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Reclaiming Access to Truth in Reproductive Healthcare After *National Institute of Family & Life Advocates v. Becerra*

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NOTE

RECLAIMING ACCESS TO TRUTH IN REPRODUCTIVE HEALTHCARE AFTER *NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES V. BECERRA*

Diane Kee*

Crisis Pregnancy Centers (CPCs) are antiabortion organizations that seek to “intercept” people with unintended pregnancies to convince them to forego abortion. It is well documented that CPCs intentionally present themselves as medical professionals even when they lack licensure, while also providing medically inaccurate information on abortion. To combat the blatant deception committed by CPCs, California passed the Reproductive FACT Act in 2015. The Act required CPCs to post notices that disclosed their licensure status and informed potential clients that the state provided subsidized abortion and contraceptives. Soon after, CPCs brought First Amendment challenges to these disclosure requirements, claiming that the state could not compel them to speak a message against their will. In 2018, the Supreme Court decided National Institute of Family and Life Advocates (NIFLA) v. Becerra and constitutionalized CPCs’ efforts to evade regulation from state-mandated compelled disclosures—disclosures not dissimilar to those regularly imposed on other businesses and medical professionals.

Although CPCs use the guise of professionalism to increase their credibility, they are not held to the same standards as actual medical professionals. States can force abortion providers to violate ethical codes by requiring them to give patients medically inaccurate information as “informed consent,” yet CPCs cannot be compelled to say anything because they are not real professionals. This Note argues that while there are striking parallels between abortion-related informed consent laws and compelled informational disclosures like the CPC disclosures at issue in NIFLA, the Court has refused to treat pro-choice speech in a manner similar to antiabortion speech. Moreover, though NIFLA has drastically limited the types of CPC regulations that pro-choice governments can implement, there are still ways in which these states can and should curb CPCs’ deceptive practices.

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INTRODUCTION

In recent years, the rapid growth of Crisis Pregnancy Centers (CPCs) in the United States has alarmed pro-choice legislators and activists.¹ CPCs are

1. See, e.g., Ramiro Ferrando, *While Abortion Clinics Diminish, Crisis Pregnancy Centers Flourish*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Feb. 19, 2019), <https://investigatamidwest.org/2019/02/19/while-abortion-clinics-diminish-crisis-pregnancy-centers-flourish/> [https://perma.cc/LU5P-DTV4] (explaining that approximately 500 new CPCs have opened between 2010 and 2018, overtaking the number of abortion clinics in almost every state); Rebecca Grant, *These Clinics Used to Provide Abortions. Now They Are Owned by Antiabortion Activists.*, LILY (Sept. 19, 2018), <https://www.thelily.com/these-clinics-used-to-provide-abortions-now-they-are-owned-by-antiabortion-activists/> [https://perma.cc/35L6-G4WX]; Emma Green, *Should Pro-Life Clinics Have to Post Information About Abortion?*, ATLANTIC (Mar. 19, 2018), <https://www.theatlantic.com/politics/archive/2018/03/nifla-becerra-crisis-pregnancy-centers-supreme-court/555887/> [https://perma.cc/AV7E-RGBM]; Garnet Henderson, *Anti-Choice Clinics Are Changing the Way They Operate to Qualify for Government Funding*, VICE (Jan. 15, 2019, 2:25 PM), https://www.vice.com/en_us/article

antiabortion organizations that use deceptive practices to draw pregnant people into their centers,² aiming to convince them to carry their pregnancies to term by providing medical misinformation on abortion.³ CPCs attract primarily young, low-income clientele by offering free medical services like sonograms and pregnancy tests.⁴ Although CPCs are often unlicensed and staffed by lay volunteers, they are designed to look like real healthcare facilities, going so far as dressing volunteers in white lab coats and asking clients to fill out standardized forms to “replicate[] the look and feel of a typical medical office.”⁵ CPCs also use a “co-location” strategy, establishing facilities near abortion clinics to confuse and intercept pregnant people on their way to receive actual abortion care.⁶ These efforts to obfuscate extend to the digital space, where CPCs have been known to run targeted advertisements for their facilities atop Google search results for words like “abortion” and “morning-after pill.”⁷ Despite this campaign to link CPCs with abortion services and education, CPCs do not actually provide abortions or abortion referrals.⁸ Instead, CPCs provide medically inaccurate information about the health risks of abortion and intentionally mislead clients into believing that they can delay seeking abortion care.⁹

Pro-choice states and cities have attempted to regulate CPC conduct by requiring CPCs to inform potential clients of their unlicensed status and to disclose the availability of state-subsidized abortion and contraceptives.¹⁰ To avoid making these disclosures, CPCs have successfully raised First

/8xpw8b/crisis-pregnancy-centers-medical-services-government-funding [https://perma.cc/L8S6-XDBH].

2. I use the term “pregnant people” rather than “pregnant women,” as it is more inclusive and accurately encapsulates the fact that pregnancy is not a condition exclusive to those who identify as cisgender women.

3. NAT’L ABORTION FED’N, *CRISIS PREGNANCY CENTERS: AN AFFRONT TO CHOICE 1* (2006); NARAL PRO-CHOICE CAL. FOUND., *UNMASKING FAKE CLINICS: AN INVESTIGATION INTO CALIFORNIA’S CRISIS PREGNANCY CENTERS* (2015).

4. See Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 PERSPS. ON SEXUAL & REPROD. HEALTH 201, 201 (2012).

5. LISA MCINTIRE, NARAL PRO-CHOICE AM. FOUND., *CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM 15* (2015); see also Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 AMA J. ETHICS 269, 270–71 (2018) (“[CPCs] strive to appear as sites offering clinical services and unbiased advice.”).

6. MCINTIRE, *supra* note 5, at 5–6.

7. *Id.* at 4–5 (noting that two major CPC networks spend \$18,000 per month on pay-per-click advertising to appear prominently in searches for abortion-related terms).

8. Andrea Swartzendruber, Anna Newton-Levinson, Ashley E. Feuchs, Ashley L. Phillips, Jennifer Hickey & Riley J. Steiner, *Sexual and Reproductive Health Services and Related Health Information on Pregnancy Resource Center Websites: A Statewide Content Analysis*, 28 WOMEN’S HEALTH ISSUES 14, 14 (2018).

9. See NARAL PRO-CHOICE CAL. FOUND., *supra* note 3; Rosen, *supra* note 4, at 202.

10. See Hayley E. Malcolm, Note, *Pregnancy Centers and the Limits of Mandated Disclosure*, 119 COLUM. L. REV. 1133, 1149–58 (2019) (evaluating states’ and cities’ attempts at regulating CPCs and their varying degrees of success).

Amendment challenges to the regulations, claiming that the state could not force them to share this information against their will.¹¹ In 2018, the Supreme Court decided *National Institute of Family and Life Advocates (NIFLA) v. Becerra* and constitutionalized CPCs' efforts to evade regulation from state-mandated compelled disclosures—disclosures not dissimilar to those regularly imposed on other businesses and medical professionals.¹² By finding that disclosures related to licensure and state-subsidized reproductive healthcare were “anything but . . . ‘uncontroversial’” and not part of obtaining informed consent for a medical procedure,¹³ the *NIFLA* Court allowed CPCs to “weaponiz[e] the First Amendment,”¹⁴ leaving vulnerable people at the other end of the sword.

NIFLA is just the latest example of troublingly uneven application of First Amendment principles in the abortion-rights context. Since *Planned Parenthood v. Casey* was decided in 1992, antiabortion informed consent requirements have grown increasingly extreme, requiring doctors to give medically inaccurate information to abortion patients.¹⁵ When challenged, these laws must only survive rational basis review.¹⁶ On the other hand, CPCs use deceptive practices to lure clients into their centers, even dressing their volunteers like doctors to increase credibility.¹⁷ But after *NIFLA*, a court evaluating a CPC disclosure requirement will apply strict scrutiny, making it difficult for states to combat CPC deception through speech-related means.¹⁸ This Note argues that while there are striking parallels between abortion-related informed consent laws and compelled informational disclosures like the CPC disclosures at issue in *NIFLA*, the Court has refused to treat pro-choice speech in a manner similar to antiabortion speech. Moreover, though *NIFLA* has drastically limited the types of CPC regulations that pro-choice governments can implement, there are still ways in which these states can and should curb CPCs' deceptive practices.

Part I traces the development of the commercial speech doctrine and the prevalence of state-mandated disclosures in commercial settings. Part I also discusses failed attempts at implementing CPC compelled disclosures and explains how the holding of *NIFLA* has foreclosed certain speech-related solutions for preventing CPC deception. Part II further explores the legal standards that courts use to evaluate compelled commercial speech and describes the similarities between compelled commercial disclosures and informed consent laws. In addition, Part II identifies why it is especially

11. See *id.* at 1153–58.

12. 138 S. Ct. 2361 (2018).

13. See *Nat'l Inst. of Fam. & Life Advocs. (NIFLA)*, 138 S. Ct. at 2372–73.

14. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

15. See *infra* notes 31–35 and accompanying text.

16. See *infra* note 116 and accompanying text.

17. See *supra* notes 2–9 and accompanying text.

18. See *infra* Section II.C.

troublesome that CPCs operate under the guise of professionalism but cannot be regulated as actual professionals. Lastly, Part III proposes three potential solutions to prevent CPCs from engaging in deceptive practices. First, even though *NIFLA* clearly signals that states cannot compel CPCs to make disclosures, states may still legislate to prohibit CPCs from making false claims related to pregnancy and abortion. In addition, this Note proposes two other solutions that intentionally avoid implicating First Amendment issues altogether—arguably the most prudent path forward for pro-choice states after *NIFLA*.

I. COMMERCIAL SPEECH DOCTRINE AND CRISIS PREGNANCY CENTER DISCLOSURES

Before *NIFLA*, several states and cities implemented CPC disclosure requirements in response to growing evidence that deception and misinformation were integral to CPCs' strategy of luring unsuspecting people into their centers.¹⁹ For example, New York City passed a comprehensive CPC disclosure ordinance after finding that CPCs engaged in deceptive practices, including misleading clients about the services available at the centers.²⁰ Although the First Amendment generally prohibits states from compelling an unwilling speaker to deliver a certain message, this Part begins by discussing the prevalence of compelled disclosures in the context of commercial speech. Section I.A also traces the development of the commercial speech doctrine, which recognizes that speech made for the purpose of effecting a commercial transaction receives limited First Amendment protection and allows states to more easily impose compelled disclosures on commercial actors. Section I.B analyzes how California's Reproductive FACT Act, the law at issue in *NIFLA*, was struck down as an impermissible compelled commercial speech disclosure. Finally, Part I.C describes courts' incongruent treatment of pro-choice and antiabortion speech, a disparity made most clear when comparing CPC disclosure requirements (which have almost invariably been struck down) to antiabortion informed consent laws (which have almost always survived judicial review).

19. See Kathryn E. Gilbert, Note, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 MICH. L. REV. 591, 593–94 (2013) (collecting CPC disclosure statutes and ordinances); *Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers*, AM. PUB. HEALTH ASS'N (Nov. 1, 2011), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/22/08/33/regulating-disclosure-of-services-and-sponsorship-of-crisis-pregnancy-centers> [https://perma.cc/LP7A-CEE2].

20. N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 20, ch. 5, § 20-816 (2016). The ordinance required CPCs to inform potential clients that the City's Department of Health and Mental Hygiene encouraged pregnant people to seek care from a licensed medical provider and mandated disclosure of whether the CPC was staffed by a licensed medical provider and whether it provided abortion referrals. § 20-816(a)–(c). These notices were to be posted at the entrance and in the waiting room of the facility in English and Spanish. § 20-816(f).

A. *When Speech May Be Compelled*

It is axiomatic in First Amendment jurisprudence that “freedom of speech prohibits the government from telling people what they must say.”²¹ Nonetheless, the government *can* compel individuals and organizations to speak without running afoul of the First Amendment’s general proscription against compelled speech by legally “requir[ing] them to provide somewhat more information than they might otherwise be inclined to present.”²² For example, attorneys can be compelled to turn over the names and tax-identification numbers of their clients to the IRS,²³ disclose to clients that they may be liable for other costs even if the attorney is hired on a contingent-fee basis,²⁴ and inform clients seeking debt-relief assistance that the firm provides bankruptcy services.²⁵ Restaurants and food producers can be required to post calorie counts on menus,²⁶ label whether the food is a product of genetic engineering,²⁷ and indicate the country of origin of meats.²⁸ Tobacco companies have been forced to provide warnings about the dangers of tobacco use,²⁹ and cell phone retailers may have to warn consumers about the risk of excessive exposure to radio-frequency radiation from carrying a cell phone.³⁰

States can also compel abortion providers to relay an antiabortion message as part of obtaining a patient’s informed consent for the procedure.³¹ For example, Mississippi’s informed consent statute requires providers to tell

21. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61 (2006).

22. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 650 (1985).

23. *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995).

24. *Zauderer*, 471 U.S. at 650.

25. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252–53 (2010).

26. *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 136 (2d Cir. 2009).

27. *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 635 (D. Vt. 2015).

28. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014).

29. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 561, 565 (6th Cir. 2012); *Cigar Ass’n of Am. v. U.S. Food & Drug Admin.*, 315 F. Supp. 3d 143, 189 (D.D.C. 2018).

30. *CTIA—The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 852 (9th Cir. 2019).

31. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (upholding informed consent requirement for physicians to tell abortion patients about adoption and child-support resources); *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 423–24 (6th Cir. 2019) (upholding informed consent law requiring physicians to show an abortion patient the fetus and play the fetal heartbeat while describing the image to the patient); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012) (same); *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 667–68 (8th Cir.) (upholding informed consent law requiring doctors to tell abortion patients that they are terminating “the life of a whole, separate, unique, living human being”), *vacated in part on other grounds on reh’g en banc*, 662 F.3d 1072 (8th Cir. 2011), *and rev’d in part on other grounds on reh’g en banc*, 686 F.3d 889 (8th Cir. 2012); *Doe v. Parson*, 368 F. Supp. 3d 1345, 1347 (E.D. Mo. 2019) (upholding law requiring physicians to give abortion patients a booklet stating that “[t]he life of each human being begins at conception,” as part of an informed consent requirement).

patients that abortion is linked to breast cancer and infertility.³² Alabama compels doctors to claim that “[an] unborn child” over nineteen weeks’ gestation may survive outside of the womb.³³ Arizona and Nebraska mandate that medication-abortion providers inform patients that the effects of mifepristone, the abortion pill, can be reversed after being taken³⁴—a scientifically inaccurate claim.³⁵

Courts have identified three main rationales for why states can compel entities to speak in certain situations. First, the government has a substantial interest in preventing deception in commercial transactions, which the government effectuates by compelling businesses to make disclosures to consumers.³⁶ Second, compelled disclosures further the government’s substantial interest in helping consumers make informed purchasing decisions.³⁷ And third, in the case of informed consent laws, the government is said to be regulating the practice of medicine as professional conduct that incidentally involves speech.³⁸

Two of these rationales—preventing deception and providing information to consumers—are rooted in a concept known as the commercial speech doctrine. The doctrine, which developed out of content-based restrictions on advertising,³⁹ provides an exception to the general rule by allowing the government to restrict private expression based on the content of the speech.⁴⁰ Typically, if a court finds that a law imposes a content-based restriction on speech, the law must survive strict scrutiny to stand.⁴¹ But the Supreme Court has treated restrictions on commercial speech—speech that does “no more than propose a commercial transaction”—quite differently.⁴² In *Valentine v. Chrestensen*, the Court upheld a New York City ordinance

32. MISS. CODE ANN. § 41-41-33 (2018).

33. ALA. CODE § 26-23A-4 (LexisNexis 2016).

34. ARIZ. REV. STAT. ANN. § 36-2153 (2018); NEB. REV. STAT. ANN. § 28-327 (LexisNexis 2015).

35. AM. CONG. OBSTETRICIANS & GYNECOLOGISTS, FACTS ARE IMPORTANT: MEDICATION ABORTION “REVERSAL” IS NOT SUPPORTED BY SCIENCE (2017), <https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactsAreImportantMedicationAbortionReversal.pdf> [<https://perma.cc/4X2N-6PQ7>].

36. See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

37. See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 24, 27 (D.C. Cir. 2014); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

38. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

39. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980).

40. See, e.g., *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

41. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (explaining that to justify “differential treatment” of speech based on its content, the state must show a compelling state interest with narrow tailoring to meet the end).

42. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 385 (1973).

that prohibited the distribution of handbills for advertising purposes under a rational basis standard, finding that “the First Amendment categorically did not apply to restrictions on ‘purely commercial advertising.’”⁴³ After *Valentine*, however, several cases limited its stringent holding by carving out spaces where some commercial speech could receive First Amendment protection.⁴⁴

The Court formally overruled *Valentine* in 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, recognizing for the first time that speech made solely for commercial purposes merits First Amendment protection.⁴⁵ In *Virginia State Board*, the Court held that a state law banning the advertisement of prescription drug prices was an unconstitutional violation of a pharmacist’s First Amendment right to provide “truthful information about entirely lawful activity.”⁴⁶ The Court determined that First Amendment protection is available even when a speaker’s interest in promoting a certain message is “purely economic.”⁴⁷

Challenges to content-based restrictions on commercial advertising further shaped commercial speech doctrine. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court held that content-based restrictions on commercial speech should only be subject to intermediate scrutiny, a lower standard than the strict scrutiny applied to content-based restrictions on noncommercial speech.⁴⁸ Therefore, *Central Hudson* made clear that “the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech.”⁴⁹

Sensibly, in *Bolger v. Youngs Drug Products Corp.*, the Court laid out factors to consider when identifying whether speech is commercial—and therefore subject to intermediate scrutiny per *Central Hudson*.⁵⁰ To determine whether it is dealing with commercial speech, a court asks if (1) the speech is

43. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 779 (1999) (quoting *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)).

44. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 820 (1975) (striking down a ban on advertising abortion by reasoning that *Valentine* did not hold that all advertising is per se unprotected under the First Amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (finding that a paid advertisement was entitled to First Amendment protection because it “expressed opinion, recited grievances, [and] protested claimed abuses”); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (“[The state] may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books . . . or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.”).

45. 425 U.S. 748, 762 (1976).

46. *Virginia State Bd.*, 425 U.S. at 773.

47. *Id.* at 762.

48. 447 U.S. 557, 566 (1980); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 883 (2015).

49. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65–68 (1983).

50. *Id.*

an advertisement, (2) the speech references a specific product, and (3) the speaker is economically motivated.⁵¹ In application, the *Bolger* factors are not independently dispositive, but when taken together, they may suggest that speech is commercial.⁵²

Despite finding that commercial speech deserves constitutional protection, the Court has been adamant that commercial speech holds a “subordinate position in the scale of First Amendment values” and receives a more “limited measure of protection, . . . allowing modes of regulation that might be impermissible in the realm of noncommercial expression.”⁵³ As discussed further in Part II, when the Court eventually confronted the question of whether a government could *compel* businesses to say more than they would otherwise choose (as opposed to *restricting* commercial speech in prior cases), it continued to apply a relaxed standard of review for compelled disclosures in the commercial context.⁵⁴

The Court first decided the issue of compelled commercial speech in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.⁵⁵ In *Zauderer*, the Court held that a state could “prescribe what shall be orthodox in commercial advertising” when a compelled disclosure required a commercial actor to include “purely factual and uncontroversial information” in their advertising.⁵⁶ The Court relied on this language in *NIFLA*, determining that an abortion-related restriction was simply too controversial to be mandated.⁵⁷

B. *Compelled Speech in Crisis Pregnancy Centers and NIFLA*

Crisis Pregnancy Centers (CPCs) are antiabortion organizations “that seek to intercept women with unintended or ‘crisis’ pregnancies who might be considering abortion” with the ultimate goal of convincing them to carry the pregnancy to term instead.⁵⁸ Supported by public funds, CPCs are also notorious for deceiving clients into believing that they will receive actual medical care from licensed professionals or that they could even obtain an abortion at the CPC facility.⁵⁹

51. *Id.*; see, e.g., *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990) (applying the three *Bolger* factors).

52. *Bolger*, 463 U.S. at 66–67.

53. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

54. See *infra* Section II.A.

55. 471 U.S. 626 (1985).

56. *Zauderer*, 471 U.S. at 651.

57. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (“The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’” (alteration in original) (quoting *Zauderer*, 471 U.S. at 651)).

58. *Bryant & Swartz*, *supra* note 5, at 269.

59. See MCINTIRE, *supra* note 5, at 2–4 (explaining that CPCs are designed to “look[] like a typical women’s clinic,” but if a woman calls a CPC to make an appointment for an abor-

CPCs commonly offer free pregnancy tests, ultrasounds, STI testing, and antiabortion counseling, but these services are often administered by volunteers without professional credentials.⁶⁰ Moreover, CPC staff frequently give clients medically inaccurate or misleading information about the physical- and mental-health consequences of abortion.⁶¹ Pregnant people may be told that abortion is available throughout all nine months of pregnancy or given an intentional misdiagnosis of gestational age.⁶² These objectively false claims are intended to delay clients from seeking abortion care until it is too late.⁶³

Requiring CPCs to make disclosures to potential clients appears to track all three rationales for permissible compelled speech: to prevent deception, enhance consumer knowledge, and regulate informed consent for reproductive healthcare. After building a record on CPCs' deceptive practices and finding that low-income people targeted by CPCs were unaware that the state offered subsidized reproductive healthcare, California passed the Reproductive FACT Act in 2015, mandating that CPCs make two key disclosures to potential clients.⁶⁴ First, the Act required unlicensed CPCs to post a notice informing potential clients of their unlicensed status.⁶⁵ Second, the Act required CPCs to display information about obtaining free or low-cost abortion and contraception from state-funded organizations.⁶⁶ Litigation ensued, and in June 2018 the Supreme Court held in *NIFLA v. Becerra* that NIFLA was likely to succeed on its First Amendment claim that compelling CPCs to post these disclosures in their facilities and on their websites was unconstitutional.⁶⁷

In that case, NIFLA sought to enjoin enforcement of the FACT Act, arguing that the disclosures were impermissible compelled speech.⁶⁸ The Court reversed the Ninth Circuit's affirmance of the District Court's denial of a preliminary injunction, holding instead that NIFLA was likely to succeed on

tion, "she is given vague or confusing answers, and told to come to the clinic to discuss in person"); see also 'Choose Life' License Plates, GUTTMACHER INST. (May 1, 2020), <https://www.guttmacher.org/state-policy/explore/choose-life-license-plates> [<https://perma.cc/6BWX-C8PW>]; Kenneth P. Vogel & Robert Pear, *Trump Administration Gives Family Planning Grant to Anti-abortion Group*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/us/politics/trump-grant-abortion.html> [<https://perma.cc/8LLW-DT88>].

60. Bryant & Swartz, *supra* note 5, at 270–71.

61. See MCINTIRE, *supra* note 5, at 8–10.

62. See Beth Vial, *What It Was Like to Get a Later Abortion*, TEEN VOGUE (Feb. 8, 2019), <https://www.teenvogue.com/story/what-it-was-like-to-get-a-later-abortion> [<https://perma.cc/5PGL-7W2F>].

63. MCINTIRE, *supra* note 5, at 12.

64. Reproductive FACT Act, 2015 Cal. Stat. 5351

65. Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 71 (2019).

66. *Id.*

67. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018).

68. *Id.* at 2370.

the merits of its First Amendment claim.⁶⁹ The Court applied strict scrutiny to the disclosures, rather than deferential *Zauderer* review, because a bare majority of the justices concluded that abortion was “anything but an ‘uncontroversial’ topic,” thus failing *Zauderer*’s “purely factual and uncontroversial” standard for compelled commercial disclosures.⁷⁰ The Court’s declaration that abortion is too controversial a topic for disclosure came at a time when there was disagreement about the precise meaning of “factual” and “controversial” in the context of evaluating compelled commercial disclosures.⁷¹ Moreover, by finding that the licensing disclosure requirement was “not an informed-consent requirement or any other regulation of professional conduct,” the Court ruled out using the lower standard of review applicable to informed consent laws.⁷²

C. Uneven Application of Compelled Speech Doctrine in the Abortion Context

In his dissent in *NIFLA*, Justice Breyer admonished the majority for drawing distinctions in the abortion context that “lack[] moral, practical, and legal force,” concluding that the Court had failed to adhere to the principle of evenhandedness that “the rule of law embodies.”⁷³ The Court’s unequal treatment of abortion issues has not gone unnoticed,⁷⁴ and the imbalanced application of the compelled speech doctrine to reproductive health disclosure requirements is a prime example.⁷⁵ By classifying the California law as a content-based regulation of speech for which neither the commercial speech nor informed consent doctrines could apply, the Court afforded CPCs the highest First Amendment protection. But in doing so, Breyer argued, the *NIFLA* majority empowered courts to “apply an unpredictable First Amendment to ordinary social and economic regulation, strik-

69. *Id.*

70. *Id.* at 2372.

71. See *infra* Section II.A; see also Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 984 (2017). Although it is beyond the scope of this Note, clarifying descriptive and normative definitions of what makes a disclosure “controversial” would go a long way toward supporting the *NIFLA* Court’s approach of determining controversiality of abortion as a social fact. See, e.g., Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 536, 550–55 (2014); Post, *supra* note 48, at 910.

72. *NIFLA*, 138 S. Ct. at 2373.

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

74. See, e.g., Teneille R. Brown, *Crisis at the Pregnancy Center: Regulating Pseudo-Clinics and Reclaiming Informed Consent*, 30 YALE J.L. & FEMINISM 221 (2018); Chemerinsky & Goodwin, *supra* note 65; Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1 (2012).

75. See *infra* Section II.B.

ing down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.⁷⁶

As the law stands today, states can force professional abortion providers to inflate the physical and psychological risks of abortion and can even mandate that providers tell patients that an abortion terminates the life of a separate, unique human being.⁷⁷ But states cannot compel CPCs to disclose that they are unlicensed healthcare providers or that the state provides subsidized abortion and contraceptive services.⁷⁸ Abortion providers can be given a “legislated script [that] forces them to commit an untenable ethical and professional wrong: deceiving their patients by providing false information and withholding empirically derived, evidence-based clinical data.”⁷⁹ Meanwhile, CPCs are left free to “formulate their own address” on abortion,⁸⁰ which strategically includes deceptive claims and intentionally withholds accurate information from clients.⁸¹

II. COMPELLED COMMERCIAL DISCLOSURES UNDER *ZAUDERER* AND THE PARALLELS TO INFORMED CONSENT REQUIREMENTS

As discussed in Part I, the *NIFLA* Court refused to apply the deferential review afforded to other compelled commercial disclosures because California’s abortion-related CPC disclosures were too “controversial.” Section II.A elaborates on the compelled commercial speech doctrine laid out by *Zauderer* and focuses on courts’ struggles to determine what it means for a disclosure to be “purely factual and uncontroversial” both before and after *NIFLA*. Section II.B explains the doctrinal framework governing abortion-related informed consent requirements. Although informed consent laws compel medical professionals to speak, they are subject only to rational basis review as a regulation of medical practice—not to the strict scrutiny applied to abortion-related CPC disclosures under *NIFLA*. Lastly, Section II.C discusses the troubling implications of allowing CPCs to present themselves as medical professionals while immunizing them from regulations placed on actual professionals.

A. *Compelled Commercial Disclosures Under Zauderer*

Traditionally, courts consider the difference between compelled speech and restricted speech to be “without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising

76. *NIFLA*, 138 S. Ct. at 2381 (Breyer, J., dissenting).

77. See *supra* note 31 and accompanying text.

78. *NIFLA*, 138 S. Ct. at 2372–78.

79. Howard Minkoff & Mary Faith Marshall, *Government-Scripted Consent: When Medical Ethics and Law Collide*, HASTINGS CTR. REP., Sept.–Oct. 2009, at 21, 21 (footnote omitted).

80. *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014).

81. See *supra* notes 2–9 and accompanying text.

the decision of both what to say and what not to say.”⁸² In the commercial speech context, however, compelled disclosures are treated differently from restrictions on commercial speech. In fact, the Court has held that compelled disclosures in commercial speech are entitled to even more deferential review than commercial speech restrictions, which receive intermediate scrutiny. Because compelled disclosures add speech into the marketplace of ideas, the Court has found that these disclosures serve a key premise of the commercial speech doctrine: providing consumers with useful factual information to make informed decisions.⁸³

The Court first evaluated a compelled commercial disclosure in *Zauderer* and established two important principles. First, states may compel commercial actors to speak when a compelled disclosure requires disseminating “purely factual and uncontroversial information.”⁸⁴ And second, states have a substantial interest in using disclosures “to dissipate the possibility of consumer confusion or deception.”⁸⁵ In *Zauderer*, the Court upheld an Ohio law that required attorneys who mentioned contingent-fee representation in their advertisements to disclose that clients are still liable for costs even if they are unsuccessful.⁸⁶ The Court recognized the “material differences between disclosure requirements and outright prohibitions on speech” in the commercial speech context.⁸⁷ In reasoning that “disclosure requirements trench much more narrowly on an advertiser’s interests than [outright] prohibitions on speech,” the Court deemed that compelled disclosures were entitled to a more deferential standard of review.⁸⁸

Specifically, the Court held that compelled disclosures are constitutional when they are “reasonably related to the State’s interest in preventing deception of consumers” and are not “unjustified or unduly burdensome.”⁸⁹ This standard of review is more deferential than the intermediate scrutiny applied to content-based restrictions on commercial speech, but less deferential than pure rational basis scrutiny.⁹⁰ The Court explained that requiring disclosure

82. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (emphasis omitted).

83. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985) (“[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . .”); see also Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 551 (2012); Post, *supra* note 48, at 877.

84. *Zauderer*, 471 U.S. at 651.

85. *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

86. *Id.* at 652.

87. *Id.* at 650.

88. *Id.* at 650–51, 651 n.14 (“Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized.”).

89. *Id.* at 651 (footnote omitted).

90. Post, *supra* note 48, at 883.

of “purely factual and uncontroversial information” furthers a consumer’s interest in receiving accurate information about the terms of service, which far outweighs an advertiser’s “constitutionally protected interest in *not* providing any particular factual information.”⁹¹

In the wake of *Zauderer*, federal courts did not universally require that disclosures be “purely factual and uncontroversial” before applying the lower level of scrutiny associated with compelled commercial disclosures. For example, the Sixth Circuit in *Discount Tobacco* plainly rejected the notion that a disclosure must be “purely factual and noncontroversial” in order to receive deferential *Zauderer* review.⁹² The court reasoned that this phrase “appear[ed] in *Zauderer* once,” and “merely describe[d] the disclosure the Court faced in that specific instance.”⁹³ Even courts that did consider “purely factual and uncontroversial” to be a requisite for upholding compelled commercial speech disclosures expressed concerns about the lack of guidance in interpreting an ambiguous standard.⁹⁴

Other courts completely dodged the issue of controversiality, instead categorizing speech as noncommercial to sidestep *Zauderer*’s rational basis review.⁹⁵ In *Greater Baltimore Center for Pregnancy Concerns v. Mayor of Baltimore*, a pre-*NIFLA* CPC disclosure case, the Fourth Circuit avoided citing *Zauderer* altogether by rejecting the state’s argument that it was regulating commercial speech.⁹⁶ The *Greater Baltimore* court found that CPCs’ “clearest motivation is not economic but moral, philosophical, and religious,” rendering commercial speech doctrine wholly inapplicable.⁹⁷ Likewise, the Ninth Circuit decision reviewed in *NIFLA* determined that relaxed

91. *Id.* at 651.

92. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012).

93. *Id.*

94. *See Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 34 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (“To be sure, determining whether a disclosure is ‘uncontroversial’ may be difficult in some compelled commercial speech cases, in part because it is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial.”); *Mass. Ass’n of Priv. Career Schs. v. Healey*, 159 F. Supp. 3d 173, 206 (D. Mass. 2016) (“It appears that few courts have considered the constitutionality of disclosure regulations that fail the ‘factual’ or ‘uncontroversial’ prerequisites of *Zauderer*.”).

95. *See, e.g., Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–97 (1988) (applying strict scrutiny to compelled disclosures for professional solicitors after finding that “[i]t is not clear that a professional’s speech is necessarily commercial whenever it relates to that person’s financial motivation for speaking”); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9 (1986) (holding that the publication of information by a third party in utility bill envelopes “extends well beyond speech that proposes a business transaction”).

96. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 879 F.3d 101 (4th Cir. 2018).

97. *Id.* at 109; *see also Centro Tepeyac v. Montgomery County*, 683 F.3d 591, 594 (4th Cir. 2012) (concluding that strict scrutiny applied to CPC disclosure requirement because the state “compel[led] noncommercial speech”), *aff’d on reh’g en banc*, 722 F.3d 184 (4th Cir. 2013).

review under *Zauderer* was inappropriate, noting without further elaboration that the California law “primarily regulate[d] the speech that occurs within the clinic, and thus is not commercial speech.”⁹⁸

In *NIFLA*, however, the Supreme Court did not address the possibility that the CPC disclosures were noncommercial speech. Instead, the Court ruled out the applicability of *Zauderer* by finding that the disclosures were not “purely factual and uncontroversial,” implicitly accepting that CPCs can engage in commercial speech,⁹⁹ but applying strict scrutiny before striking down the law.¹⁰⁰ Rather than formally cabin the scope of commercial speech, the Court relied on an underdeveloped and tenuous area of compelled speech doctrine to categorically prohibit all abortion-related disclosures.¹⁰¹

The *NIFLA* Court’s reliance on the “purely factual and uncontroversial” prong of *Zauderer* has not been without consequence. Since *NIFLA*, lower courts have struggled to apply this nebulous standard, most notably in the context of health and safety disclosures. For example, in *American Beverage Association v. City of San Francisco*, the Ninth Circuit actively avoided determining whether a warning label requirement for sugar-sweetened beverages was controversial but struck down the disclosure as an undue burden on advertisers’ speech.¹⁰² In a partial concurrence, Judge Ikuta suggested that she would have liked the opportunity to further define controversiality, explaining that “[a]lthough *NIFLA* did not define ‘uncontroversial,’ the warning here requires the advertisers to convey San Francisco’s one-sided policy views about sugar-sweetened beverages.”¹⁰³ Based on her reading of the record, Judge Ikuta would have found that warning against the health consequences of sugar consumption “is a controversial topic, and therefore, the ordinance does not qualify as ‘uncontroversial information’ under the third prong of *NIFLA*.”¹⁰⁴

In *CTIA—The Wireless Association v. City of Berkeley*, decided a few months after *American Beverage Association*, the Ninth Circuit upheld an

98. *Nat’l Inst. of Fam. & Life Advocs. v. Harris*, 839 F.3d 823, 834 n.5 (9th Cir. 2016), *rev’d*, 138 S. Ct. 2361 (2018).

99. *See Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 178, 181–82 (N.D. 1986) (upholding preliminary injunction requiring CPC to refrain from using advertising that “would lull people into believing that they are dealing with” a similarly named abortion clinic as a regulation of commercial speech); *see also* Gilbert, *supra* note 19, at 612–15 (arguing that CPC regulations should be considered compelled commercial speech).

100. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372–78 (2018).

101. *See Mass. Ass’n of Priv. Career Schs. v. Healey*, 159 F. Supp. 3d 173, 206 (D. Mass. 2016) (“[F]ew courts have considered the constitutionality of disclosure regulations that fail the ‘factual’ or ‘uncontroversial’ prerequisites of *Zauderer*.”).

102. *Am. Beverage Ass’n v. City of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (“We need not, and therefore do not, decide whether the warning here is factually accurate and non-controversial.”).

103. *Id.* at 761 (Ikuta, J., concurring in part).

104. *Id.*

ordinance requiring cell phone retailers to warn consumers that they may be exposed to excessive radio-frequency radiation by carrying a cell phone near their bodies.¹⁰⁵ By finding that the disclosure was “factual and not misleading,” the court rejected petitioner’s argument that the disclosure was “controversial.”¹⁰⁶ The *CTIA* court interpreted *NIFLA*’s application of the “purely factual and uncontroversial” standard to bar compelled disclosures only when they forced an entity to “take sides in a heated political controversy.”¹⁰⁷ But as to the radiation disclosure at issue, the *CTIA* court found that even if the parties disagreed about whether radio-frequency radiation is dangerous to consumers, this disagreement was insufficient to make a disclosure controversial.¹⁰⁸ Therefore, although *NIFLA*’s holding was premised on whether a topic was too controversial to be disclosed, the decision has left lower courts with no guidance on how to interpret this amorphous standard.

B. *Abortion-Related Informed Consent Requirements*

Through rigorous efforts to avoid applying relaxed scrutiny to CPC disclosure requirements, courts have revealed that evenhandedness in law does not apply in the abortion context. Although there are striking parallels between CPC disclosure requirements and antiabortion informed consent requirements, courts have made it all too obvious that only one ideological view will be protected. At present, thirty-four states require patients to receive antiabortion counseling before obtaining the procedure.¹⁰⁹ The Eighth Circuit upheld a South Dakota statute that requires doctors to tell patients that an abortion will “terminate the life of a whole, separate, unique, living human being.”¹¹⁰ The Fifth and the Sixth Circuits have approved laws requiring abortion patients to undergo a medically unnecessary ultrasound to view the fetus and hear a heartbeat while the doctor describes the image.¹¹¹ Other states require physicians to tell patients that medication-induced abortion can be reversed, abortion increases risk of breast cancer, and abortion causes infertility—even though these claims are medically inaccurate or

105. *CTIA—The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832 (9th Cir. 2019)

106. *Id.* at 848; *see also* *Masonry Bldg. Owners of Or. v. Wheeler*, 394 F. Supp. 3d 1279, 1302 (D. Or. 2019) (explaining that “[c]ourts have described ‘uncontroversial’ as referring to the ‘factual accuracy of the compelled disclosure’” (quoting *Nat’l Ass’n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 851 (E.D. Cal. 2018))).

107. *CTIA—The Wireless Ass’n*, 928 F.3d at 848.

108. *Id.*

109. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (May 1, 2020), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/T2FB-ACQM>].

110. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 667–68 (8th Cir.), *vacated in part on other grounds on reh’g en banc*, 662 F.3d 1072 (8th Cir. 2011), *and rev’d in part on other grounds on reh’g en banc*, 686 F.3d 889 (8th Cir. 2012).

111. *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 424 (6th Cir. 2019); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 571, 574 (5th Cir. 2012).

scientifically unproven.¹¹² Meanwhile, only one CPC disclosure requirement implemented in the past decade has survived review in federal court.¹¹³

The Supreme Court's decision in *Planned Parenthood v. Casey* provides the basis for categorizing informed consent requirements as regulations of medical practice rather than compelled speech. In *Casey*, the plurality upheld an informed consent law requiring doctors to tell abortion patients the gestational age of the fetus and inform them of resources available for childbirth, child support, and adoption.¹¹⁴ The plurality disposed of Planned Parenthood's First Amendment claim by finding that "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."¹¹⁵

Post-*Casey*, courts have consistently applied rational basis review to informed consent requirements by treating these compelled disclosures as regulations of professional conduct rather than compelled speech.¹¹⁶ However, in 2014, a circuit split developed as the Fourth Circuit struck down a descriptive sonogram requirement as compelled speech, invalidating a North Carolina statute that "require[d] physicians to perform an ultrasound, display [a] sonogram, and describe the fetus" to abortion patients.¹¹⁷ Unlike other informed consent requirements, the Fourth Circuit distinguished the sonogram requirement as "compelled speech, even though it is a regulation of the medical profession."¹¹⁸ Although this descriptive sonogram requirement was virtually identical to a law upheld by the Fifth Circuit as an informed consent provision just two years earlier,¹¹⁹ the Fourth Circuit found that the speech required was "ideological in intent and in kind."¹²⁰ The court further explained that the sonogram requirements "extend[ed] well beyond" the regulations other "states have customarily employed to effectuate their

112. See *supra* notes 32–35 and accompanying text; see also GUTTMACHER INST., *supra* note 109.

113. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 247–48 (2d Cir. 2014); see also Malcolm, *supra* note 10, at 1149–58.

114. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881, 887 (1992) (plurality opinion).

115. *Id.* at 884 (citation omitted).

116. See *Lakey*, 667 F.3d at 575 (describing the appropriate First Amendment scrutiny for physician compelled speech claims after *Casey* as "the antithesis of strict scrutiny"); see also Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 952–53 (explaining that states have "political control over the practice of medicine" such that regulations of medical professionals are "subject merely to rational basis review").

117. *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

118. *Id.*

119. *Lakey*, 667 F.3d at 573 (concerning a statute that required a physician "to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure").

120. *Stuart*, 774 F.3d at 242.

undeniable interests in ensuring informed consent.”¹²¹ By requiring a disclosure “irrespective of the needs or wants of the patient, in direct contravention of medical ethics and the principle of patient autonomy,” the state created an unnecessary risk of psychological harm to patients and unlawfully interfered in a productive doctor-patient relationship.¹²²

C. CPCs as Pseudo-Professionals

CPCs—even when unlicensed—attempt to resemble professional medical practices and provide some medical services like pregnancy tests and sonograms.¹²³ But CPCs cannot be compelled to give informed consent disclosures because they are not actual medical professionals. Moreover, post-*NIFLA*, CPCs cannot be regulated like other commercial actors and are immune from making disclosures about reproductive healthcare options because they are too “controversial.” This means that CPCs are afforded the highest level of First Amendment protections against compelled speech, the same given to a street-corner speaker engaged in core political speech.¹²⁴

On the other hand, abortion providers are regulated as professionals engaged in medical practice—rarely able to raise a cognizable First Amendment claim when the state compels them to speak through informed consent laws.¹²⁵ In principle, when professionals engage in conversations with clients, that should “trigger[] a contextual First Amendment review that is specifically centered around the social relation, as opposed to an abstract review such as that traditionally applied to the street-corner speaker.”¹²⁶ Specifically, compelling medical professionals to make disclosures is considered acceptable because “the physician-patient relationship is marked by an imbalance of authority,” as lay patients readily defer to a physician’s word based on their inherent trust in the medical profession.¹²⁷ This same logic extends to a state’s ability to compel disclosures from a person or entity that disguises it-

121. *Id.*

122. *Id.* at 253–55.

123. See Rita Rubin, At “Crisis Pregnancy Centers,” Critics Say, Ideology Trumps Evidence, 320 JAMA 425, 426–27 (2018) (describing the confusion caused by CPCs that want to look like full-service medical clinics and CPCs’ efforts to “obtain medical clinic status by incorporating sonography,” to attract more clients with the offer of a medical service).

124. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech . . . [is] a sort of second-class expression”); *United States v. Grace*, 461 U.S. 171, 180 (1983) (describing a public street as occupying a “special position” for receiving First Amendment protection of speech in public forums).

125. See Post, *supra* note 116, at 952–53.

126. Halberstam, *supra* note 43, at 834.

127. *Id.* at 845.

self as a professional to take advantage of the trustworthiness associated with medical practice.¹²⁸

By contrast, states cannot constitutionally prohibit a person on a street corner from speaking out against abortion, even when that person uses inflammatory rhetoric and displays inaccurate depictions of an abortion procedure. After all, “[u]nder the First Amendment there is no such thing as a false idea.”¹²⁹ Moreover, “a function of free speech under our system of government is to invite dispute,” and controversial speech cannot be suppressed even when it “strike[s] at prejudices and preconceptions and ha[s] profound unsettling effects as it presses for acceptance of an idea.”¹³⁰ That same person on a street corner could also give free advice on adoption services and attest that they have come out to promote antiabortion options in service of their faith, not for personal economic gain. Because the street-corner speaker is merely offering a free, morally motivated service, a court is likely to find that the speech is noncommercial and receives maximum First Amendment protection.

Like the hypothetical street-corner speaker, CPCs also express radical antiabortion views and most CPCs are affiliated with religious organizations.¹³¹ In addition, courts have found it essential that CPCs provide free services because “the offer of free services such as pregnancy tests in furtherance of a religious belief does not propose a commercial transaction,” making more lenient compelled commercial speech standards inapplicable to CPCs.¹³² But CPCs do not deliver their ideological messages and free services from a street corner. Instead, lay people wearing white lab coats in CPC exam rooms that are designed to look like medical facilities speak these messages and provide these services, all while reaping the benefits of faux professionalism to coerce and deceive exceptionally vulnerable people.

While the *NIFLA* Court rejected the notion that “professional speech” exists as a separate speech category warranting reduced First Amendment protection, it also found that “[t]he license[] notice at issue here is not an informed-consent requirement or any other regulation of professional con-

128. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978) (“In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions.”).

129. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

130. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

131. *Swartzendruber et al.*, *supra* note 8, at 14, 18.

132. *Evergreen Ass’n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011), *aff’d in part, vacated in part*, 740 F.3d 233 (2d Cir. 2014); see also *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 879 F.3d 101, 108 (4th Cir. 2018) (finding that “[a] morally and religiously motivated offering of free services cannot be described as a bare ‘commercial transaction’”); *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 463–64 (D. Md. 2011) (noting that “[i]n providing these [free] services, there is no indication that Plaintiff is acting out of economic interest”), *aff’d in part, rev’d in part*, 683 F.3d 591 (4th Cir. 2012).

duct.”¹³³ Similarly, the Fourth Circuit has explained that a CPC disclosure could not be considered an informed consent notice because “the pregnancy centers that are subject to [the disclosure requirements] do not practice medicine, are not staffed by licensed professionals, and need not satisfy the informed consent requirement.”¹³⁴ These courts have determined that CPCs are not held to the same standards as medical professionals and “must be free to formulate their own address,” even when consulting clients on a medical issue.¹³⁵

CPC staff commonly present themselves as medical professionals even when they lack licensure and offer actual medical care through pregnancy testing and ultrasounds—intentionally avoiding the image of an antiabortion zealot on the street corner.¹³⁶ Even more ironically, CPCs mimic the appearance of abortion clinics to attract clients who mistakenly think that they can access abortion at the CPC.¹³⁷ CPCs also strategically establish themselves in close proximity to abortion clinics to confuse and intercept patients seeking actual abortion care.¹³⁸

During oral argument in *NIFLA*, Justice Sotomayor asked NIFLA’s counsel about the deception featured on a CPC website. Justice Sotomayor described that the CPC website showed “a woman on the home page with a uniform that looks like a nurse’s uniform in front of an ultrasound machine.”¹³⁹ Additionally, the website included a page dedicated to abortion information in which the CPC claimed to “educate clients about different abortion methods available.”¹⁴⁰ Justice Sotomayor ultimately asked, “[W]hat is . . . misleading, incorrect, or suggestive [about] . . . telling people that, despite how the picture looks on the website, this is not a medical facility?”¹⁴¹

133. Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2373 (2018).

134. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539, 554–55 (4th Cir. 2012), *aff’d in part, vacated in part on reh’g en banc*, 721 F.3d 264 (4th Cir. 2013).

135. Evergreen Ass’n, Inc. v. City of New York, 740 F.3d 233, 249–50 (2d Cir. 2014).

136. See, e.g., Aziza Ahmed, *Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent, and the First Amendment*, 43 J.L. MED. & ETHICS 51, 51–52 (2015) (explaining that CPCs are intentionally designed to look like healthcare facilities and perform ultrasounds and pregnancy testing); Bryant & Swartz, *supra* note 5, at 270–71 (noting that “[l]ay volunteers who are not licensed clinicians at CPCs often wear white coats and see women in exam rooms”).

137. LastWeekTonight, *Crisis Pregnancy Centers: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 8, 2018), <https://www.youtube.com/watch?v=4NNpkv3UsII> (quoting antiabortion activist Abby Johnson explaining that “the best client [CPCs can] ever get is one that thinks they’re walking into an abortion clinic”); see also Swartzendruber et al., *supra* note 8, at 16 (evaluating a sample of sixty-four Georgia-based CPC websites to find that 63 percent of them “included abortion-related informational content,” and 17 percent used the words “‘options,’ ‘choice,’ or ‘abortion’ in the website name”).

138. See MCINTIRE, *supra* note 5, at 5–6.

139. Transcript of Oral Argument at 18, Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140).

140. *Id.*

141. *Id.* at 21.

Remarkably, the only CPC disclosure requirement that has survived strict scrutiny in the past decade involved a requirement that CPCs disclose whether they have a licensed medical provider on staff who provides or supervises services at the clinic.¹⁴² Finding that New York City had shown a compelling interest in “protect[ing] the health of its citizens and combat[ing] consumer deception,”¹⁴³ the Second Circuit gave approval to “the common-sense notion that pregnant women should at least be aware of the qualifications of those who wish to counsel them regarding what is, among other things, a medical condition.”¹⁴⁴

Despite disagreeing about the substantive nature of the compelled speech at issue, opponents of mandatory CPC disclosures and opponents of abortion-related informed consent laws have made identical legal arguments. Both sides have claimed that compelled disclosures and informed consent laws are ideological and content-based, urging courts to apply strict scrutiny to what they see as impermissible content-based speech regulations.¹⁴⁵ Abortion providers have argued that antiabortion informed consent regulations can cross the line from regulating professional conduct to forcing an unwilling speaker to espouse the state’s ideological message.¹⁴⁶ Likewise, CPCs have claimed that the state cannot force them to post disclosures because they do not wish to promote the state’s pro-choice policies.¹⁴⁷ The uncanny resemblance between these arguments suggests that CPC disclosure requirements and informed consent laws are not so different and that the governing doctrine should treat them equally.¹⁴⁸

But in reality, after *NIFLA*, CPCs are treated as street-corner speakers even when they masquerade as professionals, thus receiving the highest level of First Amendment protection for their antiabortion speech. The courts

142. *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014).

143. *Id.* at 247.

144. *Id.* at 249 (quoting *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 193 (4th Cir. 2013) (Wilkinson, J., concurring)).

145. *Compare* *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (calling a CPC disclosure requirement “a content-based regulation of speech”), *with* *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014) (agreeing with physicians that the informed consent law was “content-based and ideological”).

146. *Stuart*, 774 F.3d at 245 (explaining that an informed consent requirement is a regulation of professional conduct, but that compelling “display of the sonogram is plainly an expressive act entitled to First Amendment protection”); *Am. Med. Ass’n v. Stenehjem*, 412 F. Supp. 3d 1134, 1148 (D.N.D. 2019) (“[I]nformed consent statutes may violate the First Amendment rights of physicians if the state requires the doctor to communicate its ideology.”).

147. *Compare NIFLA*, 138 S. Ct. at 2371 (explaining that a CPC disclosure requirement compels clinics to “provide a government-drafted script about the availability of state-sponsored services”), *with id.* at 2372 (asserting that CPC disclosure requirement did not fall under relaxed commercial speech standard because it required a “controversial” disclosure).

148. *See id.* at 2385 (Breyer, J., dissenting) (“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?”).

have reached this result despite the large body of evidence that CPCs intentionally operate under the guise of professional medical practice to increase their credibility.¹⁴⁹ Free from regulation, CPCs use manipulative and deceptive speech to persuade clients out of an abortion or make it extremely difficult for them to obtain one.¹⁵⁰ Meanwhile, licensed abortion providers receive the least protection in First Amendment jurisprudence, as courts apply only rational basis review to state-mandated informed consent disclosures that can be medically inaccurate and purely ideological.¹⁵¹

After *NIFLA*, CPCs remain free to deliver any message they choose, even when their advice about medical conditions can cause serious harm to their clients. This risk is not merely hypothetical. In one case, a young woman from Oregon named Beth Vial reported that after an ultrasound performed at a CPC, she was told by CPC staff that she was sixteen weeks pregnant.¹⁵² The next day, Ms. Vial sought abortion care from a local hospital that determined she was actually twenty-six weeks pregnant.¹⁵³ Because Ms. Vial was late into pregnancy, her physician was required to seek approval from the local hospital's board before performing the procedure.¹⁵⁴ After the board denied her physician's request, Ms. Vial had no other options for seeking abortion care in the state.¹⁵⁵ She then flew to New Mexico and had an abortion at twenty-eight weeks, paying \$10,500 out of pocket for the procedure and spending six days in New Mexico to recover.¹⁵⁶ Had Ms. Vial not gone to a hospital the day after she went to the CPC, obtaining an abortion would have been highly inaccessible or impossible, all because the CPC deceived her. In another example, a woman asked a CPC staffer about the price of a first-trimester abortion but received a vague answer and was told that she needed to come in to discuss her pregnancy.¹⁵⁷ At the CPC, a staffer took down her medical history and forced the woman to watch a video that inaccurately described the physical and psychological dangers of abortion.¹⁵⁸ The woman reported that she was then given a sonogram while being lectured for almost twenty minutes.¹⁵⁹ When the woman attempted to leave, the CPC staffer placed the sonogram probe back onto the woman's stomach, holding

149. See *supra* Section II.C.

150. See *supra* Section II.C.

151. See Post, *supra* note 116, at 952–53.

152. Vial, *supra* note 62.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Vice News, *The Fake Abortion Clinics of America: Misconception*, YOUTUBE (Sept. 17, 2014), <https://www.youtube.com/watch?v=g-ex4Q-z-is>.

158. *Id.*

159. *Id.*

it down until the woman physically removed the staffer's hands from her body so that she could escape.¹⁶⁰

Courts have now created the untenable and dangerous result that states can more easily regulate the conduct of credentialed, licensed professionals than CPC staff deceptively posing as professionals. Courts evaluating CPC disclosure requirements have erred by parsing out each element of a CPC's speech-related activity and viewing those elements as happening independently, thus immunizing CPCs from virtually all compelled speech regulations. In doing so, courts have turned a blind eye to what CPCs are actually doing and saying: using the trappings of medical professionalism to deceive their clients.

III. PROPOSING SOLUTIONS

Although *NIFLA* bars states from *compelling* CPCs to make factual disclosures, states can still *prohibit* CPCs from making harmful and inaccurate claims about a medical condition. This Note proposes three solutions to prevent CPCs from using deceptive practices and lying to pregnant clients. First, states could legislate to prohibit CPCs from making false claims based on their compelling interest in preventing fraud. Because false statements made with the intent to deceive do not receive First Amendment protection, a state law prohibiting CPCs from making fraudulent claims would receive only rational basis review. But after *NIFLA*, states looking to regulate CPCs would be better off pursuing solutions that do not implicate speech. Therefore, a second, nonspeech solution would involve using existing state laws that criminalize holding oneself out as a professional to regulate CPC conduct. Third, people injured by CPCs could use tort law to promote "meaningful and necessary regulation of CPCs' deceptive behavior,"¹⁶¹ while still avoiding implicating speech. Specifically, the torts of negligent and fraudulent misrepresentation should be added to the menu of legal claims available to people who may seek recourse against CPCs.

A. *Legislation Prohibiting CPCs from Making False Claims Guided by Alvarez*

The state's power to "protect people against fraud . . . has always been recognized in this country and is firmly established,"¹⁶² and states should be concerned that CPCs use false claims to defraud clients, potentially causing them irreparable harm.¹⁶³ Although courts rely on many different definitions of fraud, it can generally be captured as an "intentional misrepresentation of a material fact made for the purpose of inducing another to rely and on

160. *Id.*

161. Brown, *supra* note 74, at 274.

162. Donaldson v. Read Mag., Inc., 333 U.S. 178, 190 (1948).

163. See *supra* Part II.

which the other reasonably relies to his or her detriment.”¹⁶⁴ While states cannot sanction speech merely because it is false, or even because it is an intentional lie, the Supreme Court has made clear that “[w]here false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment.”¹⁶⁵

Because false statements made with the intent to defraud are unprotected by the First Amendment, states would be permitted to prohibit CPCs from making fraudulent claims if they have a rational basis for doing so.¹⁶⁶ States seeking to curb CPC deception should pass legislation that prohibits CPCs and other reproductive-health entities from knowingly making fraudulent statements regarding the medical nature of pregnancy and the availability of abortion—targeting false claims about the gestational age of the fetus, fetal health, or the state’s abortion laws.

A plurality of the Court in *United States v. Alvarez* crystalized the First Amendment principle that false statements do receive some protection when it invalidated the Stolen Valor Act, a federal law that criminalized lying about receiving military awards and honors.¹⁶⁷ In doing so, the plurality distinguished precedent suggesting that “false statements have no value and hence no First Amendment protection” by pointing out that “[t]hese quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement.”¹⁶⁸ The plurality found that the Act “target[ed] falsity and nothing more,” as the government failed to demonstrate actual harm caused by this type of lie.¹⁶⁹ Thus, the plurality drew a clear line between the First Amendment protection afforded to false speech versus fraudulent speech.

Writing in concurrence, Justice Breyer highlighted the importance of narrow tailoring when a state seeks to criminalize false speech, sympathized with the government’s purpose in passing the Act, and suggested that a well-written statute “could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objec-

164. 37 AM. JUR. 2D *Fraud and Deceit* § 1, Westlaw (database updated Feb. 2020).

165. *United States v. Alvarez*, 567 U.S. 709, 723 (2012); see also *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 233 F.3d 981, 992 (7th Cir. 2000) (“Laws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech.”).

166. See *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) (explaining that “the First Amendment does not shield fraud”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 535–38 (1973) (articulating rational basis review for law intended to prevent fraud); see also *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 693 (6th Cir. 2014) (applying rational basis review to statute aimed at preventing fraud after rejecting petitioner’s First Amendment claim, finding that the statute “neither implicates a fundamental right nor creates a suspect classification”).

167. *Alvarez*, 567 U.S. at 715–16.

168. *Id.* at 718–19.

169. *Id.* at 719, 726.

tive.”¹⁷⁰ In a dissent joined by Justices Scalia and Thomas, Justice Alito advocated instead that “as a general matter false . . . statements possess no intrinsic First Amendment value,” and where lies do not serve any “valid purpose,” they should “merit no First Amendment protection in their own right.”¹⁷¹

In light of *Alvarez*, when enacting legislation designed to target CPC speech as fraudulent, states would have to avoid several fatal pitfalls. First, states must not single out or target CPCs as the subject of a law prohibiting false statements relating to pregnancy and the availability of abortion. Second, states must prohibit false statements only in specific contexts and articulate an intent requirement in the statute. Third, states should clearly define the causal link between the false speech and the alleged harms.

With respect to the first pitfall, the plurality and the concurring justices in *Alvarez* expressed concern that criminalizing false speech “would endorse government authority to compile a list of subjects about which false statements are punishable.”¹⁷² Justice Breyer explained that “those who are unpopular may fear that the government” will selectively prosecute certain groups for making false claims “while ignoring members of other political groups who might make similar false claims.”¹⁷³

In *NIFLA*, one of California’s notice requirements seemed to directly implicate the *Alvarez* Court’s key concern. The law compelled CPCs to disclose the availability of state-subsidized abortion and contraception; problematically, this disclosure requirement only applied to clinics with the “primary purpose” of providing family-planning or pregnancy-related services.¹⁷⁴ Clinics with another primary purpose, federal clinics, and state providers that offered emergency contraception and sterilization services were “excluded from the licensed notice requirement without explanation.”¹⁷⁵ To avoid this pitfall, states enacting legislation that prohibits making certain fraudulent statements related to pregnancy and the availability of abortion would need to ensure that the law covers all entities that discuss pregnancy and abortion. By making the legislation generally applicable, states could protect against an objection to the law being underinclusive, since an underinclusive statute “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”¹⁷⁶

Second, any law prohibiting false statements must be narrow in scope. In *Alvarez*, Justice Breyer identified examples of scope limitations placed on other statutes that prohibit false statements—for example, “requiring proof

170. *Id.* at 730, 739 (Breyer, J., concurring).

171. *Id.* at 746, 748–49 (Alito, J., dissenting).

172. *Id.* at 723.

173. *Id.* at 734 (Breyer, J., concurring).

174. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2368–69 (2018).

175. *Id.* at 2369–70, 2375–76.

176. *Id.* at 2376 (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 802 (2011)).

of specific harm to [an] identifiable victim[]” or limiting prohibition to “contexts in which a tangible harm to others is especially likely to occur.”¹⁷⁷ As such, a legally viable statute should include an intent requirement, covering only false statements used intentionally to “cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.”¹⁷⁸ To avoid overbreadth by punishing any false statement about pregnancy and the availability of abortion, a well-written statute would outline the context of the fraudulent claims it seeks to prohibit. Specifically, such a law could limit its scope to false statements about pregnancy and abortion made by individuals acting in their capacity as a pregnancy counselor or medical professional to clients and patients, spoken with the intent to deceive.¹⁷⁹

Lastly, states should clearly articulate the causal nexus between the harm they seek to prevent and the prohibited fraudulent speech. Because the “government cannot label certain speech as fraudulent so as to deprive it of First Amendment protection,” states should be prepared to explain how false claims about the nature of pregnancy and the availability of abortion cause irreparable harm to pregnant people.¹⁸⁰ When CPCs intentionally give clients inaccurate information about the gestational age of the fetus or the availability of abortion, they hope to deceive clients into delaying abortion care to the point where receiving legitimate care is highly inaccessible or impossible.¹⁸¹ CPCs frequently tell clients that they have “plenty of time” to make a decision about abortion even when the CPCs do not have any information about a fetus’s gestational age and may even tell them that abortion is available throughout all nine months of pregnancy.¹⁸² Given that “[t]reatment during pregnancy is extremely time-sensitive” and the “consequences of this misinformation for the pregnant woman’s health are astronomical,” states can easily identify a causal link between false claims and negative health outcomes to bolster their regulation.¹⁸³

177. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring).

178. *United States v. Lepowitch*, 318 U.S. 702, 704 (1943); *see also Alvarez*, 567 U.S. at 734 (Breyer, J., concurring) (“Fraud statutes, for example, typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.”).

179. *See Alvarez*, 567 U.S. at 723; *see also United States v. Bonin*, 932 F.3d 523, 536 (7th Cir. 2019) (explaining that when a statute targets a “subset of lies where specific harm is more likely to occur,” it avoids overbroad punishment (quoting *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring))); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) (holding statutes unconstitutional because the “laws reach not only defamatory and fraudulent remarks, but *all* false speech regarding a political candidate, even that which may not be material, negative, defamatory, or libelous”).

180. *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 233 F.3d 981, 993 (7th Cir. 2000).

181. *See Bryant & Swartz*, *supra* note 5, at 272.

182. *McIntire*, *supra* note 5, at 12; Amy G. Bryant & Erika E. Levi, *Abortion Misinformation from Crisis Pregnancy Centers in North Carolina*, 86 *CONTRACEPTION* 752, 753 (2012).

183. *Brown*, *supra* note 74, at 227.

B. Using Existing Laws to Regulate CPCs

Under existing First Amendment doctrine, states should be able to use fraud-prevention measures to prohibit false statements on pregnancy and abortion. However, *NIFLA* demonstrates that even with sound legal backing, it is unwise to implicate speech in the abortion-rights context. One alternative solution involves regulating CPCs under existing medical-practice laws to avoid raising First Amendment issues altogether. Solidly pro-choice states like California, Colorado, Illinois, and Vermont already have laws regulating the practice of medicine that prohibit holding oneself out as a medical professional without licensure.¹⁸⁴ For instance, in California, anyone who “holds himself or herself out as practicing[] any system or mode of treating the sick or afflicted” without a valid license to practice medicine may be fined up to \$10,000 and imprisoned for up to a year.¹⁸⁵ These laws could be used to deter CPCs from—and punish them for—engaging in deceptive practices that induce clients to believe they are receiving care from medical professionals.

States have a “compelling interest in the practice of professions within their boundaries, and . . . broad power to establish standards for licensing practitioners and regulating the practice of professions.”¹⁸⁶ Furthermore, regulations of professional conduct are evaluated under rational basis review, even when the regulation of professional conduct involves speech (like giving informed consent disclosures).¹⁸⁷ If states do not single out expressive conduct because they disagree with its content, a person or entity is “not shielded from regulation merely because they express a discriminatory idea or philosophy.”¹⁸⁸

When CPC staff pose as professionals without a license and diagnose pregnancy as a medical condition, raising a First Amendment claim to avoid sanction would be ineffective because regulating the practice of medicine is regulation of conduct, not of protected speech. By pretending to be medical professionals, CPCs exploit the trustworthiness associated with medicine as a social institution, all while performing services that should require informed consent.¹⁸⁹ Moreover, prohibiting people from posing as medical

184. CAL. BUS. & PROF. CODE § 2052 (West 2019); COLO. REV. STAT. § 12-240-107 (2019); COLO. REV. STAT. § 12-240-135 (2019); 225 ILL. COMP. STAT. ANN. 60/3.5 (West 2012); VT. STAT. ANN. tit. 26, § 1314 (2019).

185. BUS. & PROF. § 2052(a).

186. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

187. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014) (applying rational basis review after finding that a statute “regulates only treatment,” such that “any effect it may have on free speech interests is merely incidental”), *abrogated by Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018).

188. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

189. *Brown*, *supra* note 74, at 272; see also Donald Anderson, *A Case for Standards of Counseling Practice*, 71 J. COUNSELING & DEV. 22, 22–23 (1992) (listing ethical codes adopted by a wide array of counseling organizations that require giving clients informed consent disclosures on “the extent and nature of services offered” before beginning counseling); Patricia A.

professionals has a strong, well-defined relationship to the state's interest in promoting the health of its citizens.¹⁹⁰ As long as states evenhandedly enforce these licensure laws without primarily targeting CPCs, they will avoid claims of viewpoint discrimination and pretext, thereby preventing First Amendment issues from reemerging.

C. *Torts of Negligent and Fraudulent Misrepresentation*

Another possible way to regulate CPCs without implicating the First Amendment is through tort law. Victims of CPCs' deceptive practices could bring claims of negligent or fraudulent misrepresentation. Professor Teneille R. Brown argues that people harmed by CPCs could bring individual tort suits "in tandem with public efforts to minimize the deceptive and harmful practices of CPCs."¹⁹¹ She traces the philosophical underpinnings of battery and assault claims, explaining that these torts were meant to function as tools for individuals to seek redress for violations of their "personal dignity."¹⁹² In addition to remedying harm to an individual, tort suits based on a CPC's failure to obtain valid consent "might help redefine and reclaim" informed consent as a meaningful and beneficial practice in reproductive-healthcare settings.¹⁹³ Likewise, fraudulent- or negligent-misrepresentation claims can help reclaim access to accurate health information by holding CPCs liable for engaging in dangerous deceptive speech that harms pregnant people.

Both fraudulent and negligent misrepresentation require the plaintiff to demonstrate justifiable reliance.¹⁹⁴ For reliance on a misrepresentation to be justifiable, the Supreme Court has said that the plaintiff must "use his senses" rather than "blindly rel[ying] upon a misrepresentation[,] the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation."¹⁹⁵ In more concrete terms, justifiable

Sullivan, *Public Perceptions and Politics: When Diagnostic Medical Ultrasound Is Employed as a Nondiagnostic, Nonmedical Tool*, 18 J. DIAGNOSTIC MED. SONOGRAPHY 211, 216 (2002) (arguing that "ethical" use of ultrasounds in CPCs requires "diligently obtain[ing] prenatal informed consent in the initial office visit for the pregnancy").

190. See *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014).

191. Brown, *supra* note 74, at 247.

192. *Id.* at 248.

193. *Id.*

194. To state a valid claim of fraudulent misrepresentation, a plaintiff must demonstrate that the defendant "ma[de] a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it," and that it was "justifiable" for the plaintiff to rely on the misrepresentation. RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977). A plaintiff claiming negligent misrepresentation must show that the defendant made a misrepresentation upon which the plaintiff justifiably relied because the defendant "fail[ed] to exercise reasonable care or competence in obtaining or communicating the information." *Id.* § 552.

195. *Field v. Mans*, 516 U.S. 59, 71 (1995) (quoting RESTATEMENT (SECOND) OF TORTS § 541 cmt. a).

reliance requires a plaintiff to show that the false statement at issue was material and credible.¹⁹⁶ Materiality refers to a showing that the statement is of “substantial importance to a person involved in the transaction in question.”¹⁹⁷ The credibility of a statement is demonstrated when it “is not so preposterous or otherwise lacking in credibility that the plaintiff should not have relied on it.”¹⁹⁸

If a CPC negligently or intentionally gives a client an inaccurate gestational age to inhibit them from seeking abortion care, the CPC should be liable for the consequences under the legal standards set forth above.¹⁹⁹ Since CPCs present themselves as professionals and offer free medical services like pregnancy tests and ultrasounds to draw in clients, the justifiable reliance prong of fraudulent or negligent misrepresentation should be easily satisfied in most cases. For example, it is infeasible to expect a pregnant person to verify gestational age on their own, which in turn makes it justifiable that they would believe that the person who performs the sonogram is providing accurate information.

The case of Beth Vial, the young woman who was told by a CPC that she was sixteen weeks pregnant when she was actually twenty-six weeks pregnant, exemplifies the potential utility of a fraudulent misrepresentation claim.²⁰⁰ If Ms. Vial showed that she delayed seeking abortion care because she justifiably relied on the CPC’s intentional or negligent misdiagnosis of gestational age, the CPC should be liable for the harm it caused her. Therefore, by using tort law in this context, injured CPC clients can assert their right to the accurate health information that they need and deserve.

CONCLUSION

The uneven application of First Amendment principles to reach an anti-abortion result in *NIFLA* has made a complicated doctrine particularly incoherent in the sphere of reproductive rights. By finding abortion-related CPC disclosures to be too controversial, while also deeming them irrelevant to obtaining informed consent, the *NIFLA* Court has given CPCs unconditional license to hide dangerous deception behind the First Amendment. With the law on their side, CPCs will continue espousing medically inaccurate information and operating under the guise of medical professionalism to deceive vulnerable clients. But something can and must be done.

Even after *NIFLA*, there is still a path forward for states that value preventing deception, providing consumers with important information, and

196. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 316 (5th ed. 2017).

197. *Id.*

198. *Id.*

199. See Bryant & Levi, *supra* note 182, at 755 (“[CPCs] are generally not medical facilities, but they purport to explain medical risks to patients. As such, they should be held responsible for providing accurate information.”).

200. See *supra* notes 152–156 and accompanying text.

improving health outcomes through informed consent for reproductive healthcare. Following guidance from *Alvarez* on criminalizing fraudulent speech, states can legislate to prohibit CPCs and other reproductive health entities from knowingly making fraudulent statements regarding the medical nature of pregnancy and the availability of abortion. *NIFLA* signals, however, that states should avoid implicating speech altogether when attempting to combat CPC lies. One solution that avoids implicating the First Amendment is to enforce existing laws that prohibit holding oneself out as a medical professional against CPCs that masquerade as such. As a second solution, clients injured by CPCs should file tort claims, specifically alleging fraudulent and negligent misrepresentation, to vindicate their rights to truthful information and informed consent. Despite the barriers imposed by *NIFLA*'s troubling application of the First Amendment, states have opportunities to continue the crucial work of mitigating dangerous CPC deception and promoting access to truth in reproductive healthcare.