

# NIFLA v. Becerra: A case of abortion rights or deceptive speech?

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A 2018 Supreme Court case was framed as a debate over abortion rights, but a new analysis led by NYU College of Global Public Health published in the *American Journal of Public Health* finds that the Court was silent on one of the case's key issues: deceptive speech.

In June 2018, the U.S. Supreme Court struck down a California law requiring clinics to provide information to pregnant women in *National Institute of Family & Life Advocates (NIFLA) v. Becerra*. Specifically, the law required that clinics serving pregnant women provide one of two government notices: one for licensed clinics about the availability of state health services including abortion, and one for unlicensed clinics notifying potential clients that the clinics are not licensed medical facilities and have no licensed medical professionals on site.

In its decision, the Supreme Court found that both notice requirements violated the clinics' First Amendment rights. Although the law itself did not refer to the clinics at issue as crisis pregnancy centers that oppose abortion, the Court found that these clinics were targeted which in and of itself provides important lessons for policymakers.

"In addition to the Court's conclusions about states' ability to regulate speech about [reproductive health](#), the decision has broader implications for the government's ability to require factual disclosures in the commercial context," said Jennifer L. Pomeranz, assistant professor of public health policy and management at NYU College of Global Public Health and the study's author.

"Becerra may be viewed as an abortion case, but I see it as a factual disclosure requirement case, akin to those concerning tobacco warning labels or nutrition labels," added Pomeranz. "The Court has always considered warning labels like those on tobacco products in the same First Amendment class as disclosure requirements. This case appears to show the Court chipping away at the government's ability to require purely factual disclosures in the commercial context."

Commercial disclosure requirements are routine consumer protection and public health tools intended to prevent deception or alert consumers to potential health and safety harms. Courts routinely uphold such disclosure requirements—for example, calorie disclosures on restaurant menus—as consistent with the First Amendment under the Supreme Court's 1985 case, *Zauderer v. Office of the Disciplinary Counsel*. However, over the last two decades the Supreme Court has granted increased protection to businesses and decreased deference to government regulation of speech—for instance, striking down attempts to limit tobacco advertisements near schools or protect children from purchasing violent video games.

In *Becerra*, the Court found that *Zauderer* did not apply to the notice requirements because the notices were not limited to "purely factual and uncontroversial information about the terms under which services will be available." Controversy aside, the Court was silent on an issue that was central to California's reasoning for the unlicensed clinic notices: deceptive commercial speech. In fact, Pomeranz noted that the Court's lead opinion appeared to strategically avoid mentioning deceptive speech, even when directly relevant.

"Much of the business writings on the First Amendment argue that government cannot require disclosures unless its goal is to prevent deception. California's disclosure that a clinic does not have licensed medical providers should have been upheld according to this standard,"

said Pomeranz.

Pomeranz wrote that the Supreme Court's opinion creates new uncertainties about the government's ability to require the disclosure of factual information in the context of reproductive health services and more broadly in the commercial context. However, the Court's silence on deceptive speech highlights a potential avenue for future regulation.

"Addressing deceptive speech about products and services is an area ripe for government regulation in furthering the public's [health](#) and safety," said Pomeranz. "It may be the most effective strategy for enacting [disclosure](#) requirements that can withstand constitutional challenges."

Provided by New York University

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