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Pregnancy and the First Amendment

Helen Norton
University of Colorado Law School

PREGNANCY AND THE FIRST AMENDMENT

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INTRODUCTION

Suppose that you are pregnant and seated in the waiting room of a Planned Parenthood clinic, or maybe in a facility that advertises "Pregnant? We Can Help You." This Essay discusses the First Amendment rules that apply to the government's control of what you are about to hear.

If the government funds your clinic's program, the U.S. Supreme Court has held that it does not violate the First Amendment's Free Speech Clause when it forbids your health-care provider from offering information about available abortion services to you[1] (and even if *you* ask that provider about the availability of abortion services, you will be told only that "the project does not consider abortion [to be] an appropriate method of family planning"[2]). Nor, according to the Court, does the Free Speech Clause require the government to inform you that it has forbidden the program's health-care providers from discussing abortion services with you.

Nor does the government violate the Free Speech Clause, the Court has held, when it requires your doctor (regardless of whether she works in a program funded by the government) to tell you about "the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."[3] In other words, the government can require doctors to discourage you from having an abortion.

On the other hand, the Court has held that the government probably does violate the Free Speech Clause when it requires unlicensed facilities offering pregnancy-related medical services like ultrasounds to disclose that they are unlicensed (because they do not employ health-care professionals).[4] And the government probably also violates the Free Speech Clause, according to the

* Rothgerber Chair in Constitutional Law, University of Colorado School of Law. Thanks to the *Fordham Law Review* for its excellent work in hosting Fordham University School of Law's 2018 Symposium, *Equality and the First Amendment: A Symposium Celebrating 100 Years of Women*. For an overview of the Symposium, see Jeanmarie Fenrich, Benjamin C. Zipursky & Danielle Keats Citron, *Foreword: Gender Equality and the First Amendment*, 87 FORDHAM L. REV. 2313 (2019).

1. *See* Rust v. Sullivan, 500 U.S. 173, 196–200 (1991).
2. *See id.* at 180 (quoting 42 C.F.R. § 59.8(b)(5)).
3. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881, 884 (1992).
4. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018).

Court, when it requires licensed health-care facilities whose "primary purpose" is "providing family planning or pregnancy-related services" to tell you that the state offers free or low-cost comprehensive pregnancy-related services, including prenatal care, contraception, and abortion.[5]

These are the First Amendment rules, the Court tells us, for the government's control of speech to pregnant women who seek pregnancy-related services. But these holdings fail to consider the pregnant women's First Amendment interests as listeners. Rather, the Court focuses on the *government's* interests in speaking to pregnant women, or on the interests of the *speakers* regulated by the government.[6] But free speech theory and doctrine have long recognized that the First Amendment protects listeners', as well as speakers', democratic self-governance, enlightenment, and autonomy interests.[7] And for this reason, law sometimes protects speech because it furthers listeners' interests and sometimes regulates speech that threatens those interests.[8] This Essay considers what First Amendment law, as applied to speech to pregnant women, would look like if the Court attended to the First Amendment interests of pregnant women themselves.[9]

I. PREGNANT WOMEN (AND OTHER LISTENERS) HAVE FIRST AMENDMENT INTERESTS IN KNOWING WHEN THE GOVERNMENT IS SPEAKING TO THEM

The government itself often provides health-care services, and often it funds others to provide health-care services. And health-care services almost always require speech between providers and their patients. When the government speaks itself, or when it funds others to deliver its speech, the Court has held that the government may control the content of that message.[10] And that makes sense because the government's speech is not only inevitable, but also often of great value to its listeners. Governments must

5. *Id.* at 2375 (quoting CAL. HEALTH & SAFETY CODE § 123471(a)).

6. Note too these rules' viewpoint-based skew. *See id.* at 2388 (Breyer, J., dissenting) ("[A] Constitution that allows States to insist that medical providers tell women about the possibility of adoption should also allow States similarly to insist that medical providers tell women about the possibility of abortion.").

7. *See* Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1175–82 (2016) (explaining how free speech theory and doctrine protect speech in part to serve listeners' interests).

8. *See infra* Conclusion.

9. This Essay focuses on the First Amendment issues raised by the government's content-based control of speech to pregnant women by providers that offer pregnancy-related services. It does not discuss the different First Amendment issues raised by the government's content-neutral control of speech to pregnant women outside those facilities. *See* McCullen v. Coakley, 573 U.S. 464, 493–97 (2014) (striking down a statute that restricted individuals from standing on public ways and sidewalks within thirty-five feet of reproductive health care facilities' entrances and driveways); Hill v. Colorado, 530 U.S. 703, 730 (2000) (upholding a statute that restricted individuals from approaching within eight feet of another person within one-hundred feet of health-care facilities' entrances); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 771 (1994) (upholding a targeted injunction that restricted individuals from "congregating, picketing, patrolling, demonstrating, or entering" within thirty-six feet of reproductive health care clinic entrances and driveways, but striking down the injunction's three-hundred-foot buffer zone).

speak in order to govern and to offer an array of services, including health-care services. By revealing the government's priorities to the public, that speech serves the public's interest as listeners by adding to the marketplace of ideas and information and by facilitating democratic self-governance.

But there is no constitutional value, and great constitutional danger, in the government's failure to disclose the governmental source of its messages to its listeners. The Court has yet to recognize this, to listeners' detriment.[11]

More specifically, in *Rust v. Sullivan*,[12] the Court considered a First Amendment challenge to a federal regulation that forbade federally funded providers of family planning counseling and referral services (including Planned Parenthood affiliates and other nonprofit clinics) from discussing abortion with the pregnant women they served.[13] The regulation barred health-care providers in those federally funded programs from volunteering information about abortion services to the pregnant women in their care, and if a pregnant woman asked about those services, the regulation suggested that the provider simply reply that "the project does not consider abortion [to be] an appropriate method of family planning."[14] Doctors and other clinic workers argued that the regulation restricted their speech based on viewpoint in violation of the Free Speech Clause.

In a 5-4 decision, the Court disagreed. It held that the regulation simply required "that public funds be spent for the purposes for which they were authorized."[15] In other words, the majority treated the speech at issue as the government's to control because it occurred in a program funded by the government. To hold otherwise, the majority stated, "would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[16]

Although *Rust* itself makes no mention of the term "government speech," the Court would later describe this decision as the beginning of its government speech doctrine.[17] As the Court explained, we need not fear the

11. I have explored related issues at length elsewhere, and this Part draws from that work. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 28–30 (2009). *See generally* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION (Cambridge Univ. Press forthcoming 2019) (on file with author).

12. 500 U.S. 173 (1991).

13. *Id.* at 177–78.

14. *Id.* at 180.

15. *Id.* at 196.

16. *Id.* at 194.

17. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . or instances, like *Rust*, in which the government 'used private speakers to transmit

government's speech because it remains accountable to political checks: "[W]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[18] But this is only true if the public understands speech to be the government's. And recognizing a message as being from the government not only permits listeners to hold the government politically accountable for its expressive choices, but also permits them to assess the message's quality and credibility.[19]

But the majority in *Rust* required neither that the government disclose itself as the source of the speech nor that it disclose that it had restricted a clinic's speech to its patient—even though, as the dissent observed, this woman "has every reason to expect, as do we all, that her physician will not withhold relevant information regarding the very purpose of her visit. To suggest otherwise is to engage in uninformed fantasy."[20] Absent disclosure to the contrary, pregnant women listening to speech delivered by the clinic's health-care professionals assume that the speech reflects those professionals' independent, expert, and unfettered counsel, and they may evaluate the counseling differently than they would have if they knew that the government restricted its content. In rejecting the providers' Free Speech Clause challenge, the majority emphasized the government's power to control the content of the programs that it chooses to fund—but nowhere did the majority consider the pregnant women's interests, even though these women were the recipients of the government's speech.

In short, the First Amendment wrong here rests not in the content of the government's message but instead in the government's failure to identify itself as the source of the message to the message's intended audience: pregnant women seeking pregnancy-related services who have no reason to suspect, unless so notified, that the government is controlling the content of their health-care providers' speech.

So sometimes the government *itself* talks to pregnant women—and that speech can threaten pregnant women's First Amendment autonomy, enlightenment, and self-governance interests when the government fails to

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specific information pertaining to its own program.'" (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995))).

18. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

19. For this reason, as I have urged elsewhere, we should understand the First Amendment to permit the government to express and control the delivery of its own views on a variety of matters so long as it discloses itself as the source of the speech. Not only is this disclosure of great value to listeners, but the government (unlike nongovernmental speakers) has no constitutionally protected autonomy interests of its own in concealing itself as the source of speech: the First Amendment (and the rest of the Constitution) protects us from the government, not vice versa. *See generally* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008).

20. *Rust*, 500 U.S. at 212 n.3, 215 (Blackmun, J., dissenting) ("[T]he speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener.").

disclose itself as the source of the message. But sometimes the government regulates *others'* speech to pregnant women. The next Part examines how the government's regulatory choices sometimes frustrate, and sometimes further, pregnant women's First Amendment interests as listeners.

II. PREGNANT WOMEN HAVE FIRST AMENDMENT (AS WELL AS DUE PROCESS CLAUSE) INTERESTS IN RECEIVING SPEECH THAT INFORMS, BUT DOES NOT UNDULY BURDEN, THEIR REPRODUCTIVE CHOICES

Because speech to pregnant women about pregnancy-related services sometimes informs, and sometimes instead interferes with, those listeners' choices, the government's control of speech to pregnant women implicates their free speech interests. But before we turn to the Free Speech Clause, recall the special Due Process Clause rules that the Court applies to the government's regulation of abortion, including the government's regulation of speech to pregnant women about abortion.[21] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[22] the Court purported to reaffirm *Roe v. Wade*'s[23] holding that a woman's right to choose an abortion is a fundamental right under the Due Process Clause.[24] As the joint opinion observed, "Our cases recognize 'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'"[25]

At the same time, however, the Court created a new, more government-friendly test to be applied to the government's regulation of abortion.[26] Normally, the Court applies strict scrutiny to the government's restriction of a fundamental right and requires the government to show that the regulation or law at issue is narrowly tailored to serve a compelling government interest—a burden that the government rarely meets.[27] But in *Casey*, a divided Court applied the new undue burden test, which is more forgiving of the government than strict scrutiny, to assess the government's abortion

21. Many thoughtful commentators have explored the Court's abortion-specific approach not only to the Due Process Clause but also to the Free Speech Clause interests of health-care providers as speakers. *See generally* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175 (2014); B. Jessie Hill, *The First Amendment and the Politics of Reproductive Health Care*, 50 WASH. U. J.L. & POL'Y 103 (2016); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724 (1995). In this Essay I address instead the Free Speech Clause interests of pregnant women as listeners.

22. 505 U.S. 833 (1992).

23. 410 U.S. 113 (1973).

24. *Casey*, 505 U.S. at 846.

25. *Id.* at 851 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). The "joint opinion" refers to the opinion jointly written by Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter that controlled the Court's holdings in *Casey*.

26. *Id.* at 877–78.

27. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 387–91 (1978) (applying suspicious scrutiny to strike down a state law that infringed the fundamental right to marry by denying marriage licenses to those who did not comply with their child support obligations).

restrictions.[28] Under this test, the government may regulate abortion so long as it does not pose an "undue burden" to a woman seeking an abortion.[29] The term "undue burden," the joint opinion explained, "is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[30] The Court applied the undue burden test to uphold a number of Pennsylvania's restrictions on abortion, including a twenty-four-hour waiting requirement that would have been forbidden under *Roe*'s framework.[31] At the same time, the *Casey* Court struck down, as unduly burdening the right to choose to have an abortion, the state's requirement that a married woman seeking an abortion provide a signed statement that "she has notified her spouse that she is about to undergo an abortion."[32]

Casey also offered the Court the opportunity to apply its new undue burden test to the government's regulation of speech to pregnant women. More specifically, Pennsylvania's restrictions on abortion included a requirement that, at least twenty-four hours before performing an abortion, a doctor inform the woman

> of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.[33]

The Court upheld the state's control of health-care providers' speech to pregnant women and concluded that the Due Process Clause permits the government to try to persuade women not to have an abortion so long as "the means chosen by the State to further the interest in potential life [are] calculated to inform the woman's free choice, not to hinder it."[34]

> [R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.
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> . . . .
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> [T]he right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State. Because the informed

28. *Casey*, 505 U.S. at 877.
29. *Id.*
30. *Id.*
31. *Id.* at 884–88.
32. *Id.* at 887.
33. *Id.* at 881.
34. *Id.* at 877–78.

> consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right *Roe* protects.[35]

In so holding, the joint opinion suggested that the government's interests in controlling the speech of health-care providers aligned with pregnant women's interests as listeners:

> It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact of the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.[36]

In short, the Court held that the government does not violate a woman's Due Process Clause right to seek an abortion when it tries to persuade her not to choose an abortion so long as its speech does not pose an undue burden.

In *Casey*, the Court focused on the Due Process Clause implications of the government's control of speech to pregnant women and quickly disposed of the Free Speech Clause claims brought by the doctors compelled to deliver the state's script.[37] In so doing, the Court stated that, "[t]o 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."[38] In other words, according to the Court, Pennsylvania's restrictions fell within the government's longstanding regulation of professionals' speech to protect their patients and clients.

Certainly that is true of doctors' speech to their pregnant patients that explains the benefits and the risks of both abortion and childbirth. But Pennsylvania required doctors to talk about *more* than those options' medical benefits and risks. Instead, it required doctors to provide information about a range of nonmedical services and alternatives to abortion—nonmedical services and alternatives provided by institutions and individuals entirely unaffiliated with the doctors required to talk about them.[39] The joint opinion seems to assume that requiring medical providers to deliver additional accurate speech about nonmedical services and alternatives informs, rather than interferes with, pregnant women's Due Process Clause rights.[40]

To be sure, the government serves women's free speech as well as due process interests when it requires speakers to inform women's choices rather

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35. *Id.* at 883, 887.
36. *Id.* at 882.
37. *Id.* at 884.
38. *Id. But see* Corbin, *supra* note 21, at 1191 ("A doctor's right to control her speech would seem quite distinct from a patient's right to control her reproduction.").
39. *Casey*, 505 U.S. at 877.
40. *See* Thomas B. Colby, *The Other Half of the Abortion Right*, 20 U. PA. J. CONST. L. 1043, 1078 (2018) ("[T]he abortion right, in *Casey*'s reckoning, is primarily a right of decisional autonomy.").

than deceive, bully, or coerce pregnant women into making a certain decision. But that should be equally true of accurate speech about the availability of abortion as well as about alternatives to abortion.

Moreover, the government *threatens* women's free speech and due process interests when it compels speech to pregnant women that is false, misleading, or coercive. As legal scholar Jessie Hill points out, the government's false or misleading assertions about abortion's health consequences do not inform a woman's choice but instead manipulate, and thus unduly burden, it.[41] That kind of speech undermines not only pregnant women's Due Process Clause interests in exercising a protected right free from the government's undue burden but also their First Amendment interests as listeners in receiving accurate information that informs, but does not coerce or manipulate, their decision-making.[42]

III. PREGNANT WOMEN HAVE FIRST AMENDMENT INTERESTS IN RECEIVING ACCURATE, NONCOERCIVE SPEECH THAT INFORMS THEIR REPRODUCTIVE DECISIONS, INCLUDING SPEECH ABOUT THE AVAILABILITY OF ABORTION AND OTHER PREGNANCY-RELATED MEDICAL SERVICES

In *Casey*, the Court suggested that the government generally serves pregnant women's interests as listeners when it requires additional truthful and not misleading speech, at least as long as that speech seeks to discourage women from abortion. But, as evidenced by its decision in *National Institute*

41. B. Jessie Hill, *Sex, Lies, and Ultrasound*, 89 U. COLO. L. REV. 421, 448 (2018) ("[M]isleading or deceptive information cannot meaningfully serve the purpose of informing a woman's choice. And indeed, the available empirical evidence confirms that a woman's knowledge about the actual risks of abortion is decreased rather than increased by the sorts of misleading information provided by the most recent spate of informed consent laws."); *see also* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 688 (2013) ("Imagine for instance that the government positioned an employee outside the entrance to a local abortion clinic, with instructions to shout at every woman entering the clinic, saying that abortion is immoral and that she should immediately cancel any plans to end her pregnancy through artificial means. Many people will have an intuition that an extreme form of such action would offend due process.").

42. Elsewhere the Court has recognized that the government's expressive choices sometimes coerce or manipulate listeners' constitutional choices in violation of the Due Process Clause. In *Miranda v. Arizona*, the Court required law enforcement officers to disclose available constitutional protections (like the right to remain silent and the right to counsel) when interrogating those in the government's custody. 384 U.S. 436, 444–45 (1966). By requiring the government to accurately convey listeners' constitutional rights to them, *Miranda* protected listeners' rights to make informed and uncoerced choices about whether to exercise or waive those rights. *Id.* To be sure, *Miranda* involved the most captive of audiences—those in the government's physical custody. *Id.* Health-care settings offer a less extreme example. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) (noting that women seeking reproductive health care are sometimes akin to a "captive" audience because of their medical circumstances).

of Family & Life Advocates v. Becerra (*NIFLA*),[43] the Court views truthful and nonmisleading speech that does *not* discourage abortion differently.[44]

NIFLA involved a Free Speech Clause challenge to a California law that required facilities offering various services to pregnant women to disclose certain information to those women.[45] First, the law required licensed facilities (those with licensed health-care professionals) to notify women 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."[46] Second, it required unlicensed facilities to notify women that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."[47] From a listener's point of view, this information is helpful and relevant to her "mature and informed" decision.[48] Note too that the California law did not prohibit speakers from offering their opinions on abortion or its alternatives; instead, it required speakers in certain settings to disclose objectively verifiable—and subsequently valuable—information to help those women make decisions.

But crisis pregnancy centers (CPCs)[49] sued because they did not want to disclose this information to the pregnant women whom they hoped to persuade to continue their pregnancies to term.[50] In a 5-4 decision, the Court preliminarily enjoined California's law, concluding that it likely violated

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43. 138 S. Ct. 2361 (2018).

44. I have written about these issues elsewhere, and this Part draws from that work. *See* Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441 (2019) [hereinafter Norton, *Speakers*]; Helen Norton, *Taking Listeners' First Amendment Interests Seriously*, FIRST AMEND. NEWS (Sept. 20, 2018), https://concurringopinions.com/archives/2018/09/fan-200-first-amendment-news-helen-norton-taking-listeners-first-amendment-interests-seriously.html [https://perma.cc/AFY6-ZXNX].

45. *See generally Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361.

46. CAL. HEALTH & SAFETY CODE § 123472(a)(1) (2019).

47. *Id.* § 123472(b)(1).

48. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992) ("[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.").

49. CPCs are organizations generally affiliated with or operated by organizations that oppose abortion. SPECIAL INVESTIGATIONS DIV., MINORITY STAFF OF HOUSE OF REPRESENTATIVES COMM. ON GOV'T REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 14 (2006). CPCs typically offer a limited range of free services to pregnant women; few, if any, offer referrals or any other services related to birth control or abortion, and many do not employ any professional health-care providers. *Id.* CPCs' critics assert that CPCs sometimes mislead or actively deceive women. *See id.* (stating that certain pregnancy resource centers "frequently fail to provide medically accurate information" and that "[t]he vast majority of pregnancy centers contacted in this investigation misrepresented the medical consequences of abortion"); *see also* First Resort, Inc. v. Hererra, 860 F.3d 1263, 1268 (9th Cir. 2017) (discussing "[f]alse and misleading advertising by clinics that do not provide abortions, emergency contraception, or referrals to providers of such services"). None of the Court's opinions (majority, concurring, or dissenting) in *NIFLA* discussed this possibility.

50. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2370.

CPCs' free speech rights.[51] In so holding, the majority did not consider what information pregnant women as *listeners* would find helpful in making important decisions about their health and lives and focused instead on the centers as *speakers* and what information they did and did not want to provide to the pregnant women they sought to influence.[52] But the women as listeners, like the CPCs as speakers, have autonomy, enlightenment, and self-governance interests at stake—the values at the core of the Free Speech Clause.

In *Casey*, the Court held that both the Free Speech and Due Process Clauses permit the government to require professional health-care providers to deliver truthful, nonmisleading, and even *nonmedical* information to pregnant women considering abortion when the government seeks to discourage abortion through that speech.[53] But that same Free Speech Clause, the Court now tells us, likely forbids the government from requiring professional health-care providers to deliver truthful, nonmisleading information about the availability of alternative *medical* services, and it also forbids the government from requiring nonprofessionals to tell the pregnant women they seek to serve that that they are not health-care professionals.

More specifically, the *NIFLA* majority described its past precedent as permitting the government to regulate professionals' speech only in two situations: (1) when requiring "professionals to disclose factual, noncontroversial information in their 'commercial speech'"[54] or (2) when regulating "professional conduct [that] incidentally involves speech."[55] But in describing, and distinguishing, this precedent, the majority failed to acknowledge the key role played by listeners' interests.

First, with respect to commercial speech, the majority described its past deferential review of the government's compelled disclosures as applying only to "purely factual and uncontroversial" disclosures about the goods and services that a commercial speaker itself provides.[56] The majority then distinguished California's requirement that licensed facilities disclose the availability of free or low-cost reproductive health care services (that included but were not limited to abortion) because the disclosure concerned the controversial subject of abortion and was directed to services that others provide.[57]

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51. *Id.* at 2376, 2378.

52. *Id.*

53. *Casey*, 505 U.S. at 883.

54. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 657 (1985)).

55. *Id.*

56. *See id.* (quoting *Zauderer*, 471 U.S. at 651) (applying the rational-basis test to uphold commercial disclosure requirements that serve consumers' interests as listeners).

57. *Id.* at 2371–72 ("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.' The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic.

To be sure, crisis pregnancy centers do not want to say "either choice is equally good" because they do not share that opinion on moral or religious grounds. But apparently they also do not want to say that "California offers low-cost or free family planning services, prenatal care, and abortion to eligible Californians." This is an objectively verifiable, empirically uncontroverted fact. "[T]hat some speakers would prefer not to talk about those facts—or would prefer that their listeners never learn of them—does not make them 'factually controversial.'"[58]

Moreover, common practice undermines the majority's claim that *Zauderer v. Office of Disciplinary Counsel*[59] applies only to the speaker's "own services."[60] For example, some states require that health-care professionals disclose information about lawful treatment options even if a professional does not provide those services herself. Examples include state and federal laws that require certain health-care providers and facilities to inform patients or residents of their rights to execute advance health-care directives, request palliative care, refuse potentially life-prolonging treatment, or (in jurisdictions where lawful) to end one's suffering with the aid of a physician.[61] And, as noted earlier, *Casey* itself upheld the government's requirement that health-care providers disclose the availability of nonmedical services provided by others.[62]

Second, with respect to the regulation of professional conduct that incidentally involves speech, the *NIFLA* majority noted that the First Amendment permits the government to regulate professional conduct in ways that include requiring speech by health-care providers to secure their patients' informed consent to a medical procedure. The majority then cited the Pennsylvania law at issue in *Casey* as an example of the government's permissible requirement that physicians inform patients of the risks and benefits of abortion as a medical procedure.[63] But the Pennsylvania law upheld in *Casey* required doctors to inform patients not only of the nature of the procedure and the health risks of both abortion and childbirth, but also of materials describing available assistance for continuing the pregnancy, such as the availability of child support, medical assistance for childbirth, and adoption services—information that is valuable to pregnant women but in no way necessary to their informed consent to abortion as a medical procedure.[64]

In other words, both the disclosures upheld in *Casey* and those rejected (preliminarily, at least) in *NIFLA* required health-care professionals to disclose accurate information to pregnant women as listeners that is valuable

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Accordingly, *Zauderer* has no application here." (alteration in original) (citation omitted) (quoting *Zauderer*, 471 U.S. at 651)).

58. Norton, *Speakers*, *supra* note 44, at 467.

59. 471 U.S. 626 (1985).

60. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2380.

61. *See, e.g.*, 42 U.S.C. § 1395cc(f)(1) (2012); CAL. HEALTH & SAFETY CODE § 1569.156(a)(3) (2019).

62. *See supra* notes 33–39 and accompanying text.

63. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2373.

64. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

in decision-making but unnecessary for their informed consent to a medical procedure. If we focus on listeners' informational interests, then both disclosures should be upheld. But while the *Casey* joint opinion interpreted Pennsylvania's law as requiring disclosures of "reasonable measure[s] to ensure an informed choice, one which might cause the woman to choose childbirth over abortion,"[65] and held that the state was permitted to encourage that choice, the *NIFLA* majority distinguished California's notice as something other than "an informed consent requirement or any other regulation of professional conduct" and made no mention of the nonmedical disclosures upheld in *Casey*.[66]

The *NIFLA* majority's opinion centered only on the speakers and what they did and did not want to say, entirely ignoring pregnant women's First Amendment interests as listeners.[67] The dissent, in contrast, focused on the information that pregnant women as listeners would find helpful in making key, and constitutionally protected, decisions about their health and lives. As Justice Breyer wrote:

> 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? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context.
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> No one doubts that choosing an abortion is a medical procedure that involves certain health risks. But the same is true of carrying a child to term and giving birth. That is why prenatal care often involves testing for anemia, infections, measles, chicken pox, genetic disorders, diabetes, pneumonia, urinary tract infections, preeclampsia, and hosts of other medical conditions. Childbirth itself, directly or through pain management, risks harms of various kinds, some connected with caesarean or surgery-related deliveries, some related to more ordinary methods of delivery. Indeed, nationwide "childbirth is 14 times more likely than abortion to result in" the woman's death. Health considerations do not favor disclosure

65. *Id.* at 883.

66. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2373 ("The joint opinion in *Casey* rejected a free-speech challenge to this informed-consent requirement. It described the Pennsylvania law as 'a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion,' which 'for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure.'" (alteration in original) (citation omitted) (quoting *Casey*, 505 U.S. at 884)).

67. *See id.* at 2379 (Kennedy, J., concurring) ("This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these.").

> of alternatives and risks associated with the latter but not those associated with the former.[68]

The *NIFLA* majority also preliminarily enjoined California's requirement that an unlicensed facility tell pregnant women that the facility is unlicensed and does not employ health-care professionals.[69] The majority declined to decide whether to apply deferential review to California's law, which would be required if the law were characterized as requiring the disclosure of "factual and uncontroversial" information.[70] Stating that even under deferential review such disclosures must be neither unjustified nor unduly burdensome, the majority held that "California has offered no justification that the notice plausibly furthers."[71]

But the law's justification is clear if we attend to listeners' constitutional interests—more specifically, the interests of pregnant women seeking pregnancy-related services like prenatal care, postnatal support, contraceptives, or abortion.[72] Time is precious to most patients seeking health care, and this is especially true for pregnant women.[73] Delays create new health risks, which limit and sometimes altogether foreclose certain choices. When time is of the essence, listeners generally want more accurate information rather than less, and they want it sooner rather than later. They want to know what services a speaker does and does not offer and what services are available elsewhere. When we take women's interests as listeners seriously, then we understand the First Amendment to permit the government to require that speakers make such disclosures in settings where listeners are especially likely to receive them.

CONCLUSION

Why should we privilege listeners' First Amendment interests over speakers' in this setting? As I have written elsewhere:

> When we take the side of listeners in these relationships—that is, when we require *more* of speakers when their listeners lack information or power—

68. *Id.* at 2385–86 (Breyer, J., dissenting) (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2315 (2016)).

69. *Id.*

70. Unlicensed CPCs did not want to tell pregnant women that "we are unlicensed" or "we do not have any licensed medical providers here." Surely these disclosures are factual. And, as discussed above, the fact that the CPCs do not want to share these facts with pregnant women should not make them controversial. *See supra* note 58 and accompanying text.

71. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2376–78 ("We express no view on the legality of a similar disclosure requirement that is better supported or less burdensome.").

72. This Essay explains why, from a listener's perspective, *Casey* and *NIFLA* cannot both be right. But even if we focus only on *speakers'* interests, *Casey* and *NIFLA* cannot both be right. From a speaker's perspective, either professionals can make their own choices about what to say so long as they provide the information required for informed consent (and both laws fail First Amendment review because they compel professionals' speech) or the government can require professionals to give listeners truthful information on top of the information required for informed consent (and both laws survive First Amendment review).

73. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011) (stating that medical "information can save lives").

> we improve the quality of the communicative discourse. More specifically, we promote listeners' First Amendment interests when we enable them to receive accurate information that informs, but does not coerce, their decision-making. We also achieve related moral goals: in Kantian terms, we recognize listeners as ends in themselves, rather than as mere means through which powerful speakers seek to achieve their own ends.[74]

Law sometimes privileges listeners' interests over speakers' in settings outside of public discourse where the speaker has more information than the listener and seeks to push her listener's choices in her preferred direction[75]—sometimes life-shaping choices about the listener's own property or health.[76] Think, for instance, of a commercial actor's speech to persuade listeners to buy what he's selling. There, the Court's commercial speech doctrine permits the government to regulate false or misleading speech because such speech frustrates listeners' interests, and it limits the government's ability to regulate accurate commercial speech because such speech is valuable to consumers as listeners.[77] The government protects listeners in these relationships by requiring comparatively knowledgeable speakers to provide relevant and objectively verifiable information, thus enabling listeners to receive accurate information that informs, but does not coerce, their decision-making.

For these reasons, as a doctrinal matter, listeners' First Amendment interests sometimes drive the Court to apply a different level of scrutiny to the government's regulation. For example, in some settings, the Court applies rational-basis scrutiny to the government's requirement that speakers disclose factual information to inform listeners' decisions.[78] And listeners' First Amendment interests sometimes explain why the government's regulations occasionally survive even suspicious scrutiny; in the campaign finance setting, the Court has applied exacting scrutiny to uphold laws that require political speakers and contributors to disclose themselves as the source of campaign contributions and communications precisely because

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74. Norton, *Speakers*, *supra* note 44, at 443.

75. The First Amendment implications of the government's control over speech to pregnant women seeking pregnancy-related services may turn on whether we consider a woman's reproductive decisions to be health-care decisions or political decisions. *See* Hill, *supra* note 21, at 111 ("The framing of reproductive health care as a moral or ideological choice and a matter of public concern rather than as private health care is significant not just because it may shape the social meaning and public understanding of contraception and abortion, but also because this framing arguably affects the outcome in First Amendment disputes.").

76. *See* Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 75–77 (2018) (explaining that the government may have greater First Amendment leeway to regulate speech that threatens harm to individuals or their property because of the government's traditional role of protecting the public); *see also id.* at 73 ("[T]he Court generally divided activity between a realm of physical and financial interactions, where government has a crucial role in securing safety and property, and a realm of ideas, where government must generally let individuals shape their own thought free from government interference.").

77. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–64 (1980).

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

those disclosures serve listeners' informational interests.[79] Either way, listeners' interests are part of the First Amendment analysis.[80]

What would the First Amendment law that applies to speech to pregnant women look like if we considered the First Amendment interests of pregnant women? It would require the government to identify itself as the source of speech when it speaks to pregnant women about their reproductive decisions. It would prohibit the government from requiring others who speak to pregnant women about their reproductive decisions to deliver inaccurate or misleading speech to those women. And it would permit the government to require others who speak to pregnant women about their reproductive decisions to deliver accurate and relevant information to those women, even if that information does not discourage abortion.

79. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 366 (2010); Buckley v. Valeo, 424 U.S. 1, 64 (1976) (applying, and upholding, campaign disclosure requirements under "exacting" scrutiny, meaning that the regulation must be substantially related to an important government interest to survive review).

80. First Amendment doctrine that attends to listeners' informational interests still leaves those speakers free to make a wide range of expressive choices. It does not force speakers to mouth opinions that they do not hold or state any untrue fact, nor does it prohibit them from sharing their opinions or additional accurate information of their choosing in noncoercive settings.