 facilities do not provide any medical services
3 being defined as --

4 JUSTICE SOTOMAYOR: But they do
5 provide medical advice?

6 MR. FARRIS: Well, they -- they
7 provide advice on the topic of pregnancy, which
8 is basically --

9 JUSTICE SOTOMAYOR: So let me ask you,
10 how's that different from what a doctor does?
11 When you go in for a pregnancy, you see the
12 doctor, and the doctor will describe,
13 hopefully, the benefits of a pregnancy and
14 perhaps its risk because, depending -- not all
15 pregnancies are without complications.

16 So this is consulting about a medical
17 condition. How is that any different than
18 Casey? You come in to talk to an -- a doctor
19 about abortion. The state says you have to
20 tell the person the alternatives.

21 MR. FARRIS: Your Honor --

22 JUSTICE SOTOMAYOR: So if you're going
23 to choose to talk to people about -- if you're
24 an unlicensed facility, about pregnancy, why
25 shouldn't you tell people that you're not a

1 doctor?

2 MR. FARRIS: Well, Your Honor, in --
3 in Casey, again, the -- the doctors that were
4 being regulated were -- were the ones that were
5 performing abortion. The Court made note in
6 Casey that it upheld that requirement because
7 it was parallel to the general practice of
8 informed consent.

9 Unlicensed people who talk to women
10 say you can choose parenthood. You can talk
11 about adoption. They talk about the issue of
12 pregnancy. To be sure --

13 JUSTICE SOTOMAYOR: So is it okay for
14 -- is it wrong for a state to tell agencies who
15 give advice on immigration rights -- there's a
16 couple of states like this -- who say if you
17 are going to give advice on immigration
18 matters, you better tell people you're not a
19 lawyer. Those are unconstitutional?

20 MR. FARRIS: No, Your Honor. That New
21 York statute that does that gives those
22 immigration people who are required to give the
23 notice the ability to intervene in cases and
24 matters.

25 That would otherwise be the practice

1 of law. And so what that amounts to is similar
2 to a statute referred to by the state in its
3 brief where natural paths and other alternative
4 providers, who are clearly otherwise engaged in
5 the practice of medicine, are allowed to do so
6 --

7 JUSTICE SOTOMAYOR: Now you're
8 redefining medicine.

9 MR. FARRIS: -- if they give a
10 disclaimer.

11 JUSTICE SOTOMAYOR: Medicine is
12 defined by the state. You need a license to
13 practice medicine.

14 MR. FARRIS: True. In normal
15 circumstances, but --

16 JUSTICE SOTOMAYOR: So if you're
17 giving people advice about pregnancy when you
18 are not a licensed facility, please explain to
19 me what is both misleading, incorrect, or
20 suggestive in any way that a person has to do
21 something like go to this doc -- to a doctor,
22 how is it doing anything other than telling
23 people that, despite how the picture looks on
24 the website, this is not a medical facility?

25 MR. FARRIS: Your Honor, it's illegal

1 in California to practice medicine without a
2 license. It's illegal to pretend to practice
3 medicine without a license.

4 If that's what's going on here, surely
5 California would have found a way to do that
6 before now.

7 JUSTICE SOTOMAYOR: Mr. Farris --

8 JUSTICE KENNEDY: Well, in this case I
9 didn't go beyond the record to look on the
10 Internet because I don't think we should do
11 that, but I do have a hypothetical.

12 What would happen if an unlicensed
13 entity, unlicensed center, just had a billboard
14 that said "Choose Life." Would they have to
15 make the disclosure?

16 MR. FARRIS: Yes, Your Honor.

17 JUSTICE KENNEDY: All right. So
18 they'd have to make a 20-line -- or 20-word --
19 how many words in it? I forget.

20 MR. FARRIS: Right. And it would be
21 29 words.

22 JUSTICE KENNEDY: 29 words.

23 MR. FARRIS: In -- in the same size
24 font --

25 JUSTICE KENNEDY: In the same size as

1 "Choose Life."

2 MR. FARRIS: And in a number of
3 languages, whatever is required by that county.

4 JUSTICE KENNEDY: It's -- we can ask
5 -- we can ask the State of California. Will
6 the State of California disagree with that, do
7 you think? I mean, you don't know?

8 MR. FARRIS: I -- I don't think
9 they'll disagree with that.

10 JUSTICE KENNEDY: Because it seems to
11 me that that means that this is an undue burden
12 in that instance and that should suffice to
13 invalidate the statute.

14 MR. FARRIS: Yes, Your Honor, that's
15 our position.

16 JUSTICE KAGAN: Mr. -- Mr. Farris, can
17 I ask -- you've been pinning a lot when you've
18 tried to distinguish Casey on the idea of
19 informed consent. And certainly some of the
20 requirements in Casey are informed consent in
21 the way we would understand that, talking about
22 the risks of various procedures, all the things
23 that we want doctors to talk about when we go
24 to them and seek medical care.

25 But there were definitely requirements

1 in Casey that don't have much to do with
2 informed consent, as I've ever understood it.
3 You know, the -- the -- the doctor having to
4 inform patients about -- that medical
5 assistance benefits may be available for
6 childbirth in neonatal care, inform women that
7 the father would be liable to pay child
8 support. So those kinds of requirements, they
9 -- they just don't seem to have much to do
10 about informed consent.

11 And they are, and this goes back to
12 Justice Breyer's sauce for the goose point,
13 they're really the exact flip side of the
14 requirements in this case. So how am I
15 supposed to think about that?

16 MR. FARRIS: Your Honor, they are
17 triggered by a medical intervention, rather
18 than -- in this case, it's triggered by a
19 discussion.

20 JUSTICE KAGAN: Well, I realize that
21 that's a factual difference, that there's a
22 doctor in the room, and in one case, there's
23 not, but these are not informed consent
24 requirements.

25 MR. FARRIS: Well, Your Honor, this

1 Court held they were in Casey because they were
2 components of informing women about the
3 alternatives to the abortion process.

4 I see that my time has got to the
5 point that I'd like to reserve the balance for
6 rebuttal. Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Wall.

10 ORAL ARGUMENT OF JEFFREY B. WALL
11 ON BEHALF OF THE UNITED STATES,
12 AS AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY

13 MR. WALL: Mr. Chief Justice, and may
14 it please the Court:

15 The First Amendment allows states to
16 require truthful, factual disclosures about
17 one's own goods or services. What the First
18 Amendment does not allow and what California
19 has done is to require pregnancy centers to
20 make disclosures about services they do not
21 provide and that would violate their most
22 deeply held beliefs without any showing by the
23 state that it truly needs to compel speech
24 rather than speak its own message. That's --

25 JUSTICE GINSBURG: What about -- what

1 about if the -- the law were instead, if you
2 are providing women's health services, you have
3 to list all the services that you provide? And
4 that would apply to everybody. It would apply
5 to facilities that provide abortion and
6 contraceptive services, and it would apply to
7 the natal care -- every -- everyone. Like on
8 food, you have to list all the ingredients.

9 MR. WALL: Yes. I think if California
10 said to -- to all providers across the board in
11 the state you've got to put a notice up on the
12 wall that lists the services you provide, that
13 -- that looks to the United States like
14 truthful, factual information about what you're
15 doing. That seems like -- you know, pretty
16 close to the core of Zauderer.

17 I think the concern here is that the
18 license notice in California and similar
19 statutes in two states, Hawaii and Illinois,
20 are really different from the vast bulk of
21 disclosure requirements like that one.

22 CHIEF JUSTICE ROBERTS: I didn't
23 understand the question to be along the lines
24 that you've answered. It's not simply a
25 requirement of whether or not the facility must

1 list the services they provide. The question
2 is, can they be required to list services that
3 they don't provide but that may be provided
4 elsewhere?

5 JUSTICE GINSBURG: And that wasn't --
6 my question was, does everyone in the women's
7 healthcare business -- if the state decides we
8 want you to tell the public what you provide,
9 what you provide, that's -- that's all.

10 MR. WALL: I may have misunderstood
11 the question. To the extent the notice is
12 about your own services?

13 JUSTICE GINSBURG: Yes.

14 MR. WALL: We -- we think that it's
15 permissible. It's a -- a truthful disclosure
16 about your own services. As you move away from
17 that in the way that three states have done,
18 then I think you're -- you're triggering
19 heightened scrutiny under the First Amendment,
20 which would be --

21 JUSTICE BREYER: So, in your view,
22 family planning clinics do not have to tell any
23 woman about abortion -- adoption?

24 MR. WALL: I think it depends on
25 whether it's tied --

1 JUSTICE BREYER: No, they don't
2 provide adoption; it's not their service.

3 MR. WALL: As Petitioners were saying,
4 if it is just a center that counsels people on
5 abortion in a general sense --

6 JUSTICE BREYER: No, it doesn't. It's
7 a center that helps women plan their families.
8 That's what it is. Now it's not -- they don't
9 have doctors who are performing abortions
10 there. I'm just saying it's a family planning
11 center. Okay? It's an information center.

12 My point is the same. There are
13 millions of people in this country who have
14 views on this subject that are absolutely
15 opposed, one to the other. So that, to me,
16 suggests the law should keep it as simple as
17 possible. And that's why sauce for the goose,
18 sauce for the gander.

19 I mean, if the law is permissible
20 which says, Doctor, you must tell the woman
21 about adoption, then why shouldn't the law say,
22 Family Planning Center, you must tell the woman
23 about abortion? Sounds even-handed, sounds as
24 if everybody in the same business is under the
25 same rules.

1 Now you, the government, and -- and
2 the NIFLA are trying to make a distinction
3 there. And I need to know if you're right, and
4 the only distinction I hear so far is one has a
5 doctor about to perform and the other has just
6 a counselor. Is there any other distinction
7 possible?

8 MR. WALL: Justice Breyer, that is the
9 crucial distinction. I agree with you on the
10 sauce is for the goose and the gander. But
11 when you are performing a medical procedure and
12 you're making disclosures about your own
13 services, what the plurality opinion in Casey
14 says is -- this is at page 83 --

15 JUSTICE BREYER: Yeah, I kept -- it
16 was about doctors. I agree with that.

17 MR. WALL: That's right.

18 JUSTICE BREYER: But I think for most
19 people you'd think family planning, you know,
20 family planning. That's the category.

21 And the woman will make a decision,
22 and then the state can tell them some things
23 they have to say. And we know they can tell
24 them about adoption. They can make them tell
25 them about adoption. So why can't they make

1 them tell them about abortion?

2 MR. WALL: Because, Justice Breyer,
3 that -- when you are going in to have a
4 procedure and you've got to make certain
5 disclosures, that's a disclosure related to --

6 JUSTICE SOTOMAYOR: I'm sorry, but
7 isn't the --

8 CHIEF JUSTICE ROBERTS: Maybe could we
9 let him finish the answer, please?

10 MR. WALL: That's a disclosure related
11 to the service that you're providing. And then
12 it's just a question of how much you have to
13 disclose, and Casey drew that pretty broadly to
14 say at page 83 --

15 JUSTICE KAGAN: But, Mr. Wall, why --
16 go ahead. I'm sorry.

17 MR. WALL: You've got to make an
18 informed choice. And all the government is
19 saying -- we're not saying not goose for the
20 gander; we agree. What we're saying is the
21 more you get away from that kind of a
22 disclosure that's about what you're doing with
23 that patient or customer or client, the more
24 scrutiny it ought to get under the First
25 Amendment.

1 JUSTICE KAGAN: But I think the
2 question is why shouldn't there -- a state
3 says, you know what, this is the regime we
4 want. We want to say to family planning
5 clinics that they should put up a poster saying
6 we do family planning; we do not do adoption.

7 And we want to say to crisis pregnancy
8 centers, along the lines of Petitioners here,
9 we do adoption; we do not do family planning or
10 abortion.

11 And -- and -- and -- and -- and the
12 state thinks that would be a good system
13 because, when a woman goes in to either one of
14 these kinds of places, they'll know what's
15 there and they'll know what's not there.

16 And what -- why would that be
17 problematic?

18 MR. WALL: Well, I think because once
19 it's no longer tied to the specific goods or
20 services that the -- the clinic or center or
21 whomever is -- is providing, then the more we
22 ought to be worried that they're making you
23 just advertise what other people are doing.

24 And this case is even one step beyond
25 your hypothetical because it's not even saying

1 to the clinics, say what you do and don't do.
2 It's saying, look, we want people to know about
3 services that the state provides and --

4 JUSTICE SOTOMAYOR: Mr. Wall, how is
5 that different than Casey? In Casey, we
6 require doctors to hand out state-created
7 materials telling the women about what services
8 the state and others provided, adoption
9 centers, fathers had to pay things.

10 Now I think your distinction, and you
11 keep repeating it, is these centers, I'm
12 assuming both the licensed and unlicensed ones,
13 are not doing procedures. But I don't know
14 what an ultrasound is if not a procedure. I
15 don't know what a pregnancy test is if not a
16 procedure. I don't know how counseling on the
17 pregnancy state is not part of medical advice
18 in the same way a doctor gives it when he's
19 considering an abortion procedure. I don't
20 understand the difference.

21 MR. WALL: So --

22 JUSTICE SOTOMAYOR: Both of them are
23 doing medical-related procedures, and both are
24 being asked -- the Chief said there's a
25 distinction in not advertising someone else's

1 services, but in Casey, we permitted it.

2 So please explain to me again why
3 there's a difference here.

4 MR. WALL: So, Justice Sotomayor, I
5 agree with everything you said in the back half
6 there. And if California were coming in and
7 saying, before you, licensed clinic, perform an
8 ultrasound, you've got to provide certain
9 information to make sure that's an informed
10 choice by that woman to get the ultrasound in
11 the face of risks and alternatives, then it's
12 like Casey, and the question is just how much
13 disclosure do you have to provide. And Casey,
14 I think, gives us important guidance on that.

15 California's notice isn't doing that,
16 at least on the licensed side. On the licensed
17 side, it's not helping the women who come into
18 the clinic make an informed choice to opt into
19 one of the medical procedures. And I'm not
20 disputing that ultrasounds and the rest are
21 procedures that could trigger those kinds of
22 disclosure requirements. It's saying we have a
23 generalized interest in having them know that
24 we provide some low- and free-cost services.

25 And if that's their generalized

1 interest, that's tailor-made to an obvious
2 alternative, which is let the state do what
3 pregnancy centers do --

4 JUSTICE SOTOMAYOR: I'm sorry --

5 JUSTICE ALITO: Mr. Wall, before your
6 --

7 MR. WALL: -- and tell people about
8 what it provides.

9 JUSTICE ALITO: -- before your time
10 expires, can I -- can I ask you something about
11 your brief that -- that troubles me and, that
12 is, the government's request that we recognize
13 a new category of speech called professional
14 speech, which is subject to a -- a lesser
15 standard of review.

16 I mean, this case is very important in
17 itself, but adopting this new category of
18 speech would have far-reaching consequences.
19 And I -- I -- I'd like you to explain why that
20 is consistent with Stevens and other cases
21 where the Court has recently said we are not
22 going to recognize any new categories of
23 unprotected speech and how you would define the
24 boundaries of professional speech.

25 And there have been a lot of cases on

1 -- there have been some cases on this in the
2 lower courts. But just to take a couple of
3 examples: Journalists are professionals. So
4 would they be subject to this standard? How
5 about economists? How about climate
6 scientists?

7 How about a fortune teller? The
8 Fourth Circuit said that a fortune teller is a
9 -- is a professional. How about somebody who
10 writes an advice column for parents?

11 I mean, wouldn't we be getting into
12 very dangerous territory if we do this?

13 MR. WALL: So, Justice Alito, there's
14 a lot there, and I just want to make a few
15 points, and I think the Third Circuit's opinion
16 in King does a pretty nice job of this. The
17 Court's already talked about professional
18 speech. Now it's often talked about it in the
19 context of commercial speech and it's lumped
20 them together in cases like Zauderer and
21 Ohralik.

22 But what we tried to do in our brief
23 was to say, look, there's similar doctrines,
24 they overlap, but they have somewhat different
25 origins, and historically there are certain

1 professions that are regulated. That wouldn't
2 include fortune tellers. It wouldn't include
3 economists or journalists. But it would
4 include doctors and lawyers and maybe
5 accountants. And so we do think that there is
6 some room for the states historically in that
7 area.

8 And what we've tried to say is,
9 whether it's Zauderer or some equivalent for
10 professional speech, if it's a disclosure about
11 what you're doing, we should think that's a
12 fairly low level of scrutiny. And the more
13 that we shift away from that, even in the
14 commercial and professional speech box, we may
15 not get to strict scrutiny, but it is
16 heightened scrutiny and the states' license
17 notice can't satisfy it.

18 I would say that if the Court goes all
19 the way to strict scrutiny, every corrective
20 disclosure that a manufacturer has to make
21 about some product that it's put out in the
22 public that has a risk I think would get strict
23 scrutiny. And our concern is that's going to
24 dilute strict scrutiny and we're concerned
25 that's going to undermine the First Amendment.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.
2 Wall.

3 MR. WALL: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Klein.

5 ORAL ARGUMENT OF JOSHUA A. KLEIN

6 ON BEHALF OF THE RESPONDENTS

7 MR. KLEIN: Mr. Chief Justice, and may
8 it please the Court:

9 The interests served by the licensed
10 disclosure is very much like that of the
11 disclosure in Casey, promoting informed choice
12 by a patient.

13 More specifically, it allows -- it
14 empowers the woman by explaining that her
15 financial circumstance does not make her unable
16 to access alternative and supplemental care,
17 including full prenatal and delivery care that
18 Petitioners do not themselves supply.

19 And it gives her that knowledge in
20 time to be useful, because pregnancy and
21 medical care is extraordinarily time-critical.

22 JUSTICE KAGAN: There is a -- a sense
23 when you read this statute, Mr. Klein, there's
24 at least a question that arises as to whether
25 this statute has been gerrymandered.

1 So would you speak to that? Because
2 if it has been gerrymandered, that's a serious
3 issue. In other words, if, you know, it's
4 like, look, we have these general disclosure
5 requirements, but we don't really want to apply
6 them generally, we just want to apply them to
7 some speakers whose speech we don't much like.

8 MR. KLEIN: Your Honor, the disclosure
9 is targeted at women who seek free care for
10 pregnancy, not at any particular viewpoint.

11 And clinics that by their very
12 licensing status provide free or sliding scale
13 low-cost pregnancy care are the ones where
14 those women are going to be found and where
15 this information is immediately useful to them.

16 JUSTICE ALITO: If you have a law
17 that's neutral on its face, but then it has a
18 lot of crazy exemptions, and when you apply all
19 the exemptions, what you're left with is a very
20 strange pattern and, gee, it turns out that
21 just about the only clinics that are covered by
22 this are pro-life clinics.

23 Do you think it's possible to infer
24 intentional discrimination in that situation?

25 MR. KLEIN: Yes. That kind of

1 hypothetical can support --

2 JUSTICE ALITO: Okay. So let me ask
3 you about some of these exemptions which I
4 think are hard to understand. Why does this
5 apply only to clinics whose primary function is
6 providing service to pregnant women? You could
7 have a small clinic, let's say it's -- it has
8 30 pregnant women come in a month, but that's
9 the primary thing it does.

10 Then you could have a big clinic that
11 has 100 pregnant women come in a month, but it
12 does so many other things that pregnancy is not
13 the primary concern. Why -- why would -- why
14 does the law apply to one and not the other?

15 MR. KLEIN: Well, Your Honor, that
16 serves the purpose of having the disclosure
17 mostly made in the context in which it's useful
18 as opposed to being made in a lot of contexts
19 where it's not.

20 And this Court has said that
21 legislatures should be encouraged to apply
22 speech requirements more narrowly when they can
23 rather than --

24 JUSTICE ALITO: Well, I mean, I don't
25 understand that. Why -- how -- why does it

1 apply almost only to for -- to non-profits and
2 not for-profits? If the purpose is to get this
3 information out to poor women, don't you think
4 there are examples of poor women who stumble
5 into a for-profit facility? Wouldn't it be
6 beneficial for them to know that they could get
7 treatment at no cost through the state?

8 Why are most for-profits exempted?

9 MR. KLEIN: Your Honor, as a category,
10 for-profit clinics do not seem to treat
11 primarily women who need free and sliding-cost
12 scale -- sliding-cost care in the same way.

13 Now I will say it's always possible to
14 imagine a new boundary for the law. But under
15 intermediate scrutiny, a law does not need to
16 be perfect and a legislature can concentrate
17 its efforts at where the need for the law is
18 most apparent.

19 JUSTICE ALITO: What about individual
20 doctors? Why are they exempt?

21 MR. KLEIN: Your Honor, individual
22 doctors specialize as a category in treating
23 people who have a way to pay for care, whether
24 they're already enrolled in Medicaid or health
25 insurance or whether they just have the

1 finances. Free clinics are not on the same --

2 JUSTICE ALITO: So, when you put all
3 this together, you get a very suspicious
4 pattern. And I don't know that we need to go
5 into statistics about what the percentage of
6 covered clinics are -- are pro-life and -- and
7 -- and what are not, but we do -- we have an
8 amicus brief from a party in the state court
9 case where the state court held that this law
10 is unconstitutional. And according to their
11 statistics, 98.5 percent of the covered clinics
12 are pro-life clinics. Do you dispute that?

13 MR. KLEIN: Your Honor, yes. And I
14 understand we're speaking outside of the record
15 here, but that amici's evidence in the state
16 court did not -- was off by I think a factor of
17 10 in terms of how many covered non -- I mean,
18 it differed by a factor of 10 when it told the
19 state court how many covered non-anti-abortion
20 facilities there were.

21 JUSTICE ALITO: So what is your
22 position on that? What's the percentage?

23 MR. KLEIN: Your Honor, the state does
24 not have firm numbers on this. We have done a
25 preliminary assessment which found a

1 significant number of non-anti-abortion-covered
2 facilities.

3 However, I will also say that deriving
4 this from purely state databases is very tricky
5 because they rely on self-reporting that's hard
6 to interpret as to who really does primarily
7 pregnancy care. It's exactly the kind of thing
8 where a record would be useful.

9 JUSTICE KAGAN: Well, could you say --
10 could you say a few words about how these
11 boundaries came about? In other words, you
12 have these various lines that the statute draws
13 and then it has these exemptions.

14 And what was the state thinking -- I
15 mean, you know, and I realize that the state --
16 you know, there are lots of people who were
17 thinking different things, but is there -- give
18 me a little bit more about your theory of the
19 case even as to why these exemptions exist and
20 why these lines are drawn.

21 You've been saying, well, we go where
22 the problem is. But tell me how you knew where
23 the problem was. Tell me how -- what you
24 thought the problem actually was. What were
25 you doing? What were you trying to do?

1 MR. KLEIN: Well, let me start with
2 the question of what the problem is. And the
3 problem is that the state has overseen, and the
4 state legislature has overseen, an expansion of
5 public medical care in California, but has
6 experienced that publicity campaigns invariably
7 leave a gap that was highly concerning to them
8 in the pregnancy context because of the medical
9 issues and because of the severe timing
10 constraints to get care that makes a
11 difference.

12 And so the goal of the statute is to
13 identify women who are seeking pregnancy care
14 and appear unable to pay for it themselves or
15 through insurance or public coverage they
16 already have. That's why it's targeted at free
17 clinics.

18 Now there was a reference to
19 exemptions, and the exemption, leaving aside
20 the exemption for federal clinics, which I
21 think is obvious, the exemption for Medi-Cal
22 F-PACT providers reflects that a notice would
23 serve little purpose at a provider which
24 already provides care under those programs and
25 which have the incentive to help women enroll

1 in them.

2 JUSTICE KAGAN: I mean, one way to
3 think about how a statute like this gets
4 enacted is to say we're -- you know, we're
5 really concerned that there are low-income
6 women, don't have a lot of access to
7 information, don't realize what all their
8 options are, want to make sure in general and
9 across the board that they get the best
10 information that's available to them.

11 Another way to think about what the
12 problem is and how a statute like this comes
13 about is more targeted. It's to say there are
14 these crisis pregnancy centers all over
15 California and we know that women just go into
16 them and they don't realize what they are, and
17 they're being subject to being misled and we
18 think that this is a terrible problem.

19 And it might be that the -- you know,
20 that the state could legitimately view that as
21 a problem. It's a much more targeted problem.
22 Whether it's a problem or not, it's much more
23 targeted than the first.

24 And I guess what I'm asking is, is
25 this the second kind of statute or is it the

1 first kind of statute?

2 MR. KLEIN: It's the first kind of
3 statute, and the author's verbatim statements
4 about this --

5 JUSTICE GORSUCH: Well, if it's the
6 first kind of statute, then why shouldn't this
7 Court take cognizance of the state's other
8 available means to provide messages? If -- if
9 it's about just ensuring that everyone has full
10 information about their options, why should the
11 state free-ride on a limited number of clinics
12 to provide that information?

13 MR. KLEIN: Well, Your Honor, the
14 state -- the legislature is aware of the
15 shortcomings of other methods, as evidenced by
16 the gap that has remained despite their efforts
17 to publicize.

18 Now what you described as -- as
19 free-riding, I'd respectfully submit, is a
20 permissible speech requirement in the
21 professional context. These --

22 JUSTICE GORSUCH: Well, but if you're
23 trying to educate a class of -- of persons
24 about their rights, it's -- it's pretty unusual
25 to force a private speaker to do that for you

1 under the First Amendment.

2 MR. KLEIN: Your Honor, I don't think
3 it's unusual to require a professional to
4 explain alternatives, as -- or additional
5 options that are available, as in Casey and
6 also as in the laws that have been cited in our
7 brief, the New York brief --

8 JUSTICE GORSUCH: Well, put -- put
9 aside --

10 CHIEF JUSTICE ROBERTS: Counsel,
11 maybe --

12 JUSTICE GORSUCH: I'm sorry.

13 CHIEF JUSTICE ROBERTS: I'm sorry.
14 Maybe you could finish your answer to Justice
15 Kagan's question.

16 MR. KLEIN: Let me ask first what is
17 the part --

18 JUSTICE KAGAN: Yeah.

19 MR. KLEIN: -- of Justice Kagan's
20 question she would like for me to --

21 JUSTICE KAGAN: Yeah, I don't -- I
22 don't even remember which was the first kind of
23 statute anymore and which was the second kind
24 of statute. But I was saying a state could
25 really be responding to a sort of

1 generalized -- a feeling that, in general, poor
2 women don't have access to information, or a
3 state could be responding to a -- a feeling
4 that there are a particular kind of a center
5 that is misleading women as to what they do and
6 don't provide.

7 And I can see this statute arising in
8 either of those two ways, and wanted you to
9 tell me why you thought it arose in the first
10 way and not in the second.

11 MR. KLEIN: Right. Well, let -- let
12 me say I don't think they're exclusive. The
13 primary issue is women not knowing where they
14 can get the free care they need for all of
15 their options, including carrying a healthy
16 pregnancy to term and having a healthy baby.
17 But, obviously, the informational problem is
18 going to be especially concerning where there
19 are cases of deception and -- and so forth.

20 And the legislature had some awareness
21 of this, but they didn't draw a statute with
22 that as the primary principle.

23 JUSTICE BREYER: You see, that's what
24 I gave up on. I don't know. I came away from
25 these briefs and I think I got the impression

1 that there are about 60 or so centers, maybe
2 70, that are really pro-life for religious
3 reasons of different kinds, all right? And
4 they don't want to talk about abortions.

5 And then it seemed to me maybe there
6 are a thousand centers all together in
7 California, or several hundred, and I really
8 did end up wondering, well, you know, all those
9 centers, do the poor women really get the
10 information about free abortions? I have no
11 idea.

12 I mean, the fact that they may have a
13 Cal medical thing doesn't mean they tell
14 everybody about it. I don't know what they're
15 like. So this is my question: Don't we need a
16 trial on this?

17 And I don't see -- I mean, I'm just
18 telling you right now I have no idea. And your
19 answers don't tell me. They're not empirical.
20 You haven't told me whether women who don't go
21 to these 67 centers but do go to, say, 700, are
22 all informed whether the center is a -- is a --
23 is a member of the Cal medical program or not.

24 I don't know whether they're all
25 informed, and I suspect that you don't either.

1 And, therefore, I -- I -- I think trial, that's
2 what they're for. What's the answer to that?

3 MR. KLEIN: Your Honor, we agree.

4 JUSTICE BREYER: You agree with that?

5 MR. KLEIN: And the record at the
6 preliminary injunction stage, which is all this
7 concerns, was not sufficient to support an
8 injunction. At a merits stage, there would
9 presumably be a -- a great deal of evidence on
10 both sides and that would --

11 JUSTICE SOTOMAYOR: Mr. Klein, can we
12 go back to the question Justice Kennedy asked
13 the other side, which was for you to affirm or
14 disaffirm that if one of these facilities wrote
15 an ad that just said pro-life and put their
16 name, it appears as if the law would require
17 them to have the statement "This is not a
18 medical facility" in 48-point font?

19 MR. KLEIN: I don't think so, Your
20 Honor, unless the facility was -- I mean, what
21 subjects a facility to the law, if it's
22 unlicensed, is -- are -- this is on page 79a of
23 the Petitioners' appendix, are things like
24 offering obstetric ultrasounds, sonograms --

25 CHIEF JUSTICE ROBERTS: Right. Well,

1 what if it weren't -- we're dealing with the
2 more general principle. What if you had an
3 organization that simply provided adoption
4 services and advertised there is an alternative
5 to abortion, try adoption?

6 Could the state make them include the
7 disclosure requirement that you have with
8 respect to licensed facilities because that's
9 an alternative to pregnancy? I would say you'd
10 want to make all the abortion alternatives also
11 fully available and make the low-income women
12 aware of those. Could you impose that
13 requirement on that facility?

14 MR. KLEIN: I don't think so, Your
15 Honor. And it wouldn't -- and such a
16 requirement wouldn't be serving the same
17 interests. And let me explain why.

18 These facilities -- the licensed
19 facilities provide medical care, page 91 of the
20 Petitioners' appendix, their complaint,
21 describes medical care they provide to pregnant
22 women. And so women go there --

23 CHIEF JUSTICE ROBERTS: So what
24 additional, what, ultrasounds or discussion of
25 family planning, what more would it take to

1 require the adoption center to be covered? Any
2 one of the ones that you have listed for
3 licensed centers?

4 MR. KLEIN: In other words, what would
5 make it subjected to the same kind of
6 requirement as a licensed center?

7 CHIEF JUSTICE ROBERTS: Yeah. At what
8 point -- you know, you say -- let's say that
9 ultrasounds are out of it. Is the disclosure
10 still required for that facility?

11 MR. KLEIN: I don't think the
12 ultrasounds per se make the difference. What
13 would make the difference as a constitutional
14 matter is, is it licensed as a medical facility
15 and does it provide medical care to people who
16 --

17 CHIEF JUSTICE ROBERTS: Like pregnancy
18 testing, if -- if the adoption center also
19 provided pregnancy testing, could you cover
20 them?

21 MR. KLEIN: If it provided it as a --
22 as a licensed medical service through licensed
23 medical providers, then the state would have to
24 justify the sufficiently important state
25 interest with the -- and the --

1 CHIEF JUSTICE ROBERTS: What's your --
2 what's your answer, though? It provides two
3 services, adoption and pregnancy testing.
4 Could you impose the disclosure requirement on
5 that facility?

6 MR. KLEIN: Your Honor, I think it
7 would be much more difficult to justify here.

8 CHIEF JUSTICE ROBERTS: I know.
9 That's why I'm asking the question.

10 (Laughter.)

11 MR. KLEIN: Right.

12 CHIEF JUSTICE ROBERTS: I'm trying to
13 figure out -- I'm trying to figure out the
14 limits of your argument. I mean, the -- the
15 centers here have a variety of services they
16 provide, and you say, because of that, we can
17 impose this requirement on them.

18 Now, before we can say yes or no to
19 your argument, I would like to know the limits
20 of it. So a facility that provides adoption
21 services and pregnancy testing, can they be
22 covered by your law?

23 MR. KLEIN: Through a licensed
24 provider, yes, they could, except --

25 CHIEF JUSTICE ROBERTS: No, that's all

1 they do. I don't know what you mean by
2 "through a licensed provider." That is all
3 they do. They counsel on adoption and they
4 provide pregnancy testing.

5 Could you require them to say, look,
6 there are other options you may want to
7 consider and, therefore, here's a disclosure
8 saying, you know, here are the facilities where
9 you can get other options?

10 MR. KLEIN: On reflection, I think
11 probably not. And here's the difference:
12 Because they're providing a so much more
13 limited set of medical services that it may be
14 less -- less --

15 JUSTICE SOTOMAYOR: Mr. Klein, can we
16 go back to my question? I have read the law
17 with respect to facility, and it requires a
18 facility to do one of -- two of four things
19 before it qualifies under the law.

20 So abortion -- you appear right that
21 they have to, one, offer ultrasounds,
22 obstetrics, sonograms, or prenatal care,
23 pregnancy -- or pregnancy testing or diagnosis
24 or, three, prenatal monogram tests or pregnancy
25 and, four, collect health data. But they have

1 to do two or more of those things.

2 But let's go back to the question
3 Justice Kennedy asked. One of these medical
4 care facilities says "pro-life" and their name.
5 Is that -- are they required to post a notice?
6 And you started by answering the question, and
7 I don't think you finished.

8 MR. KLEIN: And the answer is no,
9 they're not required to. That is not --

10 JUSTICE SOTOMAYOR: Because they're
11 not offering in the advertising one of these
12 services?

13 MR. KLEIN: Because they're not --
14 right, they're not doing two of the --

15 JUSTICE ALITO: No, that's not --
16 that's not -- show me where that is in the
17 statute. If it's a covered facility, then any
18 ad that they put out, including one that just
19 says "Choose Life," has to -- has to include
20 this disclaimer: We're not licensed.

21 MR. KLEIN: But, in order to be a
22 covered unlicensed facility, it has to do two
23 or more of the list of things.

24 JUSTICE ALITO: Yes, it has to do
25 those things. So you have a facility that

1 offers pregnancy testing and they advertise
2 that they offer pregnancy testing. That's all
3 they do. And they put up a sign, an ad that
4 says "choose life." They have to put in the
5 disclaimer?

6 MR. KLEIN: If it -- yes, in that
7 circumstance, they may be required to do that.
8 And --

9 JUSTICE KENNEDY: Do you agree that
10 mandating speech that the speaker would not
11 otherwise give -- indeed, does not agree
12 with -- alters the content of the message?

13 MR. KLEIN: Yes, it does, Your Honor.

14 JUSTICE KENNEDY: All right. So then
15 you are saying on this billboard, the state can
16 require that the message be -- the content of
17 the message be altered, even though they are
18 not providing medical services?

19 MR. KLEIN: Yes, Your Honor, because
20 the criteria are designed not to see who is
21 providing medical services, that's taken care
22 of by our unlicensed practice law, it is
23 designed to address instances where the
24 services that are offered and provided could
25 make a woman believe that she is going to

1 have -- be accessing medical services and is
2 spending her time and resources to -- to do
3 that and is unable to evaluate what she is
4 doing.

5 JUSTICE KENNEDY: Now if we uphold
6 your -- your argument, if we agree with your
7 argument, could the state then amend its
8 statute and say that any evangelical group that
9 has a seven-day rally for pro life has to give
10 required information of this sort?

11 MR. KLEIN: No, Your Honor, I don't
12 think that would follow.

13 JUSTICE KENNEDY: Why not?

14 MR. KLEIN: Well, and even putting
15 aside the -- the free exercise targeting, the
16 --

17 JUSTICE KENNEDY: Oh, so religion is
18 not a part of this calculus in the case that
19 you have?

20 MR. KLEIN: Well, Your Honor, your
21 hypothetical statute did target evangelical
22 groups. That is on its face unconstitutional.
23 So I'm assuming we want to take that out.

24 JUSTICE KENNEDY: It didn't target it.
25 It included it.

1 MR. KLEIN: So I think the statute is
2 reasonably read and applied in -- in
3 recognition of its purposes, which are the
4 purpose to prevent women from making their
5 decisions about where to go based on mistake
6 and confusion about what's offered. That's a
7 classic Zauderer purpose.

8 JUSTICE GINSBURG: May I ask --

9 MR. KLEIN: Now, if in --

10 JUSTICE GINSBURG: -- the -- there was
11 a question raised about 13 different languages
12 and what burden that -- that would be. I don't
13 know what the state's answer to that is. I
14 mean, it is one thing just to say: We are not
15 a licensed medical provider.

16 But if you have to say that, those two
17 sentences in 13 different languages, it can be
18 very burdensome.

19 MR. KLEIN: Your -- Your Honor, if the
20 statute -- if in application to a kind of ad
21 that the centers otherwise have been running
22 and would run, if it makes it too burdensome to
23 place those ads, the statute would be
24 unconstitutional as applied to that. That
25 would --

1 JUSTICE ALITO: Well, what is the
2 situation for Los Angeles County? This is
3 California law. You should know the answer.

4 Somebody is going to put up an ad. A
5 covered unlicensed facility posts an ad in Los
6 Angeles County. In how many languages must
7 they print the disclosure -- the disclaimer?

8 MR. KLEIN: It would be 13. And it
9 would be -- if a plaintiff showed standing and
10 made a record of the kind of ad that they --
11 that they used to run and that it would be
12 impossible to run it that way, it would be
13 unconstitutional, but that requires actual
14 standing and --

15 JUSTICE ALITO: What kind of ad --

16 MR. KLEIN: -- some sort of
17 demonstration.

18 JUSTICE ALITO: -- if it's -- what
19 kind of an ad would -- as to what type of ad
20 would that not be unconstitutional?

21 MR. KLEIN: Well, Your Honor, there is
22 nothing in the record about what ads these
23 plaintiffs do, in fact, run. So we don't know.

24 We do know this doesn't apply to TV
25 and radio ads, for instance.

1 I want to make sure, if I may, to
2 address one point.

3 JUSTICE KENNEDY: So you want me to
4 have a remand for them to tell the court what a
5 billboard is, I -- because I don't know that?

6 MR. KLEIN: Your Honor --

7 JUSTICE KENNEDY: There is a lot of
8 things we don't know, but I think we know what
9 a billboard is.

10 (Laughter.)

11 MR. KLEIN: We don't know what ads
12 these Petitioners or NIFLA members run. It is
13 not in the complaint. And for a preliminary
14 injunction, the court was not -- and the
15 language issue wasn't raised at all on
16 preliminary injunction.

17 So the court did not abuse its
18 discretion with respect to that.

19 JUSTICE GINSBURG: What -- what about
20 -- there were legislative findings about false
21 and misleading representations, has California
22 ever brought charges against any of these
23 places for false and misleading advertising?

24 MR. KLEIN: I'm not aware that the
25 state has. I believe that the city and county

1 of San Francisco has, for instance.

2 But, in any case, that doesn't address
3 the -- such a procedure would not be superior.
4 First, that kind of -- policing that kind of
5 issue would not necessarily be more
6 speech-protective, since it might involve
7 undercover patients, record subpoenas, site
8 visits and the rest.

9 JUSTICE GORSUCH: But counsel, it
10 would have the virtue of applying evenly to all
11 persons and all industries in a law that is
12 very familiar. I mean, anti-fraud provisions
13 in commercial speech are well-known and -- and
14 don't pose any of the problems we've been
15 discussing today.

16 So why wouldn't that be a superior
17 mechanism for addressing these concerns, if --
18 if we're talking about a narrower set of
19 concerns, just any fraud concerns?

20 MR. KLEIN: So to the narrower
21 concerns, which are not the only ones here, it
22 could be significantly more or at least it's an
23 open question about whether it would be as or
24 more speech-intrusive to be really getting into
25 everything that the Petitioners are saying to

1 assess it; as opposed to requiring a
2 two-sentence notice that mostly obviates the
3 need for that because it gives women the
4 information to protect themselves and make
5 informed decisions in the very limited time
6 that they have available, simply by seeing the
7 notice to call the government.

8 And --

9 JUSTICE GORSUCH: The one -- the one
10 is prophylactic and requires you to compel
11 speech from someone else, that -- that
12 implicates First Amendment concerns. The
13 second is -- puts the burden on the government
14 to prove that someone has abused their
15 free-speech rights.

16 And -- and this Court is normally
17 pretty jealously protective of speech. So why
18 isn't, again, that latter approach preferable?

19 MR. KLEIN: For -- for the same reason
20 that it wasn't a necessary step in Casey,
21 because in the regulation of professional
22 speech, the government, given the close and
23 reliant relationship that the patient has on
24 her physician, can require a certain amount of
25 speech to ensure that the -- that the patient

1 makes informed decisions about very important
2 matters.

3 The main difference from Casey is how
4 much less burdensome this disclosure is because
5 there's more flexibility in how it can be
6 delivered and because it's only giving a phone
7 number for the patient to call and get
8 information from the government, rather than
9 requiring the physician to herself hand over a
10 complete state-written pamphlet, which is what
11 the disclosure in Casey required.

12 JUSTICE SOTOMAYOR: Would it be fair
13 to say -- and I still don't have a full answer
14 to my question -- all right, pro-life, nothing
15 else, an unlicensed facility, it meets all of
16 the criteria, has an ad that says just
17 "pro-life" and puts its name. Does it have to
18 give the notice; yes or no?

19 MR. KLEIN: Yes, if it meets the other
20 criteria. And it's possible in an as-applied
21 challenge --

22 JUSTICE SOTOMAYOR: That seems to me
23 more burdensome and wrong because it's not tied
24 to an advertisement that is promoting medical
25 services.

1 MR. KLEIN: May I continue?

2 It's possible that that kind of
3 as-applied challenge would result in
4 invalidating that application, but as in Ayadi,
5 injunctive relief addresses particular
6 problems. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Farris, you have five minutes
10 remaining.

11 REBUTTAL ARGUMENT OF MICHAEL P. FARRIS,
12 ON BEHALF OF PETITIONERS

13 MR. FARRIS: Thank you, Mr. Chief
14 Justice.

15 I would like to first address Justice
16 Kagan's concern about the gerrymandering issue.

17 On page 5 of our reply brief in Note
18 2, we point out the state's website for where
19 the state tells low-income women how they can
20 go to private doctors and get information or
21 get services for pregnancy.

22 Yet those doctors are all exempt from
23 the -- from this ad -- this Act, as are all
24 non-profit clinics that have the general kind
25 of practice that Justice Alito's question

1 described.

2 As to the ad burden, the amicus
3 Heartbeat International on page 24 of their
4 brief gave a mock-up of what an ad would look
5 like when you have simply pregnancy questions
6 and a phone number, and all the -- the
7 languages required in Los Angeles County.
8 That's what it would look like. And it's
9 clearly burdensome.

10 And the unlicensed -- and I think the
11 last answer from California was correct, is it
12 would be triggered if they were otherwise
13 mandated by the -- by the law.

14 I would last like to --

15 JUSTICE GINSBURG: The answer was that
16 this was not brought up in this case until now
17 --

18 MR. FARRIS: Your Honor --

19 JUSTICE GINSBURG: -- and it should be
20 aired below.

21 MR. FARRIS: Your Honor, that's not
22 correct. It was raised below, as OUR reply
23 brief sets out. It's in the complaint. It's
24 in the briefing in the district court. It's in
25 the oral argument in the district court. It's

1 in the briefing and oral argument in the court
2 of appeals. All of those details are on
3 Footnote 5 of our reply brief.

4 The good for the goose, good for the
5 gander concern, here's what's going to happen
6 if California's laws upheld: A pro-life state
7 is going to find out that there is no
8 difference any more between people who perform
9 abortions and those who counsel about it, who
10 talk about it.

11 If merely talking about abortion is
12 sufficient to require you to give pro-life
13 information, we have taken a big step in the
14 wrong direction of politicizing the practice of
15 medicine.

16 If everyone who recommends abortion
17 can have to give these kind of --

18 JUSTICE BREYER: I mean, that's --
19 since it was mine, it's -- it's -- it's you
20 have to be a professional group giving advice
21 in a professional way. It's not -- I don't
22 think the goose and gander has to do with
23 everybody in the world.

24 MR. FARRIS: But --

25 JUSTICE BREYER: It has to do -- and

1 -- and there are things called family planning
2 clinics, et cetera.

3 MR. FARRIS: Certainly, Your Honor.
4 And so taking it on a narrow and then a broader
5 construction, the narrow construction, as I
6 understood your hypothetical, was a family
7 planning center that didn't actually perform
8 abortions but did all the other services.

9 I believe it would be unconstitutional
10 in a pro-life state to require that center
11 because -- to give a pro-life kind of
12 disclaimer that's -- that was required in
13 Pennsylvania because they're not doing anything
14 that relates to the practice of medicine in
15 that context.

16 But taking the broader construction,
17 if we're not going to gerrymander this and say:
18 All doctors who treat pregnant women have to
19 give all the options. If -- if that's the
20 case, doctors who advise to deliver and doctors
21 who advise to get abortions are going to be
22 swept into this requirement.

23 And the political ramifications of
24 that are enormous. We should not politicize
25 the practice of medicine in that way. And the

1 line that Casey drew between performing
2 abortions versus advising about abortions is a
3 constitutionally appropriate line.

4 Thank you, Your Honor. I rest.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:10 a.m., the case in
8 the above-entitled matter was submitted.)

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