No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the forced recitation of a government-mandated advertisement to every client of a pregnancy center, regardless of the client's individual circumstance, qualify as a regulation of "professional speech" subject to only intermediate First Amendment scrutiny?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan policy research foundation established in 1977 and dedicated to the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case concerns Cato because it threatens the basic First Amendment right to be free from compulsory speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether licensed professionals can have their speech commandeered to advertise services that the government wishes to promote. California requires licensed clinics "whose primary purpose is providing family planning or pregnancy-related services" to deliver to each client the following message: "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." Slip op. 7–8. There is an exception for clinics that actually enroll clients in these programs—so, in effect, the law applies only to clinics that oppose the very program they must advertise.

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* funded its preparation or submission.

Holding that the requirement regulates only "professional speech," the Ninth Circuit applied intermediate First Amendment scrutiny and upheld the law.[2] The definition of "professional speech" that the lower court applied is dangerously overbroad and requires this Court's correction. No one disputes that the speech of licensed professionals can be legitimately regulated in some circumstances. Medical doctors can be liable for malpractice if they fail to convey a diagnosis to a patient, for example, or if they fail to obtain informed consent before performing surgery. Some courts and scholars have argued that speech regulations of this type deserve their own doctrinal category—"professional speech"—and that a lower, "intermediate" level of scrutiny should be applied to such regulations. Others have argued that no new doctrinal tier is necessary, because the compelling need for malpractice enforcement and informed consent laws means that they would pass strict scrutiny. *See, e.g.*, Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 101 (2016) (arguing that "properly applied First Amendment principles would sustain the power of regulators to regulate professional speech in these instances. These are the very regulations that would typically be upheld even under application of the 'strict scrutiny' test.").

Amicus needs not take a side in this debate over doctrinal categories—and neither does the Court. That

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[2] The use of intermediate scrutiny may well have been outcome-determinative. The Ninth Circuit did not reach the factual question of whether California could have distributed this message itself, but admitted that "even if it were true that the state could disseminate this information through other means, it need not prove that the Act is the least restrictive means possible" in order to satisfy intermediate scrutiny. Slip op. 34.

is because the quality of true "professional speech" that justifies these limited regulations—namely an asymmetry of expert knowledge—is entirely absent here. For that reason, the compulsory speech that California has mandated neither warrants intermediate scrutiny nor overcomes strict scrutiny.

Moreover, review is warranted because the Ninth Circuit's test ignores the threat posed by compulsory recitation of government-selected facts. Under the court's test, a state can compel unwilling physicians to recite any fact that may be relevant to "the health of [the state's] citizens," a definition broad enough to encompass essentially any statement the government chooses. If left to stand, the decision below would allow states to force professionals of all kinds to promote products and services they morally oppose.

Finally, the Court should grant certiorari because lower courts have struggled for guidance in formulating the boundaries and definitions of true professional speech. As this case shows, the Court should weigh in before the definition of "professional speech" is dangerously expanded to the point where doctors effectively lose their First Amendment rights the moment they walk into their clinics.

ARGUMENT

I. THE NINTH CIRCUIT'S DEFINITION OF "PROFESSIONAL SPEECH" IS DANGEROUSLY OVERBROAD

A. "Professional Speech" Must be Limited to a Profession's Specialized Knowledge

Regulation of patient-physician speech is justified by the notion that when doctors speak to their patients, they "assume a fiduciary obligation faithfully

and expertly to communicate the considered knowledge of the 'medical community.'" Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 977 (2007). A doctor might, for example, be liable for malpractice if he fails to inform his client of relevant medical knowledge that only the doctor could be expected to know. At the crux of this duty is an asymmetry of specialized knowledge. As one legal scholar has described, "[t]he professional-client relationship is typically characterized by an asymmetry of knowledge. The client seeks the professional's advice precisely because of this asymmetry." Claudia E. Haupt, *Professional Speech*, 125 Yale L. J. 1238, 1243 (2016). *See also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 845 (1999). ("[T]he physician-patient relationship is marked by an imbalance of authority. Patients seeking the help of a physician tend to lack the knowledge to evaluate their own medical condition or to understand fully the various treatment options apart from their careful presentation by the physician.").

This asymmetry defines both the justification for, *and the limits of*, professional speech regulations. In the medical context specifically, "the scope of permissible regulation of the physician-patient dialogue must be determined with a view to the nature of the underlying relationship." *Id.* at 844–45.

With this standard in mind, it is clear that the compelled speech at issue here, a rote advertisement for a government program, does not have any of the qualities that uniquely characterize professional speech. The state's message requires no expert knowledge to

deliver. Nor is it in any way tailored to a client's unique circumstances as diagnosed by a doctor's professional judgment. When information does not require specialized medical knowledge to explain, a doctor holds no unique power over her patients. In other words, if a message can be understood fully by reading a website or brochure (as this advertisement can be), it is not one unique to the doctor-patient relationship.

Nonetheless, the Ninth Circuit held that the notice requirement "regulates professional speech." Slip op. 27. It reached this conclusion because "professional speech is speech that occurs between professionals and their clients in the context of their professional relationship. In other words, speech can be appropriately characterized as professional when it occurs within the confines of a professional's practice." Slip op. 27–28. The court thus applied only intermediate scrutiny, upholding the requirement on the theory that "California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." Slip op. 32.

The Ninth Circuit's definition of "professional speech" is vastly overbroad. A *professional* may be speaking, but that, by itself, does not make it "professional speech." As this case shows, not all speech "that occurs between professionals and their clients in the context of their professional relationship" is speech grounded in unique expertise. Tellingly, the message that California mandates could be delivered just as competently by anyone who is *not* a licensed physician and for whom the "professional speech" doctrine would obviously *not* apply. The lower court focused exclusively on the *identity* of those compelled to speak and

the *setting* of the speech, in the process ignoring the core justification for the regulation of professionals.

Absent a limiting principle centered on expert knowledge, there is little a state could not force its licensed physicians to say under the auspices of "professional speech" regulation. The universe of "information" relevant to "the health of [a state's] citizens" is, after all, practically limitless. If the Ninth Circuit's reasoning is allowed to stand, California might constitutionally mandate that all doctors inform their patients where they can buy the cheapest nearby broccoli on the grounds that "California has a substantial interest in the health of its citizens, including ensuring that its citizens have adequate information about obtaining healthy foods like broccoli."

If this Court does not intervene, lower courts will continue to dangerously expand the ambit of so-called professional speech. One district court, for example, has suggested that any mandatory notice which "provides information relevant to patients' medical decisions" can be regulated as professional speech, because it "relates to the medical profession." *A Woman's Friend Pregnancy Resource Clinic v. Harris*, 153 F. Supp. 3d 1168, 1202 (E.D. Cal. 2015). The Court should reverse this trend and clarify the limits of professional speech before doctors are forced to be mouthpieces for promoting any product the state favors.

B. "Professional Speech" Must Be Tailored to a Particular Client's Circumstances

The fiduciary relationship between physician and patient involves not just the trust that a physician will relay expert knowledge. It also includes a trust that the physician will determine what advice is relevant *to*

a particular circumstance. "Under the knowledge community-focused theory of professional speech, the professional is to decide what is relevant professional information. The [professional] knowledge community's insights not only determine what accurate information is, but also what is relevant in any given situation according to the specific circumstances of the client." Haupt, *supra*, at 1300.

California's mandated one-size-fits-all recitation cannot be justified by the asymmetry of expertise that distinguishes professional-client relationships, because a patient's "interests are only served if the professional communicates information that is accurate (under the knowledge community's current assessment), reliable, and *personally tailored to the specific situation of the listener*." *Id.* at 1271 (emphasis added).

As Justice White accurately explained, speech cannot legitimately be regulated as professional speech when "a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted." *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the judgment). The rote recitation of a pre-written message delivered to *every* client clearly lacks this characteristic. California's regulation therefore does nothing to further the specific goals of professional speech regulations and must not be analyzed as one.

Nor can the mandatory message be justified as an informed-consent law. In *Planned Parenthood v. Casey*, this Court upheld a state informed-consent provision because it provided "truthful, nonmisleading information *about the nature of the procedure*" to women who planned to obtain an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882

(1992) (plurality op.) (emphasis added). It is telling that the Court added the caveat "about the nature of the procedure." It is the fact that patients indicated an intent to undergo a specific procedure that triggered the required message. As Mark Rienzi explains:

> Doctors performing medical procedures need to obtain informed consent because, absent such consent, the procedure would constitute a battery and would expose them to liability. Thus, while it is entirely consistent with historical practice for state courts and legislatures to dictate the terms on which informed consent must be obtained by a doctor, these courts and legislatures have no similar role in requiring informed consent before merely talking about medical issues, much less as a required step before merely offering support and assistance to help someone through a pregnancy.

Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. Contemp. Health L. & Pol'y 223, 241 (2010).

California's message, by contrast, is not linked to any course of treatment recommended by a physician. Indeed, for the plaintiffs here and many other licensed pregnancy centers, it is not linked to any course of treatment such clinics will *ever* recommend.

In sum, the Ninth Circuit should have applied strict scrutiny here, because the rationales that may justify lower scrutiny for core professional speech simply are not present. The compulsory message is neither triggered by a physician's becoming aware of

any particular circumstance regarding his patient, nor does it relate any expert knowledge of which only licensed members of the profession can be expected to know. For these reasons, the speech it mandates is not professional speech at all. Instead, the law is a commandeering of certain persons to recite a government advertisement, and it must be analyzed as such.

II. COMPELLED SPEECH IN A DOCTOR'S OFFICE IS JUST AS DANGEROUS AS COMPELLED SPEECH IN ANY OTHER CONTEXT

A. Compelled Recitation of Selective Facts Allows the Government to Impermissibly Promote Its Agenda

This Court has previously warned that the mandated recitation of selective facts burdens First Amendment rights just as much as the mandated recitation of opinions. As the Court explained,

> either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget.

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797–798 (1988).

This potential to put a thumb on the scale for the state's favored viewpoint is equally present in the context of medical advice. As one scholar explains, "[o]ne indicia of improper partisanship is underinclusiveness—that is, the imposition on doctors of unbalanced disclosure requirements that create the impression that government prefers one treatment to another." Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201, 262 (1994).

Precisely such indicia are present here. California mandates that clinics that do not provide abortions must tell clients where they can get one, but does not mandate, for example, that clinics that do not refer to adoption agencies must tell clients how to contact one.

The Ninth Circuit admitted that "the Act '[m]andat[es] speech that a speaker would not otherwise make' which 'necessarily alters the content of the speech.'" Slip op. 19 (quoting *Riley*, 487 U.S. at 795). But the test it applied—that a statute is permissible if it mandates recitation of "information about . . . medical services"—is wholly unresponsive to that concern. Indeed, it is so permissive that it would allow the state to engage in selective speech mandates even more blatant than the one here. To give just one example,

> Could a state have required physicians to tell any pregnant patient without health insurance who was contemplating an abortion that she should vote for Barack Obama in the 2012 presidential race if she was concerned about getting access to low-cost health insurance for herself and her unborn child through a state health-insurance exchange? This statement is

> truthful, non-misleading, and relevant to the patient's medical decision.

Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 Cardozo L. Rev. 2347, 2350–51 (2013).

Whether a regulation this blatant is attempted or not, the power of the government to influence society by means of compelled physician speech should not be underestimated. "During certain historical periods . . . governments have overtly politicized the practice of medicine, restricting access to medical information and directly manipulating the content of doctor-patient discourse. For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception." Berg, *supra*, at 201 (citations omitted).

The Ninth Circuit's permissive approach ignores this potential for abuse. The correct standard, once again, derives from the true definition of professional speech. A good-faith disclosure law does not mandate a recital of the state's preferred facts, but requires professionals to be candid in relaying what their own expertise tells them is relevant. "The State may ensure professionals' faithfulness to the public aspects of their calling, but it may not usurp their role or determine independently the bodies of knowledge that may be accessed or the individual judgments that may be rendered in a given case." Halberstam, *supra*, at 773.

B. Compelled Speech Violates Freedom of Conscience, Regardless Whether a Speaker Wishes to Enter a Public Debate

Compelled speech triggers First Amendment strict scrutiny not only because it impermissibly influences public debate but also because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This is no less true when the mandated speech consists of government-selected facts rather than opinions. For example, some investment funds invest only in stocks that those funds deem to be "ethical" by a particular moral or religious code. *See, e.g.*, Thomas M. Anderson, *The 7 Top Funds for Ethical Investing*, Kiplinger, July 2010, http://bit.ly/2oECcDZ. Suppose that a hypothetical financial services regulation requires that such funds inform their customers where and how they can buy stock in "non-ethical" companies that the funds themselves do not offer. Such a regulation, requiring funds to advertise precisely the companies to which they are morally opposed, would certainly burden their freedom of conscience just as much as many compelled recitations of opinions.

The regulation here "invades the sphere of intellect and spirit" of crisis pregnancy centers for precisely the same reason. It forces them to promote services to which they are morally opposed. Yet the lower court downgraded the right of professionals to be free from such compelled speech, because "'[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to

contribute to public debate.'" Slip op. 27 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014)).

The Ninth Circuit, in both *Pickup* and the decision below, has created a false dichotomy. A speaker does not have to intend to "contribute to a public debate" to be free from a *compulsion* to support one side in that debate. Neither the schoolchildren in *Barnette* nor the private family in *Wooley v. Maynard* evinced any desire to enter into a public debate or broadcast their own message. There is no reason to hold physicians or other professionals to any higher standard.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO LEND CLARITY TO THE "PROFESSIONAL SPEECH" DOCTRINE

This Court should grant certiorari because the First Amendment rights of professionals have never been explicitly clarified. "Despite the century-old recognition of the regulation of professions, we still have, for example, no paradigm for the First Amendment rights of attorneys, physicians, or financial advisers when they communicate with their clients." Halberstam, *supra*, at 772. *See also* Haupt, *supra*, at 1241 ("The Supreme Court has never identified, with any clear boundaries, the category of professional speech."); Keighley, *supra*, at 2367 ("[W]hile the term 'professional speech' has entered into the doctrine and academic commentary, the degree of protection such speech should receive is unclear—'the phrase has been used by Supreme Court Justices only in passing.'") (quoting *Stuart v. Huff*, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011)).

As scholars have noted, "[t]here is now marked and explicit disagreement among the circuits regarding

[the] proper interpretation" of this Court's three-sentence treatment of professionals' First Amendment rights in *Casey*'s plurality opinion. Haupt, *supra*, at 1259 (citing *Stuart v. Camnitz*, 774 F.3d 238, 248–49 (4th Cir. 2014) (rejecting the Fifth and Eighth Circuits' interpretation), cert. denied sub nom. *Walker-McGill v. Stuart*, 135 S. Ct. 2838 (2015)). *Casey* thus "left the development of a coherent framework for the analysis of professional speech for another day." Halberstam, *supra*, at 837. This case presents an excellent opportunity to clarify the doctrine, so that doctors and other professionals are no longer at risk of having their speech unjustifiably commandeered.

CONCLUSION

For the foregoing reasons, and those stated by petitioners, the petition should be granted and the decision of the Ninth Circuit ultimately reversed.

Respectfully submitted,

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