

Pregnant women deserve to get the whole truth on their options

MAR 19, 2018

Andis Robeznieks

Senior News Writer

Editor's note: *In a 5–4 decision issued June 26, the U.S. Supreme Court ruled in favor of NIFLA, with Justice Clarence Thomas writing for the majority that the FACT Act requires licensed and unlicensed clinics to post notices about “controversial,” state-provided services such as abortion, which, according to Justice Thomas, “unduly burdens protected speech.”*

The U.S. Supreme Court will hear oral arguments tomorrow in a controversial case that has drawn attention because it touches on the hot-button questions related to abortion and freedom of speech.

But the real issues at stake in *National Institute of Family and Life Advocates v. Becerra* are medical ethics and a patient's right to informed consent, according to an amicus brief filed by the AMA. In its brief, the AMA argues that laws seeking to compel or restrict physician speech should be subject to strict constitutional scrutiny and concludes that a California law aimed at ending deceptive pregnancy counseling meets that high bar.

The National Institute of Family and Life Advocates (NIFLA) is seeking a preliminary injunction against enforcement of California's Reproductive Freedom, Accountability, Comprehensive Care and Transparency (FACT) Act, which took effect Jan. 1, 2016. The state law requires licensed pregnancy-related clinics to disseminate information on available, publicly funded family-planning services, including contraception and abortion. It also mandates that unlicensed facilities post a notice stating that they are not licensed by the state of California.

A three-judge panel of the 9th U.S. Circuit Court of Appeals unanimously upheld a lower-court ruling denying the injunction sought by NIFLA, a Virginia-based corporation with—at the time of the decision—73 licensed and 38 unlicensed facilities located in California. Two other parties to the lawsuit against California Attorney General Xavier Becerra are Pregnancy Care Clinic (PCC), which is licensed by the state, and the Fallbrook Pregnancy Center, which is not licensed.

The judges rejected the petitioners' arguments that the law violated their rights to free speech.

"The act is a content-based regulation that does not discriminate based on viewpoint," wrote Senior Circuit Judge Dorothy Nelson, explaining how the law applied to all clinics regardless of their stance on abortion or contraception.

Arguing on behalf of the respondents in *NIFLA v. Becerra*, the brief lists three reasons for the AMA's interest in the case. They are to ensure that physicians:

- Can care for patients without government's undue interference.
- Can enjoy the right to speak—or not to speak—without "government constraints arising from partisan objectives."
- Practice ethically without misleading patients to satisfy a personal moral or religious belief.

Reining in unethical practices

The AMA brief argues that any law restricting or compelling physician speech and targeted toward a matter of general public debate should be subjected to "strict scrutiny."

In order to pass legal muster under the strict scrutiny test, the government must demonstrate that a law is narrowly tailored to serve a compelling interest. In this case, the AMA brief argues that statements made on the PCC website and in its court brief establish a compelling reason to require adherence to the Reproductive FACT Act.

The brief focuses on "California's compelling interest in mitigating the prima facie unethical practices of PCC's physicians," the need for informed consent, and the "time-sensitive health care decision" of whether to give birth.

"Pregnant women are entitled to information about their medical condition when they seek care," the brief says. "If patients are delayed in receiving this information, they may lose the right to make a decision at all."

The brief cites a PCC publication that hints at a strong association between abortion and breast cancer.

This link is "debatable, tenuous and dependent on multiple extraneous factors," the brief states. Yet PCC presents the purported link in such a way that, despite the legal disclaimers and caveats, "ninety-nine people out of 100 will read this statement and conclude, as intended, that the medical research shows that women who abort their fetus are significantly more likely to develop breast cancer than those who give birth."

(A recent article in the *AMA Journal of Ethics*® written by two physicians also highlights unethical practices and “dubious communication strategies” at so-called crisis pregnancy centers).

If physicians’ personal beliefs prevent them from counseling patients on abortion or contraceptives, the AMA brief argues, the doctors are ethically obligated to refer the patients to someone who can.

“PCC makes no bones about its failure to do this,” the brief says.

“The foundations for an ethical physician-patient relationship are trust and honesty,” the brief concludes. “At the core of responsible medical practice is respect for patients’ ability to make informed and autonomous decisions about their own healthcare. The obligations to patients sit above the physician’s own self-interest.”

The court’s decision is expected in June.