Freedom of Speech

**NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES v. HARRIS**

Ninth Circuit Upholds California Law Requiring Licensed Pregnancy Centers to Disseminate Information About the Availability of State Run Programs That Provide Abortions

839 f.3d 823 (9th Cir. 2016)

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**INTRODUCTION**

Over the past few years, states have enacted several laws that restrict doctors’ speech and courts have begun to address a doctor’s freedom of speech as the First Amendment guarantees. These issues have created serious splits within many circuits. As it reached a peak, on November 13, 2017, the Supreme Court agreed to take up a First Amendment challenge to the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act). This article reviews related circuit decisions and is intended to guide the upcoming Supreme Court decision.

**I. BACKGROUND**

The FACT Act was passed in October 2015 for the purpose of increasing access to reproductive health services after California Legislature found that a great number of California women were unaware of the existence of state-sponsored healthcare programs. According to the Bill No.775 at §1, 700,000 women in California become pregnant every year and one-half of these pregnancies are unintended. Also, 36.7 percent of unplanned births in California were unaware of the state program. The state argued that the pregnancy decisions are “time sensitive” because if a woman misses the proper time for an abortion, which is the first trimester of the pregnancy, the abortion could cause morbidity and mortality problems. Therefore, the state enacted the FACT Act, which requires licensed pregnancy centers to disseminate a notice that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women.” The Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed by the State of California (Assembly Bill No. 775 Reproductive FACT Act). The state argued that these are the most effective ways to ensure that women are able to be aware of the existence of state-sponsored programs. However, the Act brought to light an important issue on physicians’ First Amendment freedom of speech right.

**CIRCUIT DECISION**

**I. NINTH CIRCUIT DECISION (839 F.3d 823)**

The Ninth Circuit decided the FACT Act does not violate the free speech right of the First Amendment. The court decision was based on three dimensions: 1) Is the Law a content-based regulation? 2) Could the doctors’ speech be considered as professional speech? 3) What should be the level of scrutiny? First, the court found that the Act is a content-based regulation, because it requires a particular speech about a specific topic that a particular group of speakers would disfavor. Therefore, the Act goes through a strict balancing test and should be tested whether the Act has a compelling governmental purpose and is therefore necessary. However, the court asserted strict scrutiny is not appropriate, even though the Act is content-based. This is because the court prescribed that doctors’ speech relates to the Act as professional speech.

The court cited the *Casey* case (Planned Parenthood of Southeastern Pennsylvania v. Casey) to explain why strict scrutiny is not appropriate:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, 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. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

According to the statement of the Supreme Court in the part of the practice of medicine, the physician’s freedom of speech can be regulated by state, while physician’s rights are fully protected except the part of the practice of medicine such as outside of the examination room. This clearly shows that the Supreme Court distinguished doctor’s professional speech from the protection of the First Amendment. Therefore, the professional speech is less strict than other speech. Based on that, the court decided to take intermediate scrutiny for testing the Act.

After testing, the court found the Act survives intermediate scrutiny. The court argued that the California Legislature successfully proved that the statute directly advances a substantial governmental interest and is narrowly tailored to achieve the desired objective. The purpose of the California Legislature was to ensure its citizens be able to enjoy the constitutionally-protected medical services by increasing access to adequate information. The means were also narrowly focused on informing the existence of public-funded medical services. Therefore, since the state proved its reasonable basis and its compelling interest, and since the means is narrowly drawn to achieve the state’s substantial interest, the court decided the Act does not violate physicians’ freedom of speech.

The decision that the Ninth Circuit made seems appropriate and reasonable. However, there are circuit splits in doctor’s free speech cases because the Supreme Court has not clearly mentioned the level of scrutiny for these cases. To help the Supreme Court to make proper guidelines on these cases, this article contains other circuits’ decisions on a similar issue.

**II. SUPPORTIVE CIRCUIT DECISION (760 F.3d 1195)**

As a supportive case, in 2014, the eleventh circuit upheld a Florida law banning doctors from inquiring about patients’ gun ownership when such inquiry is irrelevant to a medical case (Wollschlaeger v. Governor of Florida). This case shares the issue with the case of the Ninth Circuit, because it also relates doctor’s speech to a patient. In this case, the court argued the Act is a permissible regulation, because the court found no content or viewpoint discrimination and the Act is exempted from the First Amendment scrutiny. The court argued that inquiring about gun ownership with patients is “irrelevant” to medical care in doctors’ general belief, and the Act is generally applicable to all of the stages on doctors’ practice of medicine. Therefore, the Act is content-neutral and it passed the less strict balance test because the Act was enacted for the purpose of protecting the patients’ privacy right and prohibiting discriminatory treatment based on a certain condition.

Along with the test, the court also decided that speech could be classified as medical treatment, and therefore would be considered professional conduct, not speech. In this case, the court interpreted professional speech based on the *Casey* case to be professional conduct which is not protected by the First Amendment. This is because speech that inquires of a patient’s gun ownership would not only progress in the part of the practice of medicine, but also directly influence a doctor’s treatments. Therefore, the doctor’s speech regulated by the law would receive no First Amendment protection, since the state’s needs are greater than the doctor’s rights in the part of the practice of medicine. While the court ensured that the speech merely related to medical care would retain intermediate scrutiny, the court decided the Act only regulates the part of the practice of medicine, not outside the boundaries of the physician-patient relationship. Therefore, the Eleventh Circuit decided the Act regulates professional conduct excepted from the First Amendment protection.

Because these decisions significantly decreased the doctor’s freedom of speech, some other circuits decided in the doctor’s favor by their opposite opinion on similar cases.

**III. OPPOSITIVE CIRCUIT DECISION (774 F.3d 238)**

*Stuart v. Camnitz (2014)* case decided by the Fourth Circuit is one of the circuit decisions that shows unconstitutional state regulation on the doctor’s speech. In this case, North Carolina enacted a statute called, Woman’s Right to Know Act. The Display of Real-Time View Requirement, one part of the Act, requires the doctors to perform an ultrasound on any woman seeking an abortion “at least four but not more than seventy-two hours before the abortion is to take place.” (House Bill 854 Abortion-Woman’s Right to Know Act). Under the Requirement, the Act requires the doctors to display the sonogram to patients and describe the fetus in detail. The Act also requires the doctors to explain to the woman who seeks an abortion the risks of the procedure and any adverse psychological effects associated with the abortion “at lease twenty-four hours before an abortion is performed.” These strict state’s regulations on physicians created conflict regarding freedom of speech.

To determine if the Act violates the First Amendment, the court first considered which level of scrutiny would be applied. The physicians urged that the regulation must receive strict scrutiny because it is content-based and ideological. By contrast, the state urged that the Requirement must be treated as a regulation of the medical profession in the context of abortion and thus subject only to rational basis review. The court disagreed with both parties’ arguments and decided to employ the intermediate scrutiny standard. The court decided the issue in this case should be considered as a certain commercial speech regulation and commercial speech regulation is normally used for intermediate scrutiny. The court argued the intermediate scrutiny is appropriate because the Act is content-based and ideological, but it regulates professional speech.

This regulation compelling that speech is content-based, because it requires the physician to change the content of his speech or to say something he would otherwise not say, and it directly affects listeners as well as speakers. Also, the Requirement implicitly persuades women who seek abortions to change their minds or reassess their decisions. The State claimed that the purpose of the Act is “to protect fetal life by increasing the likelihood that a woman will not follow through on the decision to have an abortion”. This shows the purpose of the Requirement is to support the state’s pro-life position, and it forces physicians to convey a particular opinion. Therefore, the regulation is also considered as ideological. However, the court decided the strict scrutiny is not appropriate in this case. The court cited the *Casey* case to show “the antithesis of strict scrutiny” as this article mentioned in the Ninth Circuit decision. However, the Fourth Circuit ensured the single paragraph in Casey does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortion, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to an extraordinary extent. Therefore, the court also considered whether the regulation imposed an undue burden on a patient and physician under the First Amendment.

In this case, the court found the substantial governmental interest, but the means did not satisfy the manner that was drawn to the interest and proportional to the burden placed on the speech. The court found the act required a physician to display an image and provide an explanation and medical description to a woman who has, through ear and eye covering, rendered herself temporarily deaf and blind. This is completely compelled speech that impedes the physician’s First Amendment rights with no counter balancing promotion of state interests and there are no benefits to state interest on this situation. The court decided this places an undue burden on both patients and physicians, and the Act changed the physician’s role from the doctor-patient relationship to mouthpiece of the state.For these reason, the Act did not survive the standard of intermediate scrutiny.

**LAW REVIEW**

As the above cases show, there are vastly different opinions among circuit courts. Therefore, the Supreme Court has an enormous responsibility to offer appropriate guidelines for future similar cases in the lower courts. the greatest conflicts appear to result from the Supreme Court’s lack of clarity in its interpretation of the First Amendment. Specifically, its decisions regarding the type of speech and the level of scrutiny to be applied in various cases with respect to doctors’ speech appears to be inconsistent. This law review article is designed to help the Supreme Court make the right decision on the *National Institute of Family & Life Advocates v. Harris* case and offers useful guidelines for similar cases in the future.

**I. PROFESSIONAL SPEECH**

In the *Casey* case, the Supreme Court clearly showed that doctors’ speech, as part of the practice of medicine, is set apart from other forms of speech in terms of what the First Amendment protects. However, the Supreme Court did not specifically mention its standard on the type of speech. Therefore, the Ninth Circuit decided doctors’ speech for treatment is considered professional speech and is treated the same as normal commercial speech with respect to scrutiny. The Eleventh Circuit decided that doctors’ speech for treatment is not considered as professional speech, but professional conduct. This is an important distinction because the level of scrutiny is determined by the type of speech.

This article disagrees with the Ninth Circuit decision which defines professional speech as subject to regulation. The Act does not regulate professional conduct or professional speech, but it does regulate general speech. First, the Act does not regulate the physicians’ professional conduct. In this case, the Act simply requires physicians to reveal the existence of public-funded medical services. This information does not relate to medical treatment, so the standard of professional conduct cannot be applicable. Next, the court needs to consider whether the speech considered as professional requires a different standard of scrutiny than general speech. Even though the Act influences patients’ choices and it affects women’s rights to abortion before viability, this article found the extent of influence did not fit the definition of professional speech as the *Casey* case determined. Clinics can continue to offer the same treatments to their patients, while also informing them of the state-funded medical services. This means state regulation does not affect any kind of doctor’s treatment for their patients. Also, the Act does not specify the place for state notices. Since the Act does not limit the notice location to doctor’s examination room or places associated with treatment, the Act is more likely related to general speech than to professional speech. Therefore, the Act regulates doctors’ general speech which is fully protected by the First Amendment, but not professional speech.

**II. LEVEL OF SCRUTINY**

Since this article concludes that the Act regulates general speech that is fully protected by the First Amendment, the level of scrutiny should be tested under the highest level. Also, even though the Act does not discriminate against particular clinics or impose the government’s ideological opinion on abortion seekers, the case is under content-based regulation because the Act requires clinics to display particular information in conspicuous places but does not require doctors to say what they otherwise would not. Therefore, the Act will be tested under the strictest scrutiny because it is considered content-based.

**III. OPINION**

After applying strict scrutiny to the Act, this article found it did not violate doctors’ freedom of speech as the First Amendment guarantees. Since the Act should be tested under strict scrutiny, California should prove its compelling purpose, and the Act itself should be narrowly tailored to meet its objective. Under the standard, the state successfully proves the compelling governmental purpose. Through the Act, the state ensured that its citizens have access to and adequate information about constitutionally-protected medical services like abortion. This qualifies as strong governmental purpose and the lower courts did not object. Therefore, this article supports the decision of the Ninth Circuit.

Next, this article closely focuses on the means that the state used through the Act, and decides the means are sufficiently narrowly tailored to meet the governmental purpose. First, the state’s notification does not encourage, suggest, or imply that women should use state-funded services. It does not contain any more speech than necessary for achieving compelling governmental objective in safeguarding public health and fully informing Californians of the existence of publicly-funded medical services.

About this test of the means, the appellants (clinics and physicians) argue that the Act cannot survive strict scrutiny because California could find other ways to disseminate the information in the state’s notice to the public, such as in an advertising campaign. However, considering that women’s rights to have abortions before viability is “time-sensitive”, the public advertising campaign cannot be a reasonable option for governmental purposes. Also, even though a particular group of people oppose it, the Act does not impose undue burden on a physician under the First Amendment and the extent of burden does not counter balance the governmental purpose to protect women from misleading information about reproductive medical services. Therefore, this article supports the opinion that the Act is narrowly tailored to meet the compelling governmental objective.

In conclusion, the Act met all requirements and this article found that it survived at any level of scrutiny. Therefore, the FACT Act does not violate the First Amendment.

**CONCLUSION**

Freedom of speech is the most basic right of all United Sates citizens. The protection of the Constitution should not discriminate based on citizens’ occupations unless the speech significantly affects other citizens’ rights. The states’ abortion-related disclosure laws could regulate physicians’ conduct and professional speech, but it should not expand to their general speech. Therefore, in this case, the Supreme Court needs to consider the Act under strict scrutiny. However, in this case, the California Law satisfied all the requirements under strict scrutiny, showing that it does not contain any particular bias and is necessary for advancing the welfare of all Americans. Therefore, this article suggests that the Supreme Court vote in favor of the FACT Act under strict scrutiny.

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