

The Limits of Professional Speech

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ABSTRACT. Professional speech is different from other types of speech. When professionals speak to their clients to give professional advice within the confines of a professional-client relationship, the law constrains what they may say in many ways. Professionals who give bad advice are subject to malpractice liability, and the First Amendment provides no defense; this creates liability for some forms of “false speech,” unknown in other areas of speech. Professionals have fiduciary duties to their clients; such duties between speakers do not exist elsewhere in First Amendment doctrine. And the state may require professionals to obtain a license before they dispense advice; a similar requirement outside the context of a professional-client relationship would likely be an impermissible prior restraint.

But professional speech can only bear the weight of these doctrinal peculiarities if it is narrowly defined. The definition of professional speech should not be expanded beyond the doctrine’s purpose: ensuring that clients receive accurate, comprehensive, and reliable advice in accordance with the insights of the relevant knowledge community. This Essay examines the limits of professional speech through the lens of *NIFLA v. Becerra*, a recent Supreme Court case that struck down compelled disclosure requirements at “crisis pregnancy centers” as a violation of the First Amendment.

INTRODUCTION

Earlier this summer, the Supreme Court announced its decision in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*),¹ a case that involved the regulation of speech at crisis pregnancy centers (CPCs). CPCs provide antiabortion counseling behind a façade of reproductive healthcare and often deceive prospective clients by appearing to be typical healthcare providers.² In response

1. 138 S. Ct. 2361 (2018).

2. See Aziza Ahmed, *Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent, and the First Amendment*, 43 J.L. MED. & ETHICS 51 (2015); B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59 (2015).

to these deceptive practices, California enacted the Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act (FACT Act), requiring CPCs to post certain disclosures.³ The statute regulated both licensed and unlicensed facilities. It required licensed pregnancy-counseling facilities to “disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion.”⁴ It also required unlicensed facilities to “disseminate a notice stating that they are not licensed by the State of California.”⁵ *NIFLA* involved a First Amendment challenge to these disclosure requirements.⁶

NIFLA reached the Supreme Court on writ of certiorari from the Ninth Circuit.⁷ The Ninth Circuit had upheld the FACT Act on the theory that the disclosures were professional speech. But in doing so, the Ninth Circuit introduced more uncertainty into the unsettled doctrine of professional speech.⁸

Upon review, the Supreme Court reversed and remanded the Ninth Circuit’s decision, striking down the disclosure requirements as a violation of the First Amendment. In so doing, the Court not only rejected the professional speech analysis offered by the Ninth Circuit—it also was suspicious of professional speech as a category of speech. While the Court noted that it had previously permitted compelled disclosures in certain contexts and had allowed regulations of professional conduct that incidentally burdened speech, it held that the required disclosures for unlicensed facilities were “unjustified and unduly burdensome.”⁹ As to the disclosure requirement for licensed facilities, the Court found that, as currently written, the FACT Act was “wildly underinclusive.”¹⁰

3. CAL. HEALTH & SAFETY CODE § 123470 (West 2018).

4. *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 828-29 (9th Cir. 2016), *rev’d*, *sub nom.* *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

5. *Id.* at 829.

6. *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2368.

7. *Nat’l Inst. of Family & Life Advocates*, 839 F.3d at 829; *see also* *A Woman’s Friend Pregnancy Res. Clinic v. Harris*, 669 F. App’x 495 (9th Cir. 2016), *vacated*, *sub nom.* *A Woman’s Friend Pregnancy Res. Clinic v. Becerra*, No. 16-1146, 2018 WL 3148264 (U.S. June 28, 2018); *Livingwell Med. Clinic, Inc. v. Harris*, 669 F. App’x 493 (9th Cir. 2016), *vacated sub nom.* *Livingwell Med. Clinic, Inc. v. Becerra*, No. 16-1153, 2018 WL 3148265 (U.S. June 28, 2018). Another case primarily raised the free-exercise implications of the FACT Act. *See Mountain Right to Life, Inc. v. Becerra*, 692 F. App’x 807 (9th Cir. 2017), *vacated*, No. 17-211, 2018 WL 3148273 (U.S. June 28, 2018).

8. *See* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016).

9. *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2377 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

10. *Id.* at 2375 (quoting *Entm’t Merchs. Ass’n v. Brown*, 564 U.S. 786, 802 (2011)).

The Court, however, left open the possibility that a better justified or less burdensome disclosure requirement may pass constitutional muster.¹¹ The dissent, authored by Justice Breyer, likewise did not rely on professional speech doctrine. Instead, the dissent analyzed whether the disclosures were unjustified¹² and analogized the disclosure requirements to those the Court has previously held did not present an undue burden to accessing abortion services.¹³

By improperly classifying the disclosure requirements as professional speech, the Ninth Circuit decision has generated confusion about the definition of professional speech. Scholarship on CPCs properly focused on the compelled speech dimension,¹⁴ and neither the petitioner's¹⁵ nor the respondents'¹⁶ brief in *NI-FLA* relied on a theory of professional speech. But the government's brief¹⁷ and amici on both sides¹⁸ nonetheless addressed professional speech. Professional speech also loomed in the background of press commentary on the case.¹⁹ During oral argument, moreover, Justice Alito asked the Principal Deputy Solicitor General about the government's position on professional speech.²⁰ And Justice Thomas's majority opinion devotes a substantial discussion to professional speech before ultimately deciding the case on other grounds.²¹ These discussions suggest that there remains considerable uncertainty about the definition of professional speech.

11. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2378.

12. *Id.* at 2386-88, 2389-92 (Breyer, J., dissenting).

13. *Id.* at 2384-86.

14. See, e.g., Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1339 (2014).

15. Brief for Petitioners, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140).

16. Brief for State Respondents, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140).

17. Brief for the United States as Amicus Curiae Supporting Neither Party, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140).

18. See Brief for the Cato Institute in Support of Petitioners, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140); Planned Parenthood Federation of America & Physicians for Reproductive Health as Amici Curiae Supporting Respondents, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140).

19. See, e.g., Linda Greenhouse, *When the Truth Is Unconstitutional*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/opinion/abortion-supreme-court-speech-california.html> [<https://perma.cc/WYB4-VZA8>] (discussing professional speech); Robert McNamara & Paul Sherman, *The Abortion Case That's Really About the First Amendment*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/opinion/supreme-court-abortion-first-amendment.html> [<https://perma.cc/82VA-CJZE>] (same).

20. Transcript of Oral Argument at 34-36, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140).

21. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371-75.

But despite the Court's insistence that it has never recognized professional speech as a category,²² professional speech is distinct. It is treated differently under the First Amendment than other types of speech, and the Court's majority opinion, without further analysis, readily accepts this doctrinal reality.²³ Unlike other speakers, professionals are constrained in many ways in what they may say. Most importantly, bad professional advice – that is, advice inconsistent with the range of knowledge accepted by the relevant knowledge community – is subject to malpractice liability, and the First Amendment provides no defense.²⁴ Moreover, the doctrine of content neutrality, despite newly introduced ambiguity,²⁵ is incompatible with professional speech.²⁶ Content neutrality ordinarily requires the regulation of speech to be neutral as to its “communicative content,” since content-based regulations of speech “are presumptively unconstitutional.”²⁷ But the regulation of professional speech, in order to achieve its aim, cannot be content-neutral; indeed, the value of professional advice depends on its content.²⁸ Nor does the otherwise applicable doctrine of prior restraint prevent states from imposing licensing requirements on professionals before they may dispense advice.²⁹ These qualities suggest that, descriptively, professional speech is a type of speech doctrinally distinct from others.

But professional speech can only bear the weight of these doctrinal peculiarities if it is narrowly defined. Expanding professional speech beyond its proper limits would dangerously untie professional speech doctrine from its purpose. The law constrains professional speech to ensure that clients and patients can receive accurate, comprehensive, and reliable advice in accordance with the insights of the relevant knowledge community. This focus on professional expertise is crucial for determining what counts as professional speech. In short, not

22. *Id.* at 2372 (majority opinion) (“This Court’s precedents do not recognize such a tradition for a category called ‘professional speech.’”). Some scholars have also argued that professional speech is not a distinct category of speech. See Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67 (2016) (arguing against a distinctive approach to professional speech).

23. *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2373 (discussing “[l]ongstanding torts for professional malpractice” and characterizing informed consent as “firmly entrenched in American tort law” (quoting *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990))).

24. See Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 675 (2017).

25. *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2374-75 (discussing content neutrality).

26. See Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J.F. 150 (2016).

27. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

28. See Haupt, *supra* note 26.

29. See Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. (forthcoming 2019) (manuscript at 50), <https://ssrn.com/abstract=3151985> [<https://perma.cc/TE5Z-PVK7>].

everything that is said by a licensed professional or within a licensed facility is professional speech.

In classifying the CPC disclosures as professional speech, the Ninth Circuit defined professional speech too broadly. The content of the disclosures in *NIFLA* was too far removed from expert knowledge to be properly attributed to the realm of professional expertise. The disclosures dealt with publicly funded reproductive healthcare and state licensing, regulatory frameworks that are not themselves subject to expert knowledge. Unlike the Ninth Circuit, the Supreme Court correctly determined that the CPC disclosures were not professional speech. But the Court's majority opinion is incoherent in its insistence that professional speech is not an identifiably distinct type of speech. Despite the Court's assertion that professional speech is not a new and separate category of speech, it acknowledged that this type of speech is doctrinally distinctive. This results in theoretical incoherence: professional speech cannot logically be the same as other speech, yet be governed by a different doctrinal framework.

This Essay proceeds in three Parts. Part I introduces the contours of professional speech and the importance of narrowly defining it. Only if theory and doctrine are closely aligned can professional speech achieve its distinctive goal: providing the client or patient with reliable, accurate, and comprehensive advice in accordance with the insights of the relevant knowledge community. Part II turns to the Ninth Circuit's application of professional speech doctrine in *NIFLA*. Part III then highlights why the CPC disclosures should not be treated as professional speech.

Ultimately, the Ninth Circuit should not have analyzed the disclosures as professional speech, and the Supreme Court rightly rejected the analytical framework of professional speech with respect to them. But confusion about the definition of professional speech persists. I agree with the Supreme Court's analysis that the required disclosures in *NIFLA* are not professional speech. Rather, the disclosures are properly analyzed under the compelled speech doctrine of *Zauderer v. Office of Disciplinary Counsel*.³⁰ But it does not follow that professional speech is not doctrinally distinctive. In the wake of *NIFLA*, the definition of professional speech must be limited to match the doctrine's purpose.

I. DEFINING PROFESSIONAL SPEECH

Professional speech is a unique type of speech that occurs within the professional-client (or doctor-patient) relationship.³¹ As a descriptive matter, it may

30. 471 U.S. 626 (1985) (upholding certain restrictions on attorney advertisements as permissible under the First Amendment).

31. See Haupt, *supra* note 8, at 1247.

not be entirely accurate to consider whether professional speech is a new category of speech. Rather, identifying professional speech as distinct merely acknowledges a specific set of doctrinal features that we have traditionally assumed apply to speech between professionals and clients. In prior cases, the Supreme Court has, at least implicitly, shared that assumption.³² Even in rejecting the notion that professional speech is a distinct category in *NIFLA*, the Supreme Court in fact recognized that the law has long treated professional speech differently. For instance, the majority, without further explanation, assumes malpractice liability and informed consent to be constitutional under the First Amendment.³³

Professional speech allows clients and patients to receive accurate, comprehensive, and reliable advice in accordance with the insights of the relevant knowledge community. To ensure that this goal is met, the First Amendment treats professional speech differently from other types of speech in at least four key realms: professional licensing, fiduciary duties, informed consent, and malpractice liability.

Professional licensing establishes a minimum educational basis for admission into a profession. Although sometimes criticized for its economic objective in limiting access to the professions,³⁴ licensing also serves the traditional purpose of ensuring the health and safety of patients.³⁵ Licensing regimes are state laws enacted under the states' police powers.³⁶ The values underlying the First Amendment and professional licensing align in protecting the client's or patient's interest in receiving advice from a qualified professional. Once licensed, professionals are subject to *professional discipline*.³⁷ The idea behind a self-regulated profession, moreover, is that members of the profession are best situated to evaluate whether their peers meet the community's professional standard.³⁸

32. See *id.* at 1258-64 (discussing Supreme Court precedent implicitly assuming professional speech to be distinctive).

33. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018).

34. See Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUSTICE (May 2012), <https://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf> [<https://perma.cc/8VXW-N39T>]; Morris M. Kleiner, *Reforming Occupational Licensing Policies*, HAMILTON PROJECT (March 2015), https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf [<https://perma.cc/NY6P-GDKE>].

35. See Haupt, *supra* note 29, at 8-9.

36. See *id.* at 6.

37. See generally Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285 (2010).

38. See *id.* at 296.

Fiduciary duties address the knowledge asymmetries between professionals and their clients or patients, creating duties of loyalty and care. The patient, for example, entrusts the doctor with providing guidance regarding their health decisions. In return, the doctor must act in the patient's best interests according to the knowledge of the profession.³⁹ Thus, professional speech is unlike speech in public discourse, where fiduciary duties between speakers ordinarily do not exist.⁴⁰

Informed consent also responds to knowledge asymmetries between doctors and patients, ensuring that the interest in patient autonomy is protected. In order to make informed choices, the patient—with whom the ultimate decision rests—must be aware of the range of options. “Patients lack the medical expertise necessary to make informed decisions on their own”; hence, “the law requires physicians to disclose material information to patients as part of the decision making process.”⁴¹ Thus, “informed consent requires the health care provider to explicate the medical risks, benefits, and alternatives to the procedure.”⁴² Imposing an informed consent regime falls within the state's regulatory power, but its content ought to be determined by the profession with the goal of ensuring “its quality for the purposes of patient well-being.”⁴³ Consequently, informed consent is also part of the medical profession's code of ethics.⁴⁴ In order to serve its purpose, informed consent must be designed in such a way as to accurately communicate the medical profession's knowledge.⁴⁵ In the end, then, the informed consent requirement and professional speech protection should be regarded as aligned in their underlying values.

Malpractice liability rests on the premise that only good professional advice, as measured by the standards of the relevant knowledge community, is protected.⁴⁶ Bad professional advice is subject to tort liability, and the First Amendment provides no defense.⁴⁷ Professional speech is thus unlike speech in other areas of the First Amendment, where tort liability for perpetuating “false ideas”

39. See Haupt, *supra* note 29, at 40-47.

40. Cf. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1216-17 (2016).

41. David Orentlicher, *Abortion and Compelled Physician Speech*, 43 J.L. MED. & ETHICS 9, 9 (2015).

42. Ahmed, *supra* note 2, at 52.

43. *Id.*

44. See *Informed Consent*, AM. MED. ASS'N, <https://www.ama-assn.org/delivering-care/informed-consent> [<https://perma.cc/83LN-KSYB>].

45. The informed consent requirement only applies to areas where there is professional knowledge; it does not apply to value judgments. See Haupt, *supra* note 8, at 1253.

46. See *id.* at 1244.

47. See Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 950-51; see also Haupt, *supra* note 24, at 675.

does not exist.⁴⁸ But because knowledge communities are not monolithic, there is usually more than one answer that could count as good advice. Tort law takes this into account through its “two schools of thought” or “respectable minority” doctrines, allowing for diverse views to count as defensible knowledge.⁴⁹

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Professional speech, as explained throughout this Essay, communicates a knowledge community’s insights to the client or patient.⁵⁰ Viewed from the perspective of permissible state regulation, then, the First Amendment allows regulation that ensures that the client or patient receives good advice from the professional. Professional speech protection can be justified by all standard First Amendment theories—autonomy interests of the speaker and listener, marketplace interests, and democratic self-government interests—though these justifications apply differently than in other speech contexts.⁵¹ For instance, whereas the autonomy interest in other speech contexts is usually only that of the speaker, the autonomy interests in the professional-client context include both (1) the decisional interest of the client or patient, who needs the profession’s advice in order to make important life decisions; and (2) the autonomy interest of the professional to advise their client or patient in accordance with the insights of their professional knowledge community.

The distinction between regulating the professions and regulating professional speech is reflected in the shared allocation of regulatory authority between the state and the professions. On the one hand, the authority to regulate professional licensing rests in the states’ police powers to protect the health, safety, and welfare of citizens. On the other hand, the learned professions are traditionally self-regulated. For instance, whereas the state creates a regime of malpractice liability, the regime’s benchmark for finding malpractice is set by the profession. This interplay of state regulation and professional self-regulation traces claims to expertise. And expertise makes professional speech different from other types of speech.

Professional licensing, fiduciary duties, informed consent, and malpractice liability all impose permissible limits on the content of professional advice.⁵² Impermissible forms of state regulation, on the other hand, undermine the integrity of professional advice. Thus, the First Amendment provides a shield against legislative activity that contradicts professional knowledge, as courts have recog-

48. Haupt, *supra* note 24, at 681-82.

49. *See id.* at 706.

50. *See* Haupt, *supra* note 8, at 1247.

51. *See id.* at 1269-77.

52. *See id.* at 1285-89.

nized in a variety of contexts, including gun safety, conversion therapy, compelled ultrasounds, and medical marijuana.⁵³ Though these federal appellate courts decisions differ in their doctrinal approaches, the value to be protected—the integrity of the professional-client relationship—is the same.

II. THE NINTH CIRCUIT AND PROFESSIONAL SPEECH

Although the Ninth Circuit—unlike the Supreme Court—properly recognized professional speech as a distinct category, the Ninth Circuit defined professional speech too broadly. The definition of professional speech has great normative significance. The professional-client relationship can only be served if clients and patients receive accurate, reliable, and comprehensive advice in accordance with the insights of the relevant knowledge community. By classifying the CPC disclosures as professional speech, the Ninth Circuit inappropriately expanded the doctrine beyond its underlying purpose.

The Ninth Circuit has relied on a professional speech framework to analyze several cases, and other federal courts of appeals have adopted the Ninth Circuit’s reasoning.⁵⁴ The Ninth Circuit was right to uphold the disclosures in *NI-FLA*, but by framing the analysis in part in professional speech terms, it did so for the wrong reasons. In fashioning its approach to professional speech, the Ninth Circuit entrenched theoretical inaccuracies into the doctrine.⁵⁵ These inaccuracies inappropriately blurred the line between regulating professional speech and regulating the professions.

53. See, e.g., *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (holding unconstitutional as violating the First Amendment the recordkeeping, inquiry, and antiharassment provisions—but holding constitutional the antidiscrimination provision—of the Florida Firearms Owners’ Privacy Act); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (holding that a mandatory ultrasound law violated the First Amendment); *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (upholding a New Jersey conversion therapy law against a First Amendment challenge); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (upholding a California conversion therapy law against a First Amendment challenge); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (upholding a permanent injunction against a revocation of a license to protect the First Amendment rights of doctors advising on medical marijuana).

54. See *Stuart*, 774 F.3d at 248 (acknowledging that “[o]ther circuits have recently relied on the distinction between professional speech and professional conduct when deciding on the appropriate level of scrutiny to apply to regulations of the medical profession” and adopting the same approach).

55. The court’s misunderstanding of professional speech originated in *Pickup v. Brown*, 740 F.3d 1208, which upheld California’s law prohibiting licensed mental health providers from engaging in conversion therapy for minors. I have previously criticized the *Pickup* court’s approach, though it reached the correct result in upholding the conversion therapy law. See Haupt, *supra* note 8, at 1294-97.

The Ninth Circuit recognized that the state has an interest in regulating both licensed and unlicensed CPCs. These interests include conveying information about available medical services in licensed facilities⁵⁶ and informing women about the lack of licensing in unlicensed facilities.⁵⁷ Moreover, given the legislature's findings of deceptive practices, suggesting that CPCs "often present misleading information to women about reproductive medical services," the state's "interest in presenting accurate information about the licensing status of individual clinics is particularly compelling."⁵⁸ The required disclosures inform women "that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state."⁵⁹ But these state interests point in the direction of regulating the delivery of services rather than the content of professional advice.

The Ninth Circuit defined professional speech as "speech that occurs between professionals and clients in the context of their professional relationship."⁶⁰ Thus, according to the court, a disclosure is professional speech as long as it "occurs within the confines of a professional's practice."⁶¹ From this, the court reasoned that "[b]ecause licensed clinics offer medical services in a professional context, the speech within their walls related to their professional services is professional speech."⁶² In the court's view, any speech that occurs within a licensed facility is professional speech, regardless of whether it is communicated by a doctor or nurse or is instead merely displayed in the waiting area.⁶³ But this broad understanding eliminates the knowledge community's expertise from the definition of professional speech.

III. THE MISMATCH BETWEEN CPC DISCLOSURES AND PROFESSIONAL SPEECH

The CPC disclosures should not have been analyzed under the professional speech doctrine; indeed, all nine Supreme Court Justices in *NIFLA* agreed on this point. I suggest that the Ninth Circuit's misapplication of professional

56. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 841 (9th Cir. 2016), *rev'd sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

57. *Id.* at 843.

58. *Id.*

59. *Id.*

60. *Id.* at 839.

61. *Id.*

62. *Id.* at 840.

63. *Id.*

speech doctrine and the Supreme Court's subsequent misunderstanding of professional speech more broadly has two primary, partially overlapping sources: (1) an erroneous conception of the CPC disclosures as professional speech, and (2) an inaccurate understanding of the interplay between professional speech and professional licensing. I examine both in turn.

A. *The CPC Disclosures Are Not Professional Speech*

The Ninth Circuit's *NIFLA* decision defined professional speech too broadly. Whereas the court held that any speech that occurs within a licensed facility is professional speech,⁶⁴ professional speech should be defined more narrowly—as speech that communicates a knowledge community's insights from a professional to a client, within a professional-client relationship, for the purpose of giving professional advice.⁶⁵ If speech does not fall within that definition, it should not be considered professional speech. The focus ought to be on the content of the message communicated. The First Amendment should shield professional speech from state interference that seeks to prescribe or alter its content in a way that contradicts professional knowledge.⁶⁶

It is important to recognize the limits of professional speech and understand its relation to malpractice liability: “Protection and liability are best conceptualized as two sides of the same coin, and the substantive content of both is determined by the knowledge community.”⁶⁷ In *Pickup v. Brown*, the case in which the Ninth Circuit most comprehensively articulated its understanding of professional speech in upholding the California conversion therapy law against a First Amendment challenge, the court itself noted the connection between professional speech and malpractice liability, stating that “doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care.”⁶⁸ In light of that connection, the expansive view of professional speech in *NIFLA* is misguided.

64. *Id.*

65. See Haupt, *supra* note 8, at 1247.

66. See Haupt, *supra* note 24, at 673.

67. See Haupt, *supra* note 8, at 1285.

68. 740 F.3d 1208, 1228 (9th Cir. 2014).

Contrast this with the regulatory goals in *Zauderer*. In *Zauderer*, the Supreme Court distinguished restrictions on commercial speech from compelled disclosures.⁶⁹ The key to understanding the Court's rationale is to recall that its commercial speech doctrine was originally built on listeners' interests.⁷⁰ Thus, the Court posited: "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," the "constitutionally protected interest in not providing any particular factual information in . . . advertising is minimal."⁷¹ The Court then noted that, "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception."⁷² Consequently, such regulations are only subject to rational basis review.⁷³

Justice Breyer's *NIFLA* dissent reiterates this understanding of *Zauderer* and connects it to professional regulation more broadly. Justice Breyer explains that the reason why commercial speech is protected in the first place is to give information to consumers.⁷⁴ Thus, a professional's interest in withholding information is minimal, and this is not limited to advertisements about the professional's own services.⁷⁵ Doctors, for example, are subject to a wide range of disclosure requirements.⁷⁶

The interests in professional speech protection and *Zauderer*-type professional disclosure regulations are related, but not necessarily the same. Professional speech protection—and its counterpart, malpractice liability—are concerned with the accuracy of the content of the advice. The emphasis, in other words, is on professional expertise. Regulating professionals' advertising and demanding compelled disclosures, in contrast, merely prevents professionals from deceiving clients and patients about the types of service they offer.⁷⁷ In response to Justice Alito's question at oral argument in *NIFLA*, the Principal Deputy Solicitor General rightly characterized the CPC disclosures as "a disclosure

69. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

70. See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 142.

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

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

73. *Id.*

74. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting).

75. *Id.*

76. *Id.* at 2380–81.

77. *Cf. Corbin*, *supra* note 14, at 1349.

about what you're doing."⁷⁸ The Ninth Circuit in *NIFLA* misses this distinction by conflating "the clinics' speech in the context of medical treatment, counseling, [and] advertising."⁷⁹

As "a disclosure about what you're doing," *Zauderer* provides the proper framework to analyze the CPC disclosures. Such disclosures are subject to rational basis review.⁸⁰ Despite uncertainty in the lower courts about how broadly *Zauderer* should be interpreted,⁸¹ the speech at issue in the CPC cases falls squarely within the state's interest in protecting consumers from deceptive advertising. Even a narrow reading of *Zauderer* suggests that the state may, consistent with the First Amendment, regulate speech to prevent consumer deception. In the CPC context, deception is at the heart of the matter. By contrast, professional speech doctrine concerns the accurate communication of information based on expertise, not preventing deception. Even those who would strike down the FACT Act agree that "[t]here's nothing particularly 'professional,' in the sense of 'special-knowledge-demanding,'" in the content of the required disclosures.⁸² In short, the professional speech doctrine is the wrong analytical tool to address the disclosures.⁸³

The Court's majority in *NIFLA* objects that the CPC disclosures are not technically advertisements if they are displayed inside the facilities and thus that they are outside the scope of *Zauderer*. But it does not follow that the disclosures instead must be considered professional speech. Imagine a client who enters the facility and, upon reading the disclosure, leaves. At that point, no professional-client relationship had formed, and thus no professional speech could have occurred. In fact, the disclosure prevented the relationship from forming in the first place. Speech regulations that exist prior to the formation of the profes-

78. Transcript of Oral Argument, *supra* note 20, at 36.

79. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 840 (9th Cir. 2016), *rev'd sub nom. Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (2018).

80. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

81. *See Wendy E. Parmet & Jason Smith, Free Speech and Public Health: Unraveling the Commercial-Professional Speech Paradox*, 78 OHIO ST. L.J. 887, 891 (2017).

82. *See Ilya Shapiro, Symposium: "Hey California, Stop Telling Us What to Say at Work!"*, SCOTUSBLOG (Dec. 13, 2017), <http://www.scotusblog.com/2017/12/symposium-hey-california-stop-telling-us-say-work/> [<https://perma.cc/2PNJ-6PG5>].

83. As a matter of doctrine, moreover, if state legislative intervention in the reproductive health context does not directly interfere with professional speech, and thus the First Amendment does not provide a shield, it still must pass the "undue burden" test under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *Cf. Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2384-86 (Breyer, J., dissenting) (applying the framework of *Casey* as governing the analysis).

sional-client relationship ought to be kept separate from those that regulate advice-giving within that relationship once it is formed.⁸⁴ Thus, even if one might argue that the CPC disclosures are not technically advertising in the strict sense, the disclosures are still communications that precede the formation of a professional-client relationship. As such, they are more like advertising than professional advice-giving.⁸⁵

The Supreme Court rightly recognized that the disclosures are not professional speech. But the majority opinion is incoherent in its resistance to professional speech as a category, and it misses the regulatory goals correctly identified by the dissent. Indeed, the dissent rightly notes that *Zauderer* is not limited to advertising, and the underlying rationale is the flow of accurate information to the client or patient.⁸⁶ This interest, to reiterate, is different from that underlying the protection of professional speech.

B. *The Interplay of Professional Speech and Professional Licensing*

With respect to the interaction of speech and licensing, the Ninth Circuit in *NIFLA* missed the important distinction between the regulation of the *profession*—of which professional licensing is one component—and the regulation of *professional speech*.⁸⁷ While activities within a clinic take place pursuant to a license, not everything that is communicated within a licensed facility is professional speech.⁸⁸ Imagine, for example, a janitor at a hospital—a facility subject to licensing requirements—displaying a political button. Imagine further that the state then prohibited such displays. The First Amendment analysis would not hinge on professional speech doctrine at all. Or imagine that your doctor advises you—incompetently, as it turns out—on how to fix your car. It is hardly imaginable that this communication would be subject to professional malpractice liability.

The broader theoretical point is encapsulated in the exchange at oral argument in *NIFLA* between Justice Alito and the Principal Deputy Solicitor General. Orthogonal to the question raised in the case, the Principal Deputy correctly noted that states may regulate professionals. And although professional speech,

84. See Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. ONLINE 1, 15 (2017).

85. This understanding does not preclude written professional advice, which may be communicated on signs posted on the wall. For example, patients might understand a sign stating that “smoking is good for you,” displayed at a doctor’s office, to be professional advice.

86. *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2387 (Breyer, J., dissenting).

87. See Haupt, *supra* note 8, at 1279-84.

88. *Cf. id.* at 1256-57.

commercial speech, and *Zauderer*-style professional regulation are sometimes lumped together and may share some doctrinal overlap, they are distinct.⁸⁹

The difference matters. With respect to licensing, an earlier Ninth Circuit case, *Conant v. Walters*, held that it is unconstitutional under the First Amendment to revoke a doctor's medical license if the doctor gives advice on the medical benefits of marijuana.⁹⁰ From a professional speech perspective, this means that the content of advice is protected⁹¹ and distinct from licensing. Once licensed, the professional must dispense advice that is accurate, comprehensive, and reliable under the standard of the profession.⁹² In another Ninth Circuit case, *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, the court upheld a California licensing requirement, noting that California did not attempt to "dictate the content of what is said in therapy."⁹³ Whereas licensing is consistent with the First Amendment, state interference into professional advice-giving that contradicts professional insights is not.

The Ninth Circuit's statement in *NIFLA*—that "states have the power to regulate the professions, as well as the power to regulate the speech that occurs within the practice of the profession"⁹⁴—thus conflates what ought to be kept separate. Similarly, the Supreme Court's opinion in *NIFLA* incorrectly assumes that the state's licensing decisions give it "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement."⁹⁵ A licensed professional's speech is constrained to ensure the client receives accurate, reliable, and comprehensive advice. At the same time, however, the First Amendment protects the content of professional advice from state interference that contradicts professional knowledge. This interplay of professional licensing and professional speech is obscured by the majority's discussion of the dangers of state interference.⁹⁶ The dissent, by contrast, correctly understands licensing to be part of the larger regulatory framework governing professionals.⁹⁷

Professional speech is rightly considered distinct from other forms of speech. Clients and patients can only make informed decisions if they receive accurate, reliable, and comprehensive advice. To that end, the larger regulatory framework

89. Transcript of Oral Argument, *supra* note 20, at 35-36.

90. 309 F.3d 629 (9th Cir. 2002).

91. *Cf. Haupt*, *supra* note 24, at 721-24.

92. *See id.* at 698.

93. 228 F.3d 1043, 1056 (9th Cir. 2000).

94. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016), *rev'd sub nom.* *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

95. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2375.

96. *Id.* at 2374-75.

97. *Id.* at 2382 (Breyer, J., dissenting).

of professional advice-giving supports these values. Outside of this narrowly defined relationship, departure from First Amendment doctrine cannot be justified. Regulation of the professions, however, remains possible. Under the *Zauderer* regime, deceptive practices may be regulated to protect future clients or patients.

CONCLUSION

Certain litigants have recently wielded the First Amendment like an all-purpose deregulatory weapon.⁹⁸ But the free speech values underlying different forms of speech do permit regulation—consistent with the First Amendment and in a theoretically coherent way—that is designed to further these values. Professional speech ought to be protected against state interference so that professionals can give their clients and patients accurate, reliable, and comprehensive advice that corresponds to the insights of their knowledge community. Professionals’ fiduciary duties and the professional malpractice regime demand no less. Professional licensing serves the same purpose, namely, to ensure a professional’s competence to give good advice to benefit the client or patient.

The First Amendment protects the content of professional speech from state interference that contradicts professional insights, but it does not prohibit the state from regulating professionals. And the Supreme Court’s decision in *NIFLA* is not the end of the professional speech doctrine;⁹⁹ it is only the beginning.

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98. See generally Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165 (2015); Shanor, *supra* note 70.

99. See Plaintiff’s Reply in Support of Motion for Summary Judgment at 1, *Castillo v. Philip*, No. 3:17-cv-00722 (N.D. Fla. June 28, 2018) (arguing that “the U.S. Supreme Court . . . definitively rejected [the professional speech] doctrine”).