Reflections

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The Battle Over Morally-Offensive, Compelled Speech

On March 20, the U.S. Supreme Court heard oral arguments in the case of *National Institute of Family and Life Advocates (NIFLA) v. Becerra*. The issue to be decided is whether the government can compel a faith-based ministry to proclaim a message that is in opposition to its mission.

Compelled behavior and speech have been tactics used by governments, throughout the ages, in many nations and in many cultures, to stigmatize, penalize and suppress minority religious views. In Elizabethan England, Catholics were fined if they did not attend Sunday services in an Anglican Church. Until the 20th century, Muslim nations imposed a jizya or yearly tax on non-Muslims living in the country. In Nazi-occupied territory during World War II, Jews were required to wear a Star of David on their clothing.

In October 2015, California passed the *Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act*, which requires all pregnancy care facilities to post notification in their waiting areas and in their advertising that the state offers free or low-cost abortions to women who qualify, along with a phone number that provides quick access to abortion clinics. These centers must do so even though they find the government-provided message morally offensive and it directly contradicts the purpose for which the centers exist.

The California law also requires pro-life, non-medical centers to inform clients that they are not licensed medical providers and have no licensed medical provider who supervises the provision of services -- effectively requiring them to advertise what they don't do or claim to do.

Under questioning from the Supreme Court justices, the California deputy solicitor general admitted that if a pro-life pregnancy center took out a billboard advertisement with the words "Choose Life," it would have to include in the same size font the 29-word government statement. If the billboard were in Los Angeles, the statement would have to be in 13 languages.

Pro-life pregnancy care centers are virtually the only groups affected by the mandate. Organizations, such as Planned Parenthood, which serve as the abortion providers for California's Medi-Cali and Family PACT (Planning, Access, Care, and Treatment) programs, are exempt from the requirement. The latter are not required to notify clients about the non-abortion services offered by pro-life organizations, such as prenatal care, material support, and adoption services, or to show ultrasounds to their patients. Thus, the mandate is not designed to make known maternity options, but rather to force pro-life centers to convey the government's viewpoint and advertise for abortion providers.

NIFLA, on behalf of the 140 pregnancy resource centers in California that are its members, sought a preliminary injunction to prohibit enforcement of the FACT Act, claiming that the law violated their First Amendment rights to free speech and free exercise of religion. The 9th Circuit Court of Appeals upheld the law, and on November 13, the Supreme Court agreed to review NIFLA's free speech argument.

Laws similar to California's FACT Act have been enacted across the nation. They have been challenged with varying results. In March 2014, Centro Tepeyac, won a suit overturning a Montgomery County, MD, law requiring pro-life pregnancy centers which counsel expectant women to advise clients to speak with licensed medical professionals; the law did not apply to abortion providers, such as Planned Parenthood, even if they offer counseling by non-medical persons.

In June 2014, Austin LifeCare, part of the Care Net network in Texas, won a suit overturning an Austin city law requiring pro-life pregnancy care centers to post signs stating they do not offer abortions or birth control drugs.

New York City passed an ordinance in 2011 requiring pro-life pregnancy centers to provide printed and oral notices that emphasize abortion and encourage women to go elsewhere. After the courts struck down most of the provisions, a settlement was reached in 2016 that frees the centers from posting messages that are contrary to their beliefs.

In July 2017, an Illinois court issued a statewide preliminary injunction against a 2016 statutory change to the state Health Care Right of Conscience Act that would force pro-life medical professionals to refer patients for abortions and to counsel patients on what the legislation calls the "benefits" of abortion.

On January 5, 2018, the Fourth Circuit Court of Appeals ruled in favor of the Greater Baltimore Center for Pregnancy Concerns, a pro-life Catholic charity, which had sued to overturn a Baltimore city ordinance passed in 2009. The ordinance, which pertained only to "limited-service" pro-life pregnancy centers, required them to post a disclaimer in their waiting rooms that they do not provide abortion or birth control services. After seven years of litigation, the appellate court ruled that the ordinance violated the First Amendment's guarantee of freedom of speech because it forced "a politically and religiously motivated group to convey a message fundamentally at odds with its core belief and mission."

But even as laws are being overturned by the courts, others are being enacted. In July 2017, Hawaii passed a pregnancy center signage law similar to the one in California; pro-life groups have said it will be contested in the courts.

The various signage laws are classic examples of content and viewpoint discrimination in compelled speech. The messages to be conveyed are antithetical to the religious and ideological reasons the pro-life centers exist. The laws should only be sustained if the relevant government body can substantiate that it is meeting a compelling government interest that cannot be achieved in a less restrictive way.

That is why *NIFLA v. Becerra* is important. If the Supreme Court rules in favor of California, other abortion-promoting statutes will likely follow. If NIFLA wins, but with a narrow ruling, California will not be able to enforce the law, but there will be little guidance for other pregnancy-related, compelled-speech cases pending in the lower courts. A broad ruling could resolve the question of such laws once and for all.

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