

NIFLA V. BECERRA: THE FIRST AMENDMENT AND THE FUTURE OF MANDATORY DISCLOSURE LAWS

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INTRODUCTION

A "crisis pregnancy center" (CPC) may sound like a comprehensive health service provider for pregnant women, but it is far from it. CPCs are pro-life¹ not-for-profit organizations that limit their services

1. This Note uses the term "pro-life" to describe individuals or organizations who are opposed to abortion services.

to exclusively non-abortion options.² CPCs pose a serious threat to women's health and safety by engaging in a number of deceptive practices that improperly influence women's reproductive health decisions and interfere with their access to comprehensive reproductive health services.³ States and local governments have attempted to regulate the deceptive practices of CPCs through mandatory disclosure laws that require CPCs to disclose information regarding the centers and their staff, the limited nature of their services, the availability of state-funded comprehensive reproductive health services, or all of the above.⁴ In response, CPCs have challenged these laws, claiming that they violate their freedom of speech under the First Amendment because the laws compel the CPCs to make statements that they otherwise would not make.⁵

The Supreme Court addressed the constitutionality of mandatory disclosure laws for the first time in 2018. The case concerned California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act, adopted in 2015, which requires pregnancy-related clinics to inform patients about the existence of state-funded health care programs and disclose whether they are licensed medical facilities.⁶ In *National Institute of Family and Life Advocates (NIFLA) v. Harris*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) found that the FACT Act's requirement that clinics inform women about state-funded programs survived intermediate scrutiny as applied to regulations of professional speech. It also found that the license disclosure requirement survived any level of scrutiny.⁷ Upon appeal, the Supreme Court reversed the Ninth Circuit's decision.

2. See Casey Watters et al., *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information* 4 (Apr. 1, 2011) (updated June 1, 2015) (unpublished comment) (on file with the UC Hastings College of the Law Public Law Research Institute) [hereinafter UC Hastings Report 2015].

3. See NARAL PRO-CHOICE AM., *THE TRUTH ABOUT CRISIS PREGNANCY CENTERS* 2–4 (2017) (providing an overview of the deceptive practices of CPCs), <http://www.prochoiceamerica.org/wp-content/uploads/2016/12/6.-The-Truth-About-Crisis-Pregnancy-Centers.pdf> [<https://perma.cc/8HKE-7TBH>] [hereinafter NARAL, *The Truth About CPCs Report* 2017].

4. This Note uses the term “mandatory disclosure law” to refer to laws and ordinances requiring CPCs to disclose information regarding the centers, their services, or the availability of comprehensive reproductive health services.

5. See *Beth Holtzman, Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive FACT Act*, 12 Nw. J. L. & Soc. POL'Y 78, 88–95 (2017) (describing legal challenges to initial mandatory disclosure laws).

6. Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act, CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West 2018), *invalidated by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

7. See *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 845 (9th Cir. 2016).

Rejecting a deferential review for professional speech, the Supreme Court found that the FACT Act's requirement to inform women about state-funded programs, while likely subject to strict scrutiny, failed even intermediate scrutiny.⁸ The Court also found that the license disclosure requirement did not survive even rational basis review.⁹

This Note examines the likely impact of *Becerra* on mandatory disclosure laws and on other medical disclosure laws, particularly abortion counseling laws.¹⁰ This Note first provides a description of the deceptive practices of CPCs, followed by an overview of both the mandatory disclosure laws adopted prior to the FACT Act and the First Amendment challenges to these laws.¹¹ This Note then introduces the FACT Act and provides an overview of the Supreme Court's decision in *Becerra*.¹² Specifically, this Note argues that the courts are likely to find at least four of the five mandatory disclosure laws adopted after the FACT Act unconstitutional because of their resemblance to the FACT Act and the experience of previous mandatory disclosure laws.¹³ This Note argues that, although *Becerra* may be perceived as a setback for reproductive rights, it could subject some abortion counseling laws to heightened scrutiny which have been upheld under rational basis review, potentially resulting in new challenges to these laws.¹⁴ This Note concludes by offering policy recommendations to states and local governments considering adopting mandatory disclosure laws moving forward.¹⁵

I.

CRISIS PREGNANCY CENTERS

A. *Introduction to CPCs*

Crisis pregnancy centers, also known as pregnancy resource centers or limited-service pregnancy centers, are pro-life, not-for-profit

8. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375–78 (2018).

9. *Id.*

10. This Note uses the term “abortion counseling laws” to refer to laws requiring medical professionals to provide counseling to women before they may perform an abortion. Counseling requirements include, but are not limited to, providing women with information about the abortion procedure and its risks; providing women with information on support services and ultrasound services; requiring women to have an ultrasound before they may have an abortion; telling women that personhood begins at conception; and discussing with women the ability of a fetus to feel pain.

11. See *infra* Parts II–IV.

12. See *infra* Part V.

13. See *infra* Section VI.A.

14. See *infra* Section VI.B.

15. See *infra* Part VII.

organizations that limit their services to exclusively non-abortion options.¹⁶ The first CPC opened in Hawaii in 1967 after the state legalized abortion.¹⁷ Since then, CPCs have continued to open across the country. Although the exact number is disputed, approximately 3,500 CPCs are in operation in the United States.¹⁸ Their mission is to “persuade teenagers and women with unplanned pregnancies to choose motherhood or adoption.”¹⁹ As a result, most CPCs do not offer services that conflict with their pro-life mission, such as contraception or abortion services, or information about those services.²⁰

Many CPCs belong to evangelical Christian networks and are affiliated with pro-life organizations, including NIFLA, Heartbeat International, and Care Net.²¹ These organizations provide CPCs with financial, organizational, and legal support to further their pro-life agenda.²² NIFLA’s website, for example, proclaims that the mission of the organization is to provide CPCs with legal resources and counsel in order to “better equip [CPCs] so they may serve abortion-vulnerable women more effectively.”²³ Similarly, Care Net proclaims that it is “dedicated to partnering with independent pregnancy centers and providing them with the resources they need to serve their local communities.”²⁴

CPCs are financed by pro-life organizations, religious organizations, individual churches and donors, and federal and state govern-

16. See UC Hastings Report 2015, *supra* note 2, at 4.

17. See Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 PERSP. ON SEXUAL & REPROD. HEALTH 201 (2012).

18. *Id.*

19. MIN. STAFF OF H.R. COMM. ON GOV’T REFORM, 109TH CONG., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 1 (Prepared for Rep. Henry A. Waxman July 2006) [hereinafter Waxman Report 2006]; see, e.g., *Mission & Vision*, CARE NET, <https://www.care-net.org/mission-and-vision> (last visited July 8, 2019) [<https://perma.cc/EY4V-XG3Y>] (“Care Net envisions a culture where women and men faced with pregnancy decisions are transformed by the gospel of Jesus Christ and empowered to choose life for their unborn children and abundant life for their families”).

20. UC Hastings Report 2015, *supra* note 2, at 4.

21. *Id.* at 5.

22. *Id.*; see, e.g., *About NIFLA*, NAT’L INST. FAMILY & LIFE ADVOCs., <https://nifla.org/about-nifla/> (last visited July 8, 2019) [<https://perma.cc/7W9W-LFRV>] (stating that “by providing legal counsel, education and training, the [National Institute of Family and Life Advocates] helps member centers more effectively reach and serve their communities”).

23. See *id.*

24. See *What is a Pregnancy Center?*, CARE NET, <http://www.care-net.org/what-is-a-pregnancy-center> (last visited July 8, 2019) [<https://perma.cc/6W68-6MUUV>].

ment programs.²⁵ Notably, since 2001, CPCs have received over \$60 million in federal abstinence and marriage-promotion funding.²⁶ In addition, CPCs receive direct allocations or tax credits in state budgets and proceeds from state sales of “choose life” license plates.²⁷ Overall, twenty-seven states have enacted laws supporting CPCs as of 2016, with fourteen states funding CPCs directly and twenty-one states requiring that health care providers refer pregnant women to a CPC or offer information to them about CPCs.²⁸

Despite the funding and support they receive from the government, the majority of CPCs operate free of government oversight.²⁹ State governments regulate health care facilities and their staff through licensing laws.³⁰ Their goal is to assure that they provide an appropriate level of quality health care.³¹ However, the facilities that must be licensed in order to provide medical services vary from state to state.³²

25. See MELISSA KLEDER & S. MALIA RICHMOND-CRUM, NARAL PRO-CHOICE MD. FUND, *THE TRUTH REVEALED: MARYLAND CRISIS PREGNANCY CENTER INVESTIGATIONS 2* (2008), <https://docplayer.net/22661406-The-truth-revealed-maryland-crisis-pregnancy-center-investigations-prepared-by-melissa-kleder-ma-and-s-malia-richmond-crum-mp.html> [<https://perma.cc/J8LA-B2SX>] (“[Crisis Pregnancy Centers] are financed primarily by religious organizations, individual churches, and individual donors.”) [hereinafter NARAL MARYLAND REPORT 2008].

26. See NARAL PRO-CHOICE CAL. FOUND., *UNMASKING FAKE CLINICS: THE TRUTH ABOUT CRISIS PREGNANCY CENTERS IN CALIFORNIA 5* (2010), <https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf> [<https://perma.cc/LSJ2-PWGZ>] (“It is estimated that \$60 million in federal abstinence and marriage-promotion funds have gone to CPCs”) [hereinafter NARAL CALIFORNIA REPORT 2010]; see also Waxman Report 2006, *supra* note 19, at 3 (“Over \$30 million in federal funds went to more than 50 pregnancy resource centers between 2001 through 2005”).

27. See NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 6; NARAL MARYLAND REPORT 2008, *supra* note 25, at 2.

28. According to NARAL Pro-Choice America, fourteen states fund CPCs directly (GA, IN, KS, LA, MI, MN, MO, NM, NC, ND, OH, PA, TX, WI); twenty-one states refer women to CPCs (AZ, AR, FL, GA, ID, KS, LA, MN, MS, NE, NC, ND, OH, OK, PA, SC, SD, TX, VA, WV, WI); and one state has a law that forces women to go to a CPC (SD). See NARAL PRO-CHOICE AM., *WHO DECIDES? THE STATUS OF WOMEN’S REPRODUCTIVE RIGHTS IN THE UNITED STATES 17* (2017), <http://www.prochoiceamerica.org/wp-content/uploads/2017/01/WhoDecides2017-DigitalEdition3.pdf> [<https://perma.cc/L8NA-MDBY>].

29. See NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 5 (noting that “the vast majority of CPCs operate free of independent regulation. A CPC can legally open its doors for business . . . with no government oversight”).

30. See SCOTT BECKER, *HEALTH CARE LAW: A PRACTICAL GUIDE* § 8.02 (2d ed. 2018) (noting that “facility licensure is a major and important aspect of the government’s control over the quality of care”).

31. See *id.* (explaining that “the primary purpose of licensing activities is to assure that facilities and providers provide an appropriate level of quality health care”).

32. Compare N.Y. PUB. HEALTH LAW § 2801(1) (McKinney 2019) (broadly encompassing a wide variety of facilities that provide health care services) with CAL.

Most CPCs operate as unlicensed facilities and are staffed by volunteers with no medical training.³³ Because CPCs cannot provide medical services if they are not licensed by the state, they focus on providing pregnancy counseling, adoption information, and financial assistance.³⁴ However, they do not supply patients with information on contraception or refer them to clinics that offer comprehensive reproductive health services.³⁵

Recently, a growing number of CPCs have become licensed health care facilities in an effort to provide a wider range of services, add legitimacy to their services, and increase their clientele.³⁶ An estimated 800 CPCs have converted to licensed health care facilities, which allows them to provide clients with certain medical services, such as ultrasounds.³⁷ NIFLA, for example, actively encourages affiliated CPCs to become licensed facilities in order to provide ultrasounds, which the organization describes as “an invaluable tool in revealing the personhood of unborn children” that allows “mothers contemplating abortion [to] have the opportunity to see the wonderful handiwork of the Creator move, kick and dance in celebration of life.”³⁸

HEALTH & SAFETY CODE § 1200 (West 2019) (requiring primary care, specialty, and psychology clinics to be licensed, but excluding clinics that provide counseling that do not constitute the practice of medicine).

33. See NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 5.

34. See, e.g., Rosen, *supra* note 17, at 201 (listing services generally provided by CPCs); see also NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 5 (explaining that “by having clients read their own pregnancy tests . . . the [unlicensed] CPC is technically not providing medical services”).

35. See Rosen, *supra* note 17, at 201 (noting that “[CPCs] do not offer abortions or referrals to abortion providers, and contraceptive services, if available, are restricted to abstinence-only counseling for unmarried women and counseling about natural family planning methods for married women”).

36. See NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 5.

37. According to NARAL Pro-Choice America, approximately 800 CPCs have converted to medical centers, and nearly two-thirds of NIFLA-affiliated crisis pregnancy centers operate as medical clinics or are in the process of acquiring ultrasound equipment. See NARAL, *The Truth About CPCs Report 2017*, *supra* note 3, at 2.

38. *Medical Clinic Conversion*, NAT’L INST. OF FAMILY & LIFE ADVOCATES, <https://nifla.org/medical-clinic-conversion/> (last visited Aug. 27, 2018) [<https://perma.cc/44W6-XHKY>]; see also *The Life Choice Project (TLC)*, NAT’L INST. OF FAMILY & LIFE ADVOCATES, <https://nifla.org/life-choice-project-tlc/> (last visited Aug. 27, 2018) [<https://perma.cc/W7YS-B5GM>] (describing the Life Choice Project).

B. *The Deceptive Practices of CPCs*

CPCs engage in a number of deceptive practices to prevent women from having an abortion.³⁹ To attract patients into their facilities, many CPCs use ambiguous and misleading advertisements that provide no indication of the pro-life nature or limited extent of their services. Examples of their ambiguous advertising include billboards and brochures that state, “Pregnant? Need Help? You have options,” but do not specify that CPCs only provide counseling on non-abortion options.⁴⁰ Some of these advertisements are placed in online directories under the headings of “abortion,” “pregnancy options,” and “family planning” in order to appear as though CPCs offer comprehensive services.⁴¹ CPCs also purchase “pay-per-click” advertisements on Internet search engines, which allows them to place their ads at the top of the search page of desired keywords.⁴² For example, Care Net and Heartbeat International have purchased more than 100 keywords, including “women’s health clinics,” “abortion,” and “morning-after pill.”⁴³

In addition, CPCs present themselves as comprehensive health centers by choosing names and locations for their facilities that resemble those of comprehensive women’s health care clinics and adopting the general appearance of licensed facilities. CPCs often adopt misleading names, such as “Pregnancy Options Clinic” or “Women’s Resource Center,” which imply that they are comprehensive health centers offering a wide range of reproductive services.⁴⁴ They also engage in co-location strategies where they place their facilities in physical proximity to comprehensive health centers or clinics that pro-

39. NARAL Pro-Choice America and its state affiliates have conducted most investigations on the deceptive practices of CPCs. Their findings have been corroborated by more limited government investigations of CPCs. *See, e.g.*, Waxman Report 2006, *supra* note 19 (reporting on “false and misleading health information provided by [CPCs]”).

40. *See* NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 6.

41. Option Line, for example, is an online directory (www.optionline.org) and call center (800-395-HELP) jointly operated by Care Net and Heartbeat International aimed at connecting people with crisis pregnancy centers. *See, e.g.*, *Considering Abortion*, OPTIONLINE, <http://optionline.org/options/abortion-overview/> (last visited July 27, 2019) [<https://perma.cc/988A-NTVL>] (“Option Line and our . . . participating pregnancy centers offers . . . information about all pregnancy options.”) (emphasis added).

42. *See* NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 7.

43. *Id.*

44. *Id.* at 6 (“CPCs adopt misleading names . . . which are similar to those used by comprehensive women’s health clinics and imply that they discuss a full range of options”).

vide abortion services.⁴⁵ Finally, many CPCs are staffed by volunteers who wear white lab coats or medical scrubs, require clients to fill out paperwork, and replicate the look of a licensed facility.⁴⁶ In effect, CPCs look and feel like comprehensive health centers.

Once women enter their facilities, CPCs often provide them with false and misleading information about the medical dangers of abortion. A 2006 Congressional report found that eighty-seven percent of the CPCs contacted during an investigation provided “grossly inaccurate or distorted” medical information, including inaccurate information that abortion increases the risk of breast cancer⁴⁷ and infertility.⁴⁸ Recent investigations in California,⁴⁹ Maryland,⁵⁰ Massachusetts,⁵¹ Minnesota,⁵² New York,⁵³ North Carolina,⁵⁴ and Virginia⁵⁵ have documented similar practices. They have noted that CPCs provide inaccur-

45. *Id.* (noting that “[o]f the CPCs examined by the NARAL Pro-Choice California Foundation, two centers were located within a hundred yards from a Planned Parenthood. When an investigator asked one CPC worker if the proximity to Planned Parenthood ever confused clients, the counselor replied: ‘All the time.’”).

46. See NARAL PRO-CHOICE AM., CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM 15 (2015), <http://www.ebony.com/wp-content/uploads/2015/05/cpc-report-2015.pdf> [<https://perma.cc/86ES-D3DY>] (“Investigators reported that many CPCs are staffed by volunteers who wear white lab coats, require forms to be filled out, and have replicated the look and feel of a typical medical office.”).

47. For example, according to the report, one CPC claimed that there is an “increased risk of breast cancer” that “can be as much as . . . 80%” See Waxman Report 2006, *supra* note 19, at 8. *But see Summary Report: Early Reproductive Events and Breast Cancer Workshop*, NAT’L CANCER INST., <https://www.cancer.gov/types/breast/abortion-miscarriage-risk#summary-report> (last updated Jan. 12, 2010) [hereinafter *Summary Report*] [<https://perma.cc/V7A9-P395>] (“Induced abortion is not associated with an increase in breast cancer risk.”); Sam Rowlands, *Review: Misinformation on Abortion*, 16 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 233 (2011).

48. For example, according to the report, one CPC claimed that abortion could lead to “many miscarriages or to permanent damage.” See Waxman Report 2006, *supra* note 19, at 9. *But see* F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 247 (Dwight Rose et al. eds, 22nd ed. 2005) (finding that “[f]ertility does not appear to be diminished by an elective abortion.”); Rowlands, *supra* note 47.

49. See NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 9.

50. See NARAL MARYLAND REPORT 2008, *supra* note 25, at 3.

51. See NARAL PRO-CHOICE MASS. FOUND., “JUST BECAUSE YOU’RE PREGNANT”: LIES, HALF-TRUTHS, AND MANIPULATION AT CRISIS PREGNANCY CENTERS IN MASSACHUSETTS 9 (2011), (on file with author) [hereinafter NARAL Massachusetts Report 2011].

52. See NARAL PRO-CHOICE MINN. FOUND., STATE-FUNDED DECEPTION: MINNESOTA’S CRISIS PREGNANCY CENTERS 17 (2012), (on file with author) [hereinafter NARAL Minnesota Report 2012].

53. See NARAL PRO-CHOICE N.Y. FOUND., “SHE SAID ABORTION COULD CAUSE BREAST CANCER”: A REPORT ON THE LIES, MANIPULATIONS AND PRIVACY VIOLATIONS OF CRISIS PREGNANCY CENTERS IN NEW YORK CITY 9 (2010), (on file with author) [hereinafter NARAL New York Report 2010].

rate medical information to women who visit their facilities, including claims that abortion can lead to breast cancer,⁵⁶ infertility,⁵⁷ and mental illness,⁵⁸ and that condoms are ineffective at preventing both pregnancy and the transmission of sexually transmitted diseases.⁵⁹ All of these contentions are contrary to medical consensus.⁶⁰

54. See NARAL PRO-CHOICE N.C. FOUND., *THE TRUTH REVEALED: NORTH CAROLINA'S CRISIS PREGNANCY CENTERS 20* (2011), (on file with author) [hereinafter NARAL North Carolina Report 2011].

55. See NARAL PRO-CHOICE VA. FOUND., *CRISIS PREGNANCY CENTERS REVEALED, PART II: AN INVESTIGATIVE UPDATE ON VIRGINIA CRISIS PREGNANCY CENTERS 2* (2013), (on file with author) [hereinafter NARAL Virginia Report 2013].

56. See, e.g., NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 9 (finding 70 percent of CPCs provided inaccurate information about abortion and the risk of breast cancer); see also NARAL MARYLAND REPORT 2008, *supra* note 25, at 3 (72%); NARAL MASSACHUSETTS REPORT 2011, *supra* note 51, at 9 (20%); NARAL MINNESOTA REPORT 2012, *supra* note 52, at 17 (73%); NARAL NEW YORK REPORT 2010, *supra* note 53, at 9 (89%); NARAL NORTH CAROLINA REPORT 2011, *supra* note 54, at 20 (26%); NARAL VIRGINIA REPORT 2013, *supra* note 55, at 2 (32%).

57. See, e.g., NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 10 (finding that 70 percent of CPCs provided inaccurate information about abortion and future infertility); see also NARAL MARYLAND REPORT 2008, *supra* note 25, at 3 (91%); NARAL Massachusetts Report 2011, *supra* note 51, at 8 (33%); NARAL Minnesota Report 2012, *supra* note 52, at 19 (67%); NARAL New York Report 2010, *supra* note 53, at 9 (89%); NARAL North Carolina Report 2011, *supra* note 54, at 20 (67%); NARAL Virginia Report 2013, *supra* note 55, at 2 (44%).

58. See, e.g., NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 9 (finding that 85 percent of CPCs provided inaccurate information about abortion and mental illnesses); see also NARAL MARYLAND REPORT 2008, *supra* note 25, at 3 (100%); NARAL Massachusetts Report 2011, *supra* note 51, at 8 (55%); NARAL Minnesota Report 2012, *supra* note 52, at 3, 18 (87%); NARAL New York Report 2010, *supra* note 53, at 9 (89%); NARAL North Carolina Report 2011, *supra* note 54, at 20 (65%); NARAL Virginia Report 2013, *supra* note 55, at 2 (71%).

59. See, e.g., NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 10 (finding that 60 percent of CPCs provided inaccurate information about condoms and the risk of pregnancy and infections from STDs); see also NARAL MARYLAND REPORT 2008, *supra* note 25, at 4; NARAL Massachusetts Report 2011, *supra* note 51, at 10 (30%); NARAL Minnesota Report 2012, *supra* note 52, at 22 (67%); NARAL New York Report 2010, *supra* note 53, at 14 (44%); NARAL North Carolina Report 2011, *supra* note 54, at 22 (48%).

60. See generally Rowlands, *supra* note 47; see also *Summary Report*, *supra* note 47 (“Induced abortion is *not* associated with an increase in breast cancer risk.”) (emphasis added); F. GARY CUNNINGHAM ET AL., *WILLIAMS OBSTETRICS 877* (21st ed. 2001) (“Fertility is *not* altered by an elective abortion.”); Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/gpr/2006/08/abortion-and-mental-health-myths-and-realities> (noting that “post-abortion traumatic stress syndrome” is *not* recognized by the American Psychological Association) (2006); King K. Holmes et al., *Effectiveness of Condoms in Preventing Sexually Transmitted Infections*, 82 *BULL. WORLD HEALTH ORG.* 454, 454–61 (2004) (“Condom use is associated with statistically significant protection of men and women against several other types of STIs.”).

C. CPCs' Deceptive Practices Pose a Public Health Threat

A woman's decision to have an abortion when faced with an unplanned pregnancy is time sensitive. Although the health risks associated with abortions are low in comparison to childbirth, the health risks associated with obtaining an abortion,⁶¹ as well as with remaining pregnant,⁶² increase with the length of the pregnancy.⁶³ Accordingly, a woman's ability to make an informed decision regarding an unplanned pregnancy requires timely access to accurate information about the benefits and risks of all available health options. Because women who visit CPCs seeking an abortion tend to be farther along in their pregnancies, the practices that CPCs employ to delay obtaining an abortion increase the health risks for pregnant women.⁶⁴

The impact of their deceptive practices is of particular concern because the women who are targeted by CPCs and who visit CPCs are disproportionately young women, women of color, and women from a lower socio-economic status.⁶⁵ CPCs perceive these groups as "abortion-minded and vulnerable clients" due to their high abortion rates and limited access to comprehensive health services.⁶⁶ These groups

61. The mortality rate for abortions increases disproportionately with time. See Linda Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 *OBSTETRICS & GYNECOLOGY* 729, 731 (2004) ("[g]estational age at the time of abortion [to be] the strongest risk factor for abortion-related mortality"); see also Suzanne Zane et al., *Abortion-Related Mortality in the United States: 1998–2010*, 126 *OBSTETRICS & GYNECOLOGY* 258, 263 (2015) ("[T]he risk of death after an abortion at 8 weeks of gestation or less is 0.3 per 100,000 or 3 per million procedures. However, even at 18 weeks or later, the risk of mortality was low, 6.7 deaths per 100,000 procedures.").

62. Delay in obtaining an abortion increases the health risks associated with pregnancy. Women with unintended pregnancies are more likely than other pregnant women to delay or receive no prenatal care. Inadequate prenatal care is associated with negative health outcomes in fetuses, including premature birth, stillbirth, and infant death. See Kathryn Kost & Laura Lindberg, *Pregnancy Intentions, Maternal Behaviors, and Infant Health: Investigating Relationships with New Measures and Propensity Score Analysis*, 52 *DEMOGRAPHY* 88 (2015); see also Sarah Partridge et al., *Inadequate Prenatal Care Utilization and Risks of Infant Mortality and Poor Birth Outcome: A Retrospective Analysis of 28,729,765 U.S. Deliveries Over 8 Years*, 29 *AM. J. PERINATOLOGY* 788 (2012).

63. See generally Brief for Am. Acad. of Pediatrics et al. as Amici Curiae Supporting Respondents at 19–23, *Nat'l Inst. of Family & Life Advocates v. Becerra* (2018) (No. 16-1140) (providing an overview of associated risks).

64. See, e.g., Rosen, *supra* note 17, at 202 (explaining that "the women who seek care at crisis pregnancy centers are likely to be farther along in their pregnancies than women who seek abortions elsewhere, and if they wish to terminate their pregnancy, they require immediate referral to a facility that provides abortions.").

65. *Id.* at 201; see also NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 6.

66. NARAL, *The Truth About CPCs Report 2017*, *supra* note 3, at 8 (quoting a CPC activist as saying during an interview, "We're going straight to the 'hood . . . to reach more *abortion-minded* and *-vulnerable* clients.") (emphasis added).

also have the highest rate of unintended pregnancies in the country and are severely underserved by our health care system, making them particularly vulnerable to the misinformation spread by CPCs.⁶⁷ CPCs use a variety of methods to attract women from these demographics, including offering free health care services and baby supplies.⁶⁸ In addition, CPCs place facilities and form community partnerships in low-income areas that are less likely to offer comprehensive health services.⁶⁹ CPCs admit that their centers are most appealing to “young women without anywhere else to turn.”⁷⁰

II.

INITIAL ATTEMPTS AT REGULATING CRISIS PREGNANCY CENTERS

Local governments have attempted to regulate CPCs through mandatory disclosure laws, which require CPCs to disclose information regarding the centers and the limited nature of their services, as well as information on how to access comprehensive reproductive health services.⁷¹ These mandatory disclosures generally fall into three categories: “status disclosures,”⁷² requiring CPCs to disclose whether they are licensed medical facilities or have a licensed medical professional on staff; “services disclosures,”⁷³ requiring CPCs to disclose whether they provide, or give referrals for, abortion or birth-control

67. See Rosen, *supra* note 17, at 201; see also NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 6 (noting that women of color, young women, women in rural areas and low-income women are “most underserved” by our healthcare system).

68. NARAL CALIFORNIA REPORT 2010, *supra* note 26, at 6.

69. In recent years, CPCs have launched campaigns specifically targeting women of color. Heartbeat International, for example, rolled a project to partner with African-American and Hispanic churches with the hope that “the Lord [will] raise up from the African-American churches and the Hispanic-American churches a passion to seize the moral high ground against the slaughter of the little ones.” See *Urban Initiative*, HEARTBEAT INT’L, <https://www.heartbeatinternational.org/about-us/item/13-urban-initiative> (last visited Jan. 4, 2017) (quoting a sermon by John Piper).

70. See Meaghan Winter, Opinion, *The Stealth Attack on Abortion Access*, N.Y. TIMES (Nov. 12, 2015), http://www.nytimes.com/2015/11/12/opinion/the-stealth-attack-on-abortion-access.html?_r=1.

71. See Molly Duane, *The Disclaimer Dichotomy: A First Amendment Analysis of Compelled Speech in Disclosure Ordinances Governing Crisis Pregnancy Centers and Laws Mandating Biased Physician Counseling*, 35 CARDOZO L. REV. 349, 360 (2013).

72. See, e.g., Montgomery County, Md., Council Res. No. 16-1252 (Feb. 2, 2010); N.Y.C., N.Y. ADMIN. CODE § 20-816 (2011); AUSTIN, TEX., CODE OF ORDINANCES § 10-10 (2012); S.F., CAL., ADMIN. CODE §§ 93.1-93.5 (2011) (requiring disclosure by the CPC if that CPC had previously violated an advertising regulation and the City Attorney requests an injunction requiring such disclosure).

73. See, e.g., BALT., MD., HEALTH CODE § 3-502(a)-(b) (2009); N.Y.C., N.Y. ADMIN. CODE § 20-816 (2011); S.F., CAL., ADMIN. CODE §§ 93.1-93.5 (2011) (requiring

services; and “government message disclosures,”⁷⁴ requiring CPCs to provide information on access to comprehensive reproductive health services.

A. *Status Disclosures*

Local governments have found that women who visit CPCs may be unaware that many CPCs are not licensed medical facilities and that they are not receiving services from licensed medical professionals.⁷⁵ Thus, they have required CPCs to disclose whether they are licensed medical facilities or have licensed medical providers on staff. Montgomery County, Maryland, and San Francisco both adopted ordinances requiring CPCs to post a notice in the center disclosing whether they have a licensed medical professional on staff.⁷⁶ Moreover, New York City and Austin required CPCs to disclose not only if they have licensed professionals on staff at the center, but also if such professionals directly supervise the provision of the center’s services.⁷⁷ Austin also required CPCs to disclose if they are licensed by a state or federal entity.⁷⁸

disclosure by the CPC if that CPC had previously violated an advertising regulation and the City Attorney requests an injunction requiring such disclosure).

74. *See, e.g.*, Montgomery County, Md., Council Res. No. 16-1252 (Feb. 2, 2010); N.Y.C., N.Y. ADMIN. CODE § 20-816 (2011).

75. Montgomery County, for example, adopted a mandatory disclosure law to regulate CPCs in part because of a growing concern that “[CPC] clients may be misled into believing that a center is providing medical services when it is not,” potentially neglecting to take action that would protect their health or prevent adverse consequences to the client or the pregnancy. *See* Montgomery County, Md., Council Res. No. 16-1252 (Feb. 2, 2010).

76. *See* Montgomery County, Md., Council Res. No. 16-1252(b) (Feb. 2, 2010) (“A limited service pregnancy resource center must post at least 1 sign in the Center indicating that the Center does not have a licensed medical professional on staff.”); *see also* S.F., CAL., ADMIN. CODE § 93.5(b)(2)(A) (2011) (requiring CPCs that violate an advertising regulation to disclose “whether there is a licensed medical doctor; registered nurse, or other licensed medical practitioner on staff at the center”).

77. *See* N.Y.C., N.Y. ADMIN. CODE § 20-816b (2011) (requiring CPCs to disclose “if it does or does not have a licensed medical provider on staff who provides or directly supervises the provision of all of the services” at such center); *see also* AUSTIN, TEX., CODE OF ORDINANCES § 10-10-2(A)(2) (2012) (requiring CPCs to disclose “whether all medical services are provided under direction and supervision of a licensed health care provider”).

78. *See* AUSTIN, TEX., CODE OF ORDINANCES § 10-10-2(A)(3) (2012) (requiring CPCs to disclose “whether the center is licensed by a state or federal regulatory entity to provide those services”).

B. *Services Disclosures*

Local governments have also found that women who visit CPCs may not be aware of the limited nature of the services provided. In particular, local governments have found that CPCs often engage in deceptive practices that mislead clients about both the services they provide on-site and the services for which they will provide patient referrals to third parties.⁷⁹ Accordingly, they have required CPCs to disclose whether they provide or give referrals for abortion services, birth control, and other services. New York City, Baltimore, and San Francisco have all adopted ordinances to this effect, requiring CPCs to provide clients and potential clients with a disclaimer that the CPCs do not provide or make referrals for abortion or birth-control services.⁸⁰

C. *Government Message Disclosures*

Finally, local governments have emphasized their interest in ensuring that women have information about, as well as timely access to, comprehensive reproductive health services.⁸¹ To this end, some local governments have adopted government message disclosures requiring CPCs to provide clients with information on how to access comprehensive reproductive health services. Montgomery County, for example, required CPCs to post a sign in the center indicating that “the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.”⁸² Similarly, New York City required CPCs to disclose that “the New

79. For example, New York City found that CPCs “engage in deceptive practices, which include misleading consumers about the types of goods and services they provide on-site, as well as misleading consumers about the types of goods and services for which they will provide patient referrals.” N.Y.C., N.Y. ADMIN. CODE § 20-815 (2011).

80. See N.Y.C., N.Y. ADMIN. CODE § 20-816c-d (2011) (“A pregnancy services center shall disclose if it does or does not provide referrals for abortion. A pregnancy services center shall disclose if it does or does not provide or provide referrals for emergency contraception.”); see also BALT., MD., HEALTH CODE § 3-502(a) (2009) (“A limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services.”); see also S.F., CAL., ADMIN. CODE § 93.5(b)(2)(B) (2011) (requiring CPCs to disclose “whether abortion, emergency contraception, or referrals for abortion or emergency contraception are available at the center”).

81. For example, New York City sought to ensure that “consumers in New York City have access to comprehensive information about and timely access to all types of reproductive health services.” N.Y.C., N.Y. ADMIN. CODE § 20-815 (2011).

82. See Montgomery County, Md., Council Res. No. 16-1252(b) (Feb. 2, 2010) (“A limited service pregnancy resource center must post at least 1 sign in the Center indicating that . . . the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.”).

York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider.”⁸³

III.

THE CONSTITUTIONALITY OF INITIAL MANDATORY DISCLOSURE LAWS

CPCs have begun to challenge mandatory disclosure laws, generally by alleging that they infringe upon their right to freedom of speech under the First Amendment.⁸⁴ Only San Francisco’s ordinance and one provision of the New York City local law have survived such constitutional challenges.⁸⁵ The courts have found that most of these mandatory disclosure laws are content-based regulations subject to strict scrutiny.⁸⁶ While some courts recognized exemptions for commercial and professional speech, they generally found that mandatory disclosure laws do not regulate these categories of speech and are thus not entitled to a lower standard of review.⁸⁷ As a result, the courts found that most of these laws were unconstitutional.⁸⁸ Even when the courts were able to identify a compelling state interest, they concluded that it was possible to identify a less restrictive alternative to regulate the deceptive practices of CPCs.⁸⁹

Section A of this Part provides an overview of the right to freedom of speech as protected by the First Amendment. Sections B through D discuss the principles governing First Amendment protections for commercial speech, professional speech, and viewpoint-targeted speech, and how each type of speech relates to mandatory disclosure laws. This Section concludes by discussing the constitutionality of the disclosure requirements in Section E.

83. See N.Y.C., N.Y. ADMIN. CODE § 20-816a (2011) (“A pregnancy services center shall disclose to a client that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider.”).

84. See *Holtzman*, *supra* note 5, at 89–94 (providing an overview of challenges to mandatory disclosure laws).

85. See *First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017); see also *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 244 (2d Cir. 2014).

86. See *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 553–54 (4th Cir. 2012); *Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 594 (4th Cir. 2012); *Evergreen Ass’n v. City of New York*, 801 F. Supp. 2d 197, 207 (S.D.N.Y. 2011). But see *First Resort*, 860 F.3d at 1273–74.

87. *Id.*

88. *Id.*

89. *Id.*

A. *The First Amendment and the Right to Freedom of Speech*

The First Amendment, applicable to the states through the Fourteenth Amendment, protects the right to freedom of speech.⁹⁰ The right to freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.⁹¹ Accordingly, the First Amendment prohibits a government, including a municipal government vested with state authority, from forbidding or compelling speech.⁹² Laws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the nature of the speech. Compelled speech is considered content-based speech that is subject to strict scrutiny.⁹³ However, the courts have recognized exceptions for content-based speech that is commercial⁹⁴ or professional⁹⁵ in nature and does not discriminate based on the viewpoints of the speakers. Viewpoint discrimination is the most “egregious form of content discrimination,”⁹⁶ and regulations that favor some viewpoints at the expense of others are traditionally subject to strict scrutiny.⁹⁷

B. *Content-Based, Commercial Speech*

1. *First Amendment Protection of Commercial Speech*

Commercial speech is generally accorded less First Amendment protection than non-commercial speech.⁹⁸ Accordingly, in assessing the constitutionality of mandatory disclosure laws, the courts have examined whether the speech targeted by these laws constitutes commer-

90. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

91. *See* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (noting that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”).

92. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943).

93. *See* *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that “[c]ontent-based laws . . . may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

94. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *see also* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980).

95. *See* *Lowe v. S.E.C.*, 472 U.S. 181, 211 (1985); *see also* *Pickup v. Brown*, 740 F.3d 1208, 1225–29 (9th Cir. 2013).

96. *See* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

97. *See* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

98. *See* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *see also* *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *see also* *Zauderer*, 471 U.S. at 651; *see also* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978).

cial speech.⁹⁹ The Supreme Court has found that, because commercial speech is “linked inextricably with the commercial arrangement that it proposes, the state’s interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.”¹⁰⁰ As a result, regulations that compel speech that is commercial in nature tend to receive a more deferential judicial review than regulations that compel non-commercial speech.¹⁰¹ The Court has found that speech is commercial when it “does no more than propose a commercial transaction.”¹⁰² Specifically, speech may be considered commercial in nature when it admittedly involves advertising, the speech references a specific product, and the speaker has an economic motive for engaging in the speech.¹⁰³ The Court has also defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”¹⁰⁴

Laws involving commercial speech are generally subject to intermediate scrutiny.¹⁰⁵ They must advance a substantial government interest and be appropriately tailored to achieve such interest.¹⁰⁶ However, the Court has used a rational basis standard in reviewing laws that require disclosures of “purely factual and uncontroversial information about the terms under which . . . services will be available.”¹⁰⁷ In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, for example, the Supreme Court upheld a law requiring lawyers who advertised services on a contingency-fee basis to disclose that clients may still be liable for some costs since this was considered the disclosure of non-misleading information about a lawyer’s services.¹⁰⁸ Laws involving such types of disclosures are upheld “as long

99. See, e.g., *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539 (4th Cir. 2012); see also *Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591 (4th Cir. 2012); *Evergreen Ass’n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011); *First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017).

100. See *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

101. See *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (noting that commercial speech is subject to regulation that might be otherwise impermissible because of “its subordinate position in the scale of First Amendment values”).

102. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

103. *Id.* at 66–67.

104. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

105. *Id.* at 563–66; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

106. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); see also *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989) (explaining that what is required is “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best dispositive but one whose scope is in proportion to the interest served”).

107. See *Zauderer*, 471 U.S. at 651.

108. *Id.* at 650–53.

as [the] disclosure requirements are reasonably related to the state's interest in preventing deception of consumers."¹⁰⁹ Although the courts have applied this level of review to laws intended to prevent consumer fraud, other courts have taken the position that it controls all cases involving truthful commercial speech.¹¹⁰

2. *Initial Mandatory Disclosure Laws and Commercial Speech*

The courts that have assessed the constitutionality of mandatory disclosure laws regulating CPCs have disagreed over whether the speech regulated by these laws constitutes commercial speech.¹¹¹ Some courts found that the disclosure requirements did not involve commercial speech and were thus not entitled to a more deferential standard of review under the First Amendment. For instance, in *Greater Baltimore Center for Pregnancy Concerns v. Mayor of Baltimore*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) found that Baltimore's ordinance did not regulate commercial speech.¹¹² The court reasoned that CPCs were not motivated by an economic interest or proposing a commercial transaction because the law targeted speech about the provision of free services.¹¹³ That same year, the Fourth Circuit found that Montgomery County's regulation did not concern commercial speech.¹¹⁴ Although the U.S. Court of Appeals for the Second Circuit (Second Circuit) did not address whether New York City's local law regulated commercial speech in *Evergreen Ass'n v. City of New York*, the district court had also found that "the offer of free services . . . in furtherance of a religious belief does not propose a commercial transaction."¹¹⁵

In contrast, the Ninth Circuit found in *First Resort, Inc. v. Herrera* that San Francisco's ordinance regulated commercial speech and was thus subject to a lower level of scrutiny.¹¹⁶ The Ninth Circuit

109. *Id.* at 651.

110. *See* Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *see also* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (finding that rational review applies to non-misleading disclosures).

111. *Compare* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012) with *First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017).

112. *See Greater Balt. Ctr.*, 683 F.3d at 553–54 (4th Cir. 2012).

113. *Id.* (explaining that "while this fact alone might not be dispositive, it becomes so in this case because there is no indication that the [CPC] is motivated by any economic interest or that it is proposing any commercial transaction.")

114. *See* Centro Tepeyac v. Montgomery Cty., 683 F.3d 591, 594 (4th Cir. 2012).

115. *See* Evergreen Ass'n v. City of New York, 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011).

116. *See First Resort, Inc.*, 860 F.3d at 1273–74.

found that San Francisco's ordinance targeted commercial speech because it "regulates advertising designed to attract a patient base in a competitive marketplace for commercially valuable services."¹¹⁷ Notably, unlike the mandatory disclosure laws of Baltimore, Montgomery County, and New York City, San Francisco's ordinance only required CPCs to make disclosures if they violated an advertising regulation prohibiting them from making or disseminating "before the public anywhere . . . any statement, concerning [pregnancy-related] services, professional or otherwise, . . . which is untrue or misleading."¹¹⁸ Like the Ninth Circuit, the district court had reasoned that the advertisements of CPCs were economically-motivated because the CPCs used them in order to compete with abortion providers.¹¹⁹

C. Content-Based, Non-Commercial Speech by Professionals

1. First Amendment Protection of Professional Speech

Like commercial speech, some courts have found that professional speech is also accorded less First Amendment protection.¹²⁰ Accordingly, the courts that have assessed the constitutionality of mandatory disclosure laws have also examined whether the speech targeted by these laws is professional speech.¹²¹ Although the Supreme Court has defined commercial speech for purposes of First Amendment protection, it has not defined professional speech.¹²²

However, Justice Byron White posited a "personal nexus" standard in *Lowe v. Securities and Exchange Commission* for identifying professional speech that is entitled to less First Amendment protection.¹²³ The Supreme Court has not endorsed Justice White's stan-

117. *Id.* at 1274.

118. S.F., CAL., ADMIN. CODE § 93.4(a) (2011).

119. *See* First Resort, Inc. v. Herrera, 80 F. Supp. 3d 1043, 1052 (N.D. Cal. 2015) (explaining that the CPC "considers its advertising as a means of competing with abortion providers" for the attention of "abortion-minded" women).

120. *See, e.g.,* Moore-King v. County of Chesterfield, 708 F.3d 560 (4th Cir. 2013); *see also* Locke v. Shore, 634 F.3d 1185 (11th Cir. 2011); Accountant's Soc'y of Va. v. Bowman, 860 F.2d 602 (4th Cir. 1988).

121. *See, e.g.,* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012); *see also* Evergreen Ass'n v. City of New York, 801 F. Supp. 2d 197 (S.D.N.Y. 2011); Centro Tepeyac v. Montgomery Cty., 779 F. Supp. 2d 456 (D. Md. 2011).

122. *See* Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1325 (11th Cir. 2017) (Wilson, J., concurring) (noting that "the Supreme Court has not squarely addressed the appropriate level of protection for professional speech.").

123. *See* *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("Where the *personal nexus* between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to func-

dard,¹²⁴ though several circuits have applied it to uphold laws imposing requirements for the practice of certain professions.¹²⁵ In *Accountant's Soc. of Virginia v. Bowman*, the Fourth Circuit upheld a law restricting client communications by non-licensed accountants.¹²⁶ The Fourth Circuit reasoned that the restrictions were not entitled to full First Amendment protection because the relationship between accountants and clients involves a "personal nexus."¹²⁷ The Fourth Circuit and the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) have also applied the "personal nexus" standard to uphold licensing requirements for professions.¹²⁸

The Ninth Circuit proposed a framework for assessing the First Amendment protection of professional speech in *Pickup v. Brown*, which addressed a state law that banned mental health professionals from providing sexual orientation change efforts (SOCE) therapy.¹²⁹ The Ninth Circuit explained that the level of First Amendment protection applicable to professional speech is best understood along a continuum.¹³⁰ The court posited that a professional's right to engage in public dialogue has the greatest protection while a professional's right to engage in professional conduct is subject to rational basis review.¹³¹ Notably, the Ninth Circuit recognized a category of speech in the middle of the continuum, which it described as "speech within the confines of the professional relationship," where First Amendment protection is "somewhat diminished."¹³²

Pickup, however, did not provide a doctrinal basis for distinguishing professional conduct from speech that occurs within the confines of the professional relationship. Moreover, *Pickup* did not

tion as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech.'").

124. *Id.*

125. *See, e.g., Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013); *see also Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988).

126. *See Bowman*, 860 F.2d at 603.

127. *Id.* at 605 (noting "[c]learly the relationship between accountant and client gives rise to a personal nexus between professional and client" and finding that "[t]he statute in question restricts only accountants' communications with and on behalf of their clients, as a means of regulating the professional activities of non-CPAs.").

128. *See Moore-King v. County of Chesterfield*, 708 F.3d 560, 570 (4th Cir. 2013) (requirements for spiritual counseling); *see also Locke*, 634 F.3d at 1192 (requirements for interior designers).

129. *See Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014).

130. *Id.*

131. *Id.*

132. *Id.* at 1228.

discuss the level of scrutiny applicable to speech that occurs as part of such professional relationship. Instead, the Ninth Circuit ultimately found that the ban involving speech related to SOCE therapy implicated only professional conduct subject to rational basis review.¹³³ Other circuits have agreed that professional speech is not fully protected by the First Amendment, but they have refused to label certain communications as “conduct” subject to rational basis review.¹³⁴ For instance, in *King v. Governor of New Jersey*, the U.S. Court of Appeals for the Third Circuit (Third Circuit) found that speech related to SOCE therapy was professional speech subject to intermediate scrutiny.¹³⁵ The Third Circuit warned that labeling certain communications as “conduct” would assure that they receive no First Amendment protection.¹³⁶

2. Initial Mandatory Disclosure Laws and Professional Speech

In assessing the constitutionality of mandatory disclosure laws for CPCs, the courts generally found that the disclosure requirements did not concern professional speech and were thus not entitled to a more deferential standard of review under the First Amendment. The courts reasoned that the CPCs were not giving individualized advice that engenders a relationship of trust with clients. For instance, the Fourth Circuit in *Greater Baltimore Center for Pregnancy Concerns* distinguished Baltimore’s ordinance from the mandatory disclosures that had been upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which considered a state law requiring physicians to provide certain information to women seeking an abortion.¹³⁷ In *Casey*, the Supreme Court reasoned that “the physician’s First Amendment rights not to speak are implicated . . . only as part of the practice of medicine, subject to reasonable licensing and regulation by

133. See *id.* at 1231 (finding “[b]ecause Senate Bill 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, sexual orientation change efforts (SOCE), any effect it may have on free speech interests is merely incidental . . . SB 1172 is subject to only rational basis review.”).

134. See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (“characterizing speech as conduct is a dubious constitutional enterprise”); see also *King v. Governor of N.J.*, 767 F.3d 216, 229 (3d Cir. 2014), *abrogated by Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (warning that labeling communications as conduct assures that they receive no First Amendment protection).

135. See *King*, 767 F.3d at 232.

136. *Id.* at 229.

137. See *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 553–54 (4th Cir. 2012); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992).

the State.”¹³⁸ In contrast, in *Greater Baltimore Center for Pregnancy Concerns*, the Fourth Circuit opined that the regulation of professional speech in *Casey* was incidental to the broader governmental regulation of the medical profession.¹³⁹ In contrast, the Fourth Circuit noted that the CPCs subject to Baltimore’s ordinance “do not practice medicine, are not staffed by licensed professionals, and need not satisfy the informed consent requirement.”¹⁴⁰

The Second Circuit did not address whether New York City’s local law regulated professional speech subject to a lower level of scrutiny in *Evergreen*.¹⁴¹ However, the district court found that the law did not involve professional speech because there was no professional relationship between CPC staff and clients.¹⁴² The court noted that, while CPC staff met with clients, “there is no indication that they employ any expertise or professional judgment in service of their clients’ individual circumstances.”¹⁴³ Similarly, the district court in *Centro Tepeyac v. Montgomery County* found that Montgomery County’s ordinance did not regulate professional speech.¹⁴⁴ Although the court found that CPCs offered clients information, it explained that “not every offering of advice or information creates a relationship of trust.”¹⁴⁵ Accordingly, the court found that “this mere provision of information would not seem to be enough to create the type of quasi-fiduciary relationship contemplated by the *Lowe* and *Thomas* concurrences.”¹⁴⁶

138. *Casey*, 505 U.S. at 884.

139. *Greater Balt. Ctr.*, 683 F.3d at 554 (highlighting that “[i]n *Casey*, the mandatory disclosures focused on the speech of licensed medical professionals, and the regulations were upheld because, even though they implicated a physician’s right not to speak, they did so ‘only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.’”).

140. *Id.*

141. *See Evergreen Ass’n v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014) (“We find . . . that we need not decide the issue, because our conclusions are the same under either [intermediate scrutiny] or [strict scrutiny].”).

142. *See Evergreen Ass’n v. City of New York*, 801 F. Supp. 2d 197, 207 (S.D.N.Y. 2011).

143. *Id.*

144. *See Centro Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 467 (D. Md. 2011).

145. *Id.*

146. *Id.*

D. Content-Based, Viewpoint-Targeted Speech

1. First Amendment Protection of Viewpoint-Targeted Speech

In determining the appropriate level of review to apply to mandatory disclosure laws for CPCs, the courts have examined whether these laws discriminate on the basis of viewpoint.¹⁴⁷ Even when the speech targeted by a law is commercial or professional in nature, the courts have found that it is subject to strict scrutiny when it discriminates based on viewpoint.¹⁴⁸ It is a First Amendment principle that “each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”¹⁴⁹ Courts have read the First Amendment as prohibiting the government from regulating speech in ways that “favor some viewpoints or ideas at the expense of others.”¹⁵⁰ A regulation discriminates based on viewpoint when it regulates speech based on the specific motivating ideology or the opinion or perspective of the speaker.¹⁵¹ Viewpoint discrimination is considered a more blatant and “egregious form of content discrimination.”¹⁵² Thus, the First Amendment prohibits the government from regulating speech when the motivating ideology or perspective of the speaker is the rationale for the restriction, unless the law is narrowly tailored to advance a compelling government interest.¹⁵³

Even though the Supreme Court has found that laws that regulate some forms of content-based commercial speech are entitled to less First Amendment protection, it has also held that “speech does not retain its commercial character when it is inextricably intertwined with otherwise fully protected speech.”¹⁵⁴ In such cases, the court has applied strict scrutiny.¹⁵⁵ For instance, in *Riley v. National Federation of the Blind of North Carolina*, the Supreme Court found that the state

147. See, e.g., *Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 594–95 (4th Cir. 2012); see also *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 252 (2d Cir. 2014); see also *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017).

148. See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (discussing viewpoint discrimination in the context of commercial speech); see also *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (discussing viewpoint discrimination in the context of professional speech).

149. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

150. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

151. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015).

152. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

153. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

154. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

155. *Id.* at 798.

cannot force professional fundraisers to announce to potential donors the percentage of charitable contributions raised that were given to charities.¹⁵⁶ The court rejected the argument that the law was subject to deferential review because it involved commercial speech in that it relates to the profits from the contributions.¹⁵⁷ The court applied strict scrutiny instead, reasoning that the commercial aspect of the law was intertwined with protected charitable solicitations.¹⁵⁸

Although the Supreme Court has not addressed the appropriate level of scrutiny to apply to content-based, viewpoint-targeted professional speech, the circuits that have embraced professional speech as a category of speech entitled to less First Amendment protection have recognized an exception for viewpoint-targeted professional speech.¹⁵⁹ For example, in *Conant v. Walters*, the Ninth Circuit applied strict scrutiny to a federal policy that would have penalized physicians for educating patients about the medicinal values of marijuana.¹⁶⁰ The court invalidated the policy, reasoning that it not only prohibited the discussion of marijuana, but it also condemned the viewpoint that medical marijuana would likely help a specific patient.¹⁶¹

Similarly, the Fourth Circuit found that the law at issue in *Stuart v. Camnitz* requiring physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions compelled speech that conveyed a particular message.¹⁶² In *Stuart*, the Fourth Circuit recognized that the state may express a preference for childbirth over abortion through its agents and written materials.¹⁶³ However, the court found that “the state cannot commandeer the doctor-patient relationship to compel a physician to express its preference to the patient.”¹⁶⁴ While the court refused to address the appropriate level of scrutiny to apply to these compelled speech laws, it found that

156. *Id.* at 799–80.

157. *Id.* at 795–96.

158. *See id.* at 796 (explaining that regulation of a solicitation “must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech”).

159. *See Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) (“Other 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.”); *see also Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

160. *See Conant*, 309 F.3d at 637.

161. *Id.*

162. *See Stuart*, 774 F.3d at 255 (finding that “[the statute] is intended to convey not the risks and benefits of the medical procedure to the patient’s own health, but rather the full weight of the state’s moral condemnation.”).

163. *Id.*

164. *Id.* at 253.

the law failed intermediate scrutiny and, by implication, strict scrutiny.¹⁶⁵

2. *Initial Mandatory Disclosure Laws and Viewpoint-Targeted Speech*

Some circuits found that mandatory disclosure requirements discriminated on the basis of viewpoint. For instance, in *Centro Tepeyac*, the Fourth Circuit found that Montgomery County's ordinance singled out CPCs for disfavored treatment, while leaving other sources of information that pregnant women may consult unregulated regardless of whether the advice they give comes from a licensed medical professional.¹⁶⁶ Similarly, in *Evergreen*, the Second Circuit found that some of New York City's disclosure requirements may require CPCs to "advertise on behalf of the City," thus mandating them to affirmatively espouse the government's position.¹⁶⁷ In contrast, the Ninth Circuit rejected the argument that San Francisco's ordinance was viewpoint discriminatory, explaining that while CPCs may engage in false or misleading advertising because of anti-abortion views, "the Ordinance regulates these entities because of the threat to women's health posed by their false or misleading advertising" and not because of their views.¹⁶⁸

E. *The Constitutionality of the Disclosure Requirements*

1. *Status Disclosures*

Because the circuit courts have found that mandatory disclosure laws do not regulate commercial or professional speech, and may even discriminate based on the viewpoint of CPCs, they have reviewed each type of disclosure requirement under strict scrutiny. Different circuit courts have disagreed on whether status disclosure requirements withstand strict scrutiny. In *Evergreen*, the Second Circuit upheld New York City's status disclosure requirement.¹⁶⁹ The court found that it survived both strict and intermediate scrutiny because it was the least restrictive means to ensure that a woman was aware of whether a

165. *Id.* at 248 ("[W]e need not conclusively determine whether strict scrutiny ever applies in similar situations, because in this case 'the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.'").

166. *See* *Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 594–95 (4th Cir. 2012) (noting that "[CPCs] are singled out for disfavored treatment while many other sources that pregnant women may consult for advice . . . are left unregulated, regardless of whether the advice they give comes from a 'licensed medical professional.'").

167. *See* *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014).

168. *See* *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017).

169. *See* *Evergreen Ass'n*, 740 F.3d at 249.

particular CPC had a licensed medical provider on staff.¹⁷⁰ Similarly, the district court in *Centro Tepeyac* found that the requirement was narrowly tailored to the state's interest in "ensuring that its citizenry are able to obtain needed medical care" because it "does not require any other specific message and in neutral language states the truth."¹⁷¹ The Fourth Circuit, however, reversed the district court's finding.¹⁷² The Fourth Circuit found that the state's interest could be achieved through less restrictive methods, including "a more vigorous enforcement of laws against practicing medicine without a license."¹⁷³ Finally, in *Austin LifeCare, Inc., v. City of Austin*, the district court invalidated Austin's status disclosure because it found that some provisions were "facially vague" and "so intertwined" with the other provisions of the chapter as to render the whole void.¹⁷⁴ The district court did not address First Amendment claims.¹⁷⁵

2. *Services Disclosures*

Unlike status disclosures, the circuit courts that reviewed service disclosure requirements generally found that they do not survive strict scrutiny. In reviewing Baltimore's service disclosure requirement, the Fourth Circuit found that, while the requirement aimed to regulate "false advertising," it applied to "all [CPCs] regardless of whether they advertise at all."¹⁷⁶ The court also identified less restrictive alternatives, including undertaking education campaigns promoting consultation with physicians for pregnant women and producing documents or websites noting what services are available at each local CPC.¹⁷⁷ Similarly, the Second Circuit invalidated the service disclo-

170. *See id.* at 247 (explaining that in order for women to have prompt access to the type of care that they seek, they need to know if a particular CPC has a licensed medical provider at the time that they first interact with the CPC).

171. *See Centro Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 468, 471 (D. Md. 2011).

172. *See Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 595 (4th Cir. 2012).

173. *Id.*

174. *See Austin LifeCare, Inc., v. City of Austin*, No. A-11-CA-875-LY, 2014 WL 12774229, at *1, *8 (W.D. Tex. 2014) ("The court concludes that the phrases at issue are facially vague and neither is fairly susceptible to a narrowing construction. The court further concludes that these vague portions are so intertwined with the other provisions of Chapter 10-10 that the entire chapter is rendered vague").

175. *Id.* ("Because the court resolves this action on fair-notice grounds under the Due Process Clause, the court need not address the First Amendment implications of Chapter 10-10, if any.")

176. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 557-58 (4th Cir. 2012).

177. *Id.* at 558.

sure component of New York City's local law.¹⁷⁸ The court found that “[a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers’ political speech by mandating the manner in which the discussion of these issues begins.”¹⁷⁹

3. *Government Message Disclosures*

Like in the case of service disclosures, the circuit courts that reviewed government message requirements generally found that they do not survive strict scrutiny. In *Centro Tepeyac*, the Fourth Circuit found that Montgomery County's government message requirement did not withstand strict scrutiny.¹⁸⁰ The court reasoned that “[i]f Montgomery County wishes to ‘encourage women who are or may be pregnant to consult with a licensed health care provider,’ it must, at a minimum, first do so using its own voice.”¹⁸¹ The Second Circuit found that New York City's government message disclosure infringed upon the rights of CPCs by requiring them to “espouse the government’s position on a contested public issue.”¹⁸² The court held the requirement was insufficiently tailored because, though the government has an interest in ensuring that women do not forgo medical treatment, the city could communicate via an advertising campaign.¹⁸³

IV.

NIFLA V. BECERRA AND CALIFORNIA’S MANDATORY DISCLOSURE LAW

A. *The Reproductive “FACT” Act*

On October 9, 2015, California Governor Jerry Brown signed into law Assembly Bill 755, also known as the FACT Act.¹⁸⁴ Its purpose is to ensure that “[a]ll California women, regardless of income . . . have access to reproductive health services.”¹⁸⁵ Given the time-sensitive nature of family-planning decisions, the state legislature found that the most effective way to ensure that women have access

178. *See* *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014).
179. *Id.*

180. *See* *Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 594–95 (4th Cir. 2012).

181. *Id.* at 594.

182. *See* *Evergreen Ass’n*, 740 F.3d at 250.

183. *Id.*

184. CAL. HEALTH & SAFETY CODE §§ 123470–73 (West 2018), *invalidated* by Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

185. A.B. 775, 2015-2016 Sess. § 1(a) (Cal. 2015).

to, and accurate information about, reproductive health services is to require pregnancy-related clinics to inform pregnant women about the existence of state-funded health care programs and disclose whether they are licensed medical facilities.¹⁸⁶

1. *The FACT Act's Mandatory Disclosures*

a. *Government Message Disclosures*

The state legislature found that a great number of women in California were unaware of the existence of state-funded health care programs that provide “immediate access to free or low cost comprehensive family planning services and pregnancy-related care.”¹⁸⁷ Because pregnancy decisions are time-sensitive, the state legislature found that it was imperative for licensed medical facilities offering pregnancy services that do not enroll patients in state-sponsored programs to inform women about their existence.¹⁸⁸ As a result, the FACT Act requires licensed medical facilities to post and distribute a notice that states 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. To determine whether you qualify, contact the county social services office at [insert telephone number].”¹⁸⁹

The notice must be posted in a place where individuals may read it, printed, and distributed to all clients, or distributed to clients electronically for them to read when they arrive at the facility.¹⁹⁰

The requirement applies to licensed covered facilities, defined as a licensed clinic (i) “whose primary purpose is providing family planning or pregnancy related services”¹⁹¹ and (ii) has two or more of the following characteristics: offers obstetric ultrasounds, sonograms, or prenatal care; provides or offers counseling about contraception; offers pregnancy testing; advertises prenatal sonography, pregnancy tests, or pregnancy options counseling; offers abortion services; or has staff or volunteers who collect health care information from clients.¹⁹²

186. *Id.* § 1(c)-(d).

187. *Id.* See also Assemb. Comm. on Health, Bill Analysis, AB-775 Reproductive FACT Act, 2015-2016 Sess., at 2 (Cal. 2015).

188. A.B. 775, 2015-2016 Sess. § 1(c)-(d) (Cal. 2015).

189. CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West 2018), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

190. *Id.* § 123472(a)(2).

191. CAL. HEALTH & SAFETY CODE § 123471 (West 2018), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

192. *Id.*

b. Status Disclosures

The state legislature also found that CPCs hinder the ability of women to receive access to, and accurate information about, reproductive health services by posing as comprehensive health centers.¹⁹³ The state legislature found that CPCs utilize “intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.”¹⁹⁴ Thus, the FACT Act also requires “unlicensed covered facilities” to post signs that state “This 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.”¹⁹⁵ The message must also be distributed to clients in print and must be included in any print or digital advertising.¹⁹⁶

The FACT Act defines an “unlicensed facility” as a facility that (i) “does not have a licensed medical provider on staff,” (ii) “whose primary purpose is providing pregnancy-related services,” and (iii) has two or more of the following features: offers obstetric ultrasounds, sonograms, or prenatal care; offers pregnancy testing; advertises prenatal sonography, pregnancy tests, or pregnancy counseling; or has staff or volunteers who collect health information.¹⁹⁷

2. Lessons Learned from the Initial Mandatory Disclosure Laws

In drafting the FACT Act, the state legislature sought to address the weaknesses of the initial mandatory disclosure laws.¹⁹⁸ One of the main weaknesses of these laws was that they only applied to unlicensed CPCs.¹⁹⁹ Because most CPCs are religiously-affiliated, regulations that only apply to them are susceptible to viewpoint discrimination challenges and free exercise violations.²⁰⁰ Although the FACT Act contains requirements that apply to both licensed and unli-

193. See Assemb. Comm. on Health, Bill Analysis, AB-775 Reproductive FACT Act, 2015-2016 Sess., at 3 (Cal. 2015).

194. *Id.*

195. CAL. HEALTH & SAFETY CODE § 123472(b)(1) (West 2018), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

196. CAL. HEALTH & SAFETY CODE § 123472(b) (West 2018), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

197. CAL. HEALTH & SAFETY CODE § 123471(b) (West 2018), *invalidated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

198. See Holtzman, *supra* note 5, at 97 (providing an overview of the legislative history of the FACT Act).

199. See UC Hastings Report 2015, *supra* note 2, at 13.

200. *Id.*

censed CPCs, early drafts of the FACT Act did not cover facilities other than CPCs.²⁰¹ However, language was ultimately added to ensure that the requirements applicable to “licensed covered facilities” applied to a wide range of facilities that offer pregnancy services.²⁰² Thus, unlike the requirements in Baltimore, Montgomery County, Austin, and New York City, the FACT Act applies to licensed and unlicensed CPCs, as well as other types of facilities.²⁰³

Another weakness of initial mandatory disclosure laws was that they contained service disclosures, which the courts found unconstitutional. Unlike the Baltimore and New York City ordinances, the FACT Act does not contain service disclosure requirements.²⁰⁴ The FACT Act does not require covered facilities to say anything about the particular services they provide.²⁰⁵ Although the FACT Act requires facilities to provide information about the services available in the state, the legislature also addressed the weaknesses of the government message requirements in the Montgomery County and New York City local laws. Those laws required CPCs to disclose that the state “encouraged” women who are or may be pregnant to consult with a licensed provider.²⁰⁶ In contrast, the FACT Act only requires them to disclose the services available.²⁰⁷

Moreover, although the FACT Act contains a status disclosure requirement for unlicensed facilities, the legislature modeled the FACT Act’s requirement after the status disclosure requirement in New York City’s local law, which the Second Circuit upheld.²⁰⁸ The status disclosure obligation in New York City’s local law requires un-

201. See Holtzman, *supra* note 5, at 97 (noting that although “earlier drafts of the Act did not include ‘The facility offers abortion services’ as a factor for classifying ‘licensed covered facilities,’” it was ultimately added to the bill).

202. See *id.*

203. Compare BALT., MD., HEALTH CODE § 3-501 (2009), and Montgomery County, Md., Council Res. No. 16-1252(a)(3) (Feb. 2, 2010), and AUSTIN, TEX., CODE OF ORDINANCES § 10-10-1(1) (2012), and N.Y.C., N.Y. ADMIN. CODE § 20-815g (2011), with CAL. HEALTH & SAFETY CODE § (West 2018), *invalidated* by Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

204. Compare BALT., MD., HEALTH CODE § 3-502(a) (2009), and N.Y.C., N.Y. ADMIN. CODE § 20-816c-e (2011), with CAL. HEALTH & SAFETY CODE § 123472 (West 2018), *invalidated* by Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

205. CAL. HEALTH & SAFETY CODE § 123472 (West 2018), *invalidated* by Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

206. Montgomery County, Md., Council Res. No. 16-1252(b)(1)(b) (Feb. 2, 2010); N.Y.C., N.Y. ADMIN. CODE § 20-816a (2011).

207. CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West 2018).

208. Compare CAL. HEALTH & SAFETY CODE § 123472(b) (West 2018), *invalidated* by Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018), with N.Y.C., N.Y. ADMIN. CODE § 20-816b (2011); see also Evergreen Ass’n v. City of

licensed facilities to inform clients that they do not have a licensed medical professional on staff.²⁰⁹ In *Evergreen*, the Second Circuit noted that a status disclosure of this kind is “the least restrictive means to ensure that a woman is aware of whether or not a particular pregnancy services center has a licensed medical provider at the time that she first interacts with it.”²¹⁰ Similarly, the district court in *Centro Tepeyac* found that Montgomery County’s status disclosure requirement was narrowly tailored to the state’s interest in “ensuring that its citizenry are able to obtain needed medical care” because it did not require any “specific message” and “in neutral language state[d] the truth.”²¹¹

Finally, the legislature tried to ensure that the disclosure requirements of the FACT Act were less burdensome than those of other mandatory disclosure laws that the courts found unconstitutional.²¹² For example, unlike New York City’s local law, which required that the disclosures be posted near entrances, in waiting rooms, on advertisements, and stated during telephone conversations, the FACT Act allows the information on available services in the state to be posted in a place where individuals may read it, printed and distributed to clients, or distributed to clients electronically.²¹³ The FACT Act does not require that the relevant information be stated during patient visits or telephone conversations.²¹⁴

B. *The Constitutionality of the Reproductive “FACT” Act*

On October 13, 2015, NIFLA filed a lawsuit along with a group of covered facilities that object to abortion for religious reasons.²¹⁵ They sought to enjoin enforcement of the FACT Act alleging, among

New York, 740 F.3d 233, 248 (2d Cir. 2014) (upholding New York’s status disclosure requirement).

209. N.Y.C., N.Y. ADMIN. CODE § 20-816b (2011).

210. See *Evergreen Ass’n*, 740 F.3d at 247.

211. See *Centro Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 471 (D. Md. 2011).

212. See Holtzman, *supra* note 5, at 103 (noting that “unlike the previous ordinances, the FACT Act does not impose additional burdens or requirements on CPCs, such as mandating that staff or volunteers remind women of that notice orally or requiring the notice to be displayed in multiple places throughout the CPCs.”).

213. Compare N.Y.C., N.Y. ADMIN. CODE § 20-816f (2011) with CAL. HEALTH & SAFETY CODE § 123472 (West 2018), *invalidated by* Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

214. Compare N.Y.C., N.Y. ADMIN. CODE § 20-816b (2011) with CAL. HEALTH & SAFETY CODE § 123472 (West 2018), *invalidated by* Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

215. See Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2370 (2018).

other things, that it violates their freedom of speech rights.²¹⁶ The district court denied the injunction, and the Ninth Circuit affirmed.²¹⁷ The Ninth Circuit held that the FACT Act's government message disclosure requirement survived intermediate scrutiny as applied to regulations of professional speech, while the status disclosure requirement survived any level of scrutiny.²¹⁸ In *NIFLA v. Becerra*, the Supreme Court recently reversed the Ninth Circuit's decision.²¹⁹ Rejecting a deferential review of professional speech, the Supreme Court held that the government message requirement was likely subject to strict scrutiny, and held that it failed even intermediate scrutiny.²²⁰ Moreover, the Supreme Court held that the status disclosure requirement did not survive even rational basis review as applied to commercial speech.²²¹

1. *Government Message Disclosures*

The Supreme Court found that the government message disclosure was likely subject to strict scrutiny because it did not regulate professional conduct or commercial speech. Following *Pickup*, the Ninth Circuit recognized professional speech as a category of speech entitled to less First Amendment protection.²²² Accordingly, the Ninth Circuit applied intermediate scrutiny, reasoning that the facilities engaged in speech that "occurs squarely within the confines of their professional practice."²²³ The court noted that clients go to the facilities because of their services and rely on them for knowledge.²²⁴ Moreover, the court found that their professional speech extends beyond the examining rooms because "all the speech related to the clinic's professional services that occurs within the clinics' walls . . . is part of the clinic's professional practice."²²⁵

In *Becerra*, the Supreme Court refused to recognize professional speech as a category of speech that should be accorded a more defer-

216. *Id.*

217. *See Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 845 (9th Cir. 2016).

218. *Id.*

219. *See Becerra*, 138 S. Ct. at 2378.

220. *Id.* at 2375.

221. *Id.* at 2378.

222. *See Harris*, 839 F.3d at 839 (explaining that "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it").

223. *Id.* at 839-40.

224. *See id.* at 840 (noting that "[t]here is no question that Pregnancy Care's clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill.>").

225. *Id.*

ential review.²²⁶ The Court acknowledged that it had previously upheld regulations of professional conduct that incidentally burdened speech, but distinguished them from regulations of professional speech.²²⁷ In particular, the Supreme Court explained that the law at issue in *Casey* regulated speech as part of the practice of medicine, subject to reasonable regulation by the state.²²⁸ The Supreme Court noted that the government message disclosure is not an informed-consent requirement or a regulation of professional conduct.²²⁹ The Court found it particularly telling that “[the disclosure] is not tied to a procedure at all.”²³⁰

The Supreme Court also acknowledged that the Court has given a more deferential review to regulations of commercial speech.²³¹ In particular, the Supreme Court acknowledged that, in *Zauderer*, the Court had upheld commercial advertising by professionals that required the disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available.”²³² However, the Court found that *Zauderer* was inapplicable to the government message disclosure because “[t]he notice in no way relates to the services that licensed clinics provide.”²³³ The Supreme Court highlighted that the FACT Act requires covered facilities to make disclosures about state-sponsored services, including abortion services.²³⁴

While finding that the requirement was likely subject to strict scrutiny, the Court noted that it did not need to make a definitive finding on the appropriate level of review because the requirement failed even intermediate scrutiny.²³⁵ In particular, the Court found that, even assuming that California has a substantial interest in “providing low-income women with information about state-sponsored services,” the law was not sufficiently narrowly drawn in order to achieve their

226. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018).

227. *Id.* at 2373.

228. See *id.* (explaining that informed consent requirements are “firmly entrenched in American tort law.”) (internal citations and quotation marks omitted).

229. *Id.*

230. See *id.* (noting that the requirement applies regardless of whether a procedure is “sought, offered, or performed.”).

231. See *id.* at 2372.

232. *Id.* (internal citations and quotation marks omitted).

233. See *id.* (arguing that “[t]he notice in no way relates to the services that licensed clinics provide.”).

234. See *id.* (explaining that *Zauderer* has no application because “[the notice] requires these clinics to disclose information about state-sponsored services—including abortion, anything but an ‘uncontroversial’ topic.”).

235. *Id.* at 2375.

goal.²³⁶ The Court noted that the requirement exempts federal clinics and Family PACT providers.²³⁷ The Court noted that, while these clinics can enroll women in state-funded programs, there is no evidence that they are more likely to provide information than covered facilities.²³⁸ The Court also identified less restrictive alternatives, including information campaigns.²³⁹ As a result, the Court found that the requirement was likely unconstitutional.²⁴⁰

2. *Status Disclosures*

Neither the Supreme Court nor the Ninth Circuit decided the appropriate level of review for the FACT Act's status disclosure requirement.²⁴¹ Nevertheless, the Ninth Circuit found that the requirement survived even strict scrutiny.²⁴² The Ninth Circuit recognized that California has a compelling interest in informing women when they are using a facility that has not satisfied licensing requirements by the state.²⁴³ Moreover, the Ninth Circuit found that the FACT Act is narrowly tailored to this interest because it ensures that women are fully informed.²⁴⁴ The Ninth Circuit noted that the requirement is only one sentence long, and "says nothing about the quality of service women may receive . . . and in no way implies or suggests California's preferences regarding unlicensed clinics."²⁴⁵ In doing so, the Ninth Circuit followed the Second and Fourth Circuits, which also found that status disclosures requirements survive strict scrutiny.²⁴⁶

236. *See id.* at 2375.

237. *Id.* at 2376.

238. *See id.* at 2376 (noting "[i]f the goal is to maximize women's awareness of these programs, then it would seem that California would ensure that the places that can immediately enroll women also provide this information.").

239. *Id.*

240. *Id.*

241. *See id.* at 2377; *see also* Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 845 (9th Cir. 2016).

242. *See Harris*, 839 F.3d at 843 (noting that "given the Legislature's findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services, California's interest in presenting accurate information about the licensing status of individual clinics is particularly compelling.").

243. *Id.*

244. *See id.* ("The [notice] helps ensure that women . . . are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that overview those professionals who are licensed.").

245. *Id.*

246. *See* Evergreen Ass'n v. City of New York, 740 F.3d 233, 247 (2d Cir. 2014) (finding that a status disclosure was "the least restrictive means to ensure that a woman [was] aware of whether or not a particular [CPC] ha[d] a licensed medical provider at the time that she first interact[ed] with it."); *see also* Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 190 (4th Cir. 2013) (upholding a status disclosure

The Supreme Court rejected their decisions, finding that the status disclosure requirement did not survive even rational basis review.²⁴⁷ The Supreme Court considered whether the requirement was subject to deferential review under *Zauderer*.²⁴⁸ The Court found that, even if the requirement involved factual and uncontroversial information about the terms under which services will be available, it failed rational basis review because it was unjustified and unduly burdensome.²⁴⁹ Unlike the Ninth Circuit, the Supreme Court found that California's interest in informing women about the licensing status of the facilities they visit is "purely hypothetical" because there is no evidence that women do not already know this information.²⁵⁰ In addition, the Supreme Court found that the status disclosure requirement was unduly burdensome noting, by way of example, that an advertisement that says "Choose Life" would have to surround those two words with a statement from the government in as many as thirteen different languages.²⁵¹

V.

THE IMPACT OF NIFLA V. BECERRA ON MANDATORY DISCLOSURE LAWS

A. *Mandatory Disclosure Laws*

Since the enactment of the FACT Act, at least five other jurisdictions have adopted mandatory disclosure laws impacting CPCs.²⁵² Hawaii adopted government message disclosure requirements.²⁵³ In addition, King County, Washington, and the City of Hartford, Con-

because it "merely notifie[d] patients that a licensed medical professional [was] not on staff").

247. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377–78 (2018).

248. *Id.* at 2378.

249. *Id.*

250. See *id.* at 2377 ("California points to nothing suggesting that pregnant women do not already know that covered facilities are staffed by unlicensed professionals. The services that trigger [the requirement] do not require a . . . license.").

251. See *id.* at 2378.

252. See S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (Haw. 2017); King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017), <https://www.kingcounty.gov/depts/health/board-of-health/~/media/depts/health/board-of-health/documents/regulations/BOH-regulation-17-04.ashx>; HARTFORD, CONN., MUN. CODE § 17-163 (2017), [253. See S.B. 501, S.D. 1, 29th Leg., Reg. Sess. \(Haw. 2017\).](https://library.municode.com/ct/hartford/codes/code_of_ordinances?nodeId=PTIIMUCO_CH17HESA_ARTVIPRINDIPR_S17-163REDI; 745 ILL. COMP. STAT. ANN 70/2, 3, 6, 9 (West 2019); OAKLAND, CAL., CODE § 5.06.110 (2016).</p>
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necticut, adopted status disclosures,²⁵⁴ while Illinois and the City of Oakland, California, both adopted services disclosures.²⁵⁵ As CPCs challenge these laws on First Amendment grounds, the courts will rely on *Becerra* for guidance on the constitutionality of these laws. Because of their resemblance to the requirements of the FACT Act, the courts are likely to find the government message and status disclosure requirements to be unconstitutional. Moreover, given the lessons learned from early mandatory disclosure laws, it is likely that only the City of Oakland's services requirement will be subject to rational basis review as a regulation of commercial speech.

1. Government Message Disclosures

On July 12, 2017, Hawaii's Governor David Ige signed S.B. 501 into law.²⁵⁶ The law requires CPCs to disseminate a notice stating, "Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services," including pregnancy-related services for eligible women.²⁵⁷ Hawaii's law requires that the notice contains the following disclaimer: "Only ultrasounds performed by qualified health care professionals and read by licensed clinicians should be considered medically accurate."²⁵⁸ A district court in Hawaii invalidated the law following the Supreme Court's decision in *Becerra*.²⁵⁹

Notably, Hawaii's mandatory disclosure law has several features that made it more vulnerable to a First Amendment challenge than other government message requirements. In *Becerra*, the Supreme Court found that the FACT Act's government message requirement was not likely to withstand intermediate or strict scrutiny because it

254. See King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017), <https://www.kingcounty.gov/depts/health/board-of-health/~/media/depts/health/board-of-health/documents/regulations/BOH-regulation-17-04.ashx>; see HARTFORD, CONN., MUN. CODE § 17-163 (2017), https://library.municode.com/ct/hartford/codes/code_of_ordinances?nodeId=PTIIMUCO_CH17HESA_ARTVIPRINDIPR_S17-163REDI.

255. 745 ILL. COMP. STAT. ANN 70/2, 3, 6, 9 (West 2019); OAKLAND, CAL., CODE § 5.06.110 (2016).

256. See S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (Haw. 2017); HAW. REV. STAT. ANN. § 321-561(b) (West 2019).

257. *Id.*

258. *Id.*

259. See *Calvary Chapel Pearl Harbor v. Suzuki*, No. 17-00326-DKW-KSC, at 1, 2 (D. Haw. Sept. 20, 2018) (order granting permanent injunction and final judgment stating that "[i]n light of the United States Supreme Court's decision in *Nat'l Inst. of Family & Life Advocates v. Becerra* . . . it is hereby ordered . . . that Hawaii revised statutes § 321-561(b)-(c) [are] declared to be unconstitutional under the United States Constitution . . . with respect to plaintiffs' First Amendment free speech claim.").

was “wildly underinclusive” and the state provided insufficient evidence that less restrictive alternatives could not achieve the state’s interest.²⁶⁰ Although the FACT Act applied to licensed and unlicensed facilities, the Court found it troubling that the state exempted facilities without sufficient justification.²⁶¹ Because Hawaii’s law applies only to unlicensed CPCs, it is likely more underinclusive than the FACT Act.²⁶² Moreover, while the FACT Act addressed less restrictive alternatives, Hawaii’s law makes no mention of whether the state pursued alternatives and found them to be insufficient.

Furthermore, both the Second and Fourth Circuits have found that government message requirements are not likely to survive strict scrutiny because they require covered entities to espouse the government’s view on contested issues.²⁶³ New York City and Montgomery County “encouraged” women to consult with a licensed health care provider.²⁶⁴ Although the Ninth Circuit upheld the FACT Act’s government message requirement, the court upheld it in part because the requirement made no mention of the state’s view on these services.²⁶⁵ Hawaii’s requirement contains a disclaimer that “[o]nly ultrasounds performed by qualified health care professionals and read by licensed clinicians should be considered medically accurate.”²⁶⁶ Although the notice does not expressly encourage women to visit licensed providers, it could be construed as requiring CPCs to espouse the state’s view on the quality of certain services.

2. *Status Disclosures*

In 2017, King County, Washington, and the City of Hartford, Connecticut, adopted status disclosure requirements impacting CPCs.²⁶⁷ King County requires unlicensed CPCs to disseminate a no-

260. See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2367 (2018).

261. *Id.*

262. See S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (Haw. 2017); HAW. REV. STAT. ANN. § 321-561(a)(2) (West 2019).

263. See *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014); see also *Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 594–95 (4th Cir. 2012).

264. N.Y.C., N.Y. ADMIN. CODE § 20-816a (2011); Montgomery County, Md., Council Res. No. 16-1252(b)(1)(b) (Feb. 2, 2010).

265. See *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 842 (9th Cir. 2016) (“[t]he Licensed Notice does not use the word ‘encourage,’ or other language that suggests the California Legislature’s preferences regarding prenatal care.”).

266. See S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (Haw. 2017); HAW. REV. STAT. ANN. § 321-561(b) (West 2019).

267. See King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017); HARTFORD, CONN., MUN. CODE § 17-163 (2017), <https://library.municode>

tice that states “this facility is not a health care facility.”²⁶⁸ The ordinance defines “health care facility” as a hospital, clinic, or a similar place with a licensed health care provider.²⁶⁹ The City of Hartford requires unlicensed CPCs to display a sign disclosing that the “facility does not have a licensed medical provider on site to provide or supervise all services.”²⁷⁰ The requirements resemble the FACT Act’s status disclosure, which required unlicensed CPCs to state that “This 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.”²⁷¹

Although the Second, Fourth, and Ninth Circuits upheld status disclosure requirements impacting unlicensed CPCs, the Supreme Court found that the FACT Act’s status disclosure requirement was not likely to survive even rational basis review.²⁷² The Supreme Court found that California’s justification was “purely hypothetical” because the state provided insufficient evidence that pregnant women do not already know this information.²⁷³ California found that CPCs hinder the ability of women to receive access to, and accurate information about, reproductive health services by posing as comprehensive health centers.²⁷⁴ King County posited that women in King County are in need of state-funded comprehensive reproductive health care services, but are unaware that these programs exist.²⁷⁵ The City of Hartford found that women who visit CPCs are particularly vulnerable to false and misleading advertising by CPCs because they are experiencing

.com/ct/hartford/codes/code_of_ordinances?nodeId=PTIIMUCO_CH17HESA_ART_VIPRINDIPR_S17-163REDI.

268. See King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017), [https://www.kingcounty.gov/depts/health/board-of-health/~media/depts/health/board-of-health/documents/regulations/BOH-regulation-17-04.ashx](https://www.kingcounty.gov/depts/health/board-of-health/~/media/depts/health/board-of-health/documents/regulations/BOH-regulation-17-04.ashx).

269. *Id.*

270. See HARTFORD, CONN., MUN. CODE § 17-163 (2017), https://library.municode.com/ct/hartford/codes/code_of_ordinances?nodeId=PTIIMUCO_CH17HESA_ART_VIPRINDIPR_S17-163REDI.

271. CAL. HEALTH & SAFETY CODE § 123472(b)(1) (West 2018), *invalidated by* Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

272. Compare Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 845 (9th Cir. 2016), and Evergreen Ass’n v. City of New York, 740 F.3d 233, 247 (2d Cir. 2014), and Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 190 (4th Cir. 2013), with Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2377 (2018).

273. See *Becerra*, 138 S. Ct. at 2377.

274. See Assemb. Comm. on Health, Bill Analysis, AB-775 Reproductive FACT Act, 2015-2016 Sess., at 3 (Cal. 2015).

275. See King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017), <https://www.kingcounty.gov/depts/health/board-of-health/~media/depts/health/board-of-health/documents/regulations/BOH-regulation-17-04.ashx>.

emotional and physical distress.²⁷⁶ However, the Supreme Court did not decide in *Becerra* what type of state interest could sustain a status disclosure requirement.²⁷⁷

Nonetheless, the Supreme Court found that, even if the state had presented a compelling justification, the FACT Act's status disclosure requirement covered a "curiously narrow subset of speakers" and was overly burdensome.²⁷⁸ The Supreme Court found it troubling that the FACT Act's status disclosure, unlike the government message disclosure, only applied to unlicensed CPCs "no matter what the facilities say on site or in their advertisements."²⁷⁹ Like the FACT Act's status disclosure, the requirements from King County and the City of Hartford apply only to unlicensed CPCs and are not dependent on their advertisements.²⁸⁰ Additionally, the Supreme Court found that the requirement could "drown the facility's own message," noting, by way of example, that an advertisement that says "Choose Life" would need to include a twenty-nine word government statement in as many as thirteen different languages.²⁸¹ Similarly, King County requires that the notice states the government's message in ten languages.²⁸² Although the City of Hartford only requires that the notice states the message in English and Spanish, the ordinance also requires that the message be communicated orally in certain circumstances.²⁸³

3. Services Disclosures

In 2016, Illinois and the City of Oakland, California, both adopted services disclosure requirements impacting CPCs.²⁸⁴ Illinois's

276. See HARTFORD, CONN., MUN. CODE § 17-163 (2017), https://library.municode.com/ct/hartford/codes/code_of_ordinances?nodeId=PTIIMUCO_CH17HESA_ARTVIPRINDIPR_S17-163REDI.

277. See *Becerra*, 138 S. Ct. at 2377–78.

278. *Id.* at 2377.

279. *Id.*

280. See King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017), <https://www.kingcounty.gov/depts/health/board-of-health/~media/depts/health/board-of-health/documents/regulations/BOH-regulation-17-04.ashx>; HARTFORD, CONN., MUN. CODE § 17-163 (2017), https://library.municode.com/ct/hartford/codes/code_of_ordinances?nodeId=PTIIMUCO_CH17HESA_ARTVIPRINDIPR_S17-163REDI.

281. See *Becerra*, 138 S. Ct. at 2378.

282. See King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017), <https://www.kingcounty.gov/depts/health/board-of-health/~media/depts/health/board-of-health/documents/regulations/BOH-regulation-17-04.ashx>.

283. See HARTFORD, CONN., MUN. CODE § 17-163 (2017), https://library.municode.com/ct/hartford/codes/code_of_ordinances?nodeId=PTIIMUCO_CH17HESA_ARTVIPRINDIPR_S17-163REDI.

284. 745 ILL. COMP. STAT. ANN. 70/6.1 (West 2019); OAKLAND, CAL., CODE § 5.06.110 (2016).

law requires “health care facilities,” defined as an institution or location where health care services are provided, that refuse to provide services requested by a client because of a conscience-based objection to notify the client that she will not receive the service.²⁸⁵ The City of Oakland’s ordinance requires specifically CPCs, under certain circumstances, to post a notice stating whether there is a licensed medical professional on staff and whether the CPC provides abortion, emergency contraception, or referrals for those services.²⁸⁶

Because the FACT Act does not contain a services disclosure requirement, the Supreme Court did not address in *Becerra* what standard of review would apply to them. However, the courts have generally found that services disclosures are likely subject to strict scrutiny.²⁸⁷ In particular, the Second Circuit has expressed concern that services disclosures alter CPC’s political speech.²⁸⁸ In *Evergreen*, for instance, the Second Circuit invalidated New York City’s services disclosure requirement, noting that “[t]he Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues of prenatal care, emergency contraception, and abortion.”²⁸⁹ Illinois’ law appears more burdensome than New York City’s local law. Unlike New York City’s law, Illinois’ law does not only require CPCs to inform women whether they provide or make referrals for certain services.²⁹⁰ Illinois’ law also requires CPCs to refer them to or provide them with information about providers who may offer the service that the CPC refuses to participate in because of the conscience-based objection.²⁹¹

In contrast to Illinois’ services disclosure, which applies to facilities that refuse to perform or refer a person for a medical service because of a conscience-based objection, the City of Oakland’s ordinance specifically targets the advertising practices of CPCs.²⁹² The City of Oakland’s ordinance prohibits CPCs from making or disseminating any statement concerning pregnancy-related services that the CPC knows or should know to be untrue or misleading.²⁹³ Impor-

285. 745 ILL. COMP. STAT. ANN. 70/3(d), 70/6.1 (West 2019).

286. OAKLAND, CAL., CODE § 5.06.110(C)-(D) (2016).

287. See *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014); see also *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 557–58 (4th Cir. 2012).

288. See *Evergreen Ass’n*, 740 F.3d at 249.

289. *Id.* at 249–50.

290. 745 ILL. COMP. STAT. ANN. 70/6.1 (West 2019).

291. *Id.*

292. Compare 745 ILL. COMP. STAT. ANN. 70/6.1 (West 2019) with OAKLAND, CAL., CODE § 5.06.110 (2016).

293. OAKLAND, CAL., CODE § 5.06.110(C)-(D) (2016).

tantly, if the CPC refuses to cure the deceptive advertising, the ordinance provides that the City Attorney may issue an injunction requiring the CPC to disseminate appropriate corrective advertising and post a notice stating whether there is a licensed medical professional on staff and whether the CPC provides abortion, emergency contraception, or referrals for those services.²⁹⁴ The purpose of the ordinance is to “regulate false and misleading advertising by [CPCs].”²⁹⁵

Unlike Illinois’ law, the City of Oakland’s requirement is likely entitled to rational basis review as a regulation of commercial speech. In *First Resort*, the Ninth Circuit found that San Francisco’s ordinance regulates commercial speech subject to a lower level of scrutiny.²⁹⁶ San Francisco’s ordinance is different from other services disclosures in that it only requires disclosures of CPCs that violated an advertising regulation.²⁹⁷ Like San Francisco’s ordinance, the City of Oakland’s ordinance only requires disclosures from CPCs that have been found to make a false and misleading advertisement.²⁹⁸ Thus, the courts are likely to find that the City of Oakland’s ordinance is directed at the advertisement of services, not the exchange of ideas.²⁹⁹

Although the Supreme Court did not address in *Becerra* whether services disclosures that regulate commercial speech withstand rational basis review, the Court found that, “under *Zauderer*, a disclosure requirement cannot be unjustified or unduly burdensome.”³⁰⁰ Because the City of Oakland’s disclosure only applies to CPCs that have been found to violate an advertising regulation, the city is likely to prove a compelling justification for the disclosure.³⁰¹ Further, the disclosures are likely not unduly burdensome. While the courts have found the disclosure requirements of other mandatory disclosure laws

294. *Id.*

295. *Id.*

296. *See First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1279 (9th Cir. 2017) (“Because LSPCs are not a suspect class, only rational basis review—not strict scrutiny—applies.”).

297. *Compare* N.Y.C., N.Y. ADMIN. CODE § 20-816 (2011), *and* BALT., MD., HEALTH CODE § 3-502(a)-(b) (2009), *with* S.F., CAL., ADMIN. CODE § 93.5 (2011).

298. *Compare* S.F., CAL., ADMIN. CODE § 93.5 (2011) *with* OAKLAND, CAL., CODE § 5.06.110(C)-(D) (2016).

299. *See First Resort*, 860 F.3d at 1273 (“[T]he Ordinance is directed at advertisements related to the provision of certain medical services . . . the City did not attempt to ban advertisements related to . . . pro-life advocacy.”).

300. *See Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

301. OAKLAND, CAL., CODE § 5.06.110(C)-(D) (2016).

burdensome because of the format that CPCs must use for their notices, the City of Oakland does not prescribe a specific format.³⁰²

B. *Abortion Counseling and Other Medical Disclosures*

Thirty-four states currently have laws requiring physicians to provide counseling to women before they may perform an abortion.³⁰³ The requirements range from providing women with information about the abortion procedure and the risks of abortion to providing women with materials from the state with information on a range of support services.³⁰⁴ Although some of these laws have been challenged as an infringement of the physician's right under the First Amendment not to provide this information, the courts have generally upheld these laws under rational basis review, reasoning that they are a regulation of the medical practice as in *Casey*.³⁰⁵ By interpreting *Casey* as applying only when obtaining informed consent to a procedure, the Supreme Court's decision in *Becerra* could subject some of these laws to heightened scrutiny—particularly those with disclosure requirements that do not relate to the procedure at issue.³⁰⁶

1. *Casey and Abortion Counseling Laws*

In *Casey*, the Supreme Court upheld a law requiring physicians to obtain informed consent before they could provide an abortion.³⁰⁷ The law required physicians to inform women of the nature of the procedure, the health risks of the abortion and childbirth, and the prob-

302. *Id.*

303. *See generally Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (July 1, 2019), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/FZ2U-5F8N>].

304. *Id.*

305. *See, e.g., Tex. Med. Providers v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012); *see also Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008), *aff'd* 686 F.3d 889, 904–05 (8th Cir. 2012) (upholding advisory notice linking abortion to suicide on the grounds that it “is non-misleading and relevant to the patient’s decision to have an abortion, as required by *Casey*”); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (“*Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.”).

306. *See Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

307. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 887 (1992).

able gestational age of the unborn child.³⁰⁸ The law also required that women know of the availability of printed materials with information about the unborn child, agencies that offer alternatives to abortion, and medical assistance benefits.³⁰⁹ The *Casey* plurality found that informed consent laws requiring disclosures of truthful, non-misleading, and relevant information did not impose an undue burden on the woman's right to an abortion and were thus permitted by the Fourteenth Amendment.³¹⁰ The plurality also found that the law did not infringe upon the physician's First Amendment right not to make such disclosures, reasoning that it regulated speech only "as part of the practice of medicine, subject to reasonable licensing and regulation by the State."³¹¹

Following *Casey*, thirty-three states have adopted informed consent laws requiring physicians to provide counseling before they may perform an abortion.³¹² Nearly all of the states that have adopted abortion counseling laws require physicians to provide women with information about the abortion procedure³¹³ and inform them of the risks of abortion.³¹⁴ However, some states require physicians to tell women that personhood begins at conception and discuss the ability of a fetus to feel pain.³¹⁵ Some require that women receive information on accessing ultrasound services, while others require that a woman undergo an ultrasound before an abortion.³¹⁶ Additionally, some states require physicians to provide women with directories with information

308. *Id.* at 881.

309. *Id.*

310. *See id.* at 882 (explaining that "if the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.").

311. *Id.* at 884.

312. *See Counseling and Waiting Periods for Abortion, supra* note 303.

313. *See id.* Twenty-five states require that women be given information about the specific procedure, while twenty-three require information about all common abortion procedures; thirty-two states require that the woman be told the gestational age of the fetus and twenty-eight states require fetal development information throughout pregnancy. *Id.*

314. *See id.* Twenty-five states include information about the risks of abortion; twenty-one states include accurate information on the potential effect of abortion on future fertility; five states inaccurately assert a link between abortion and an increased risk of breast cancer. Eight states stress negative emotional responses to abortion. *Id.*

315. *See id.* Six states require that the woman be told that personhood begins at conception; thirteen states include information on the ability of a fetus to feel pain. *Id.*

316. *See id.* Fourteen states require verbal counseling or written materials to include information on accessing ultrasound services; eleven states mandate that an abortion provider perform an ultrasound on each woman seeking an abortion; three states require the provider to show and describe the image. *Id.*

on support services, such as prenatal care, child care, and adoption services.³¹⁷

Litigation concerning these informed consent laws has mostly focused on Fourteenth Amendment challenges asserting that the laws require disclosures of inaccurate and misleading information that impose an undue burden on the woman's right to an abortion.³¹⁸ The courts that have considered First Amendment challenges to these laws have largely upheld them under rational basis review.³¹⁹ For example, in *Texas Medical Providers v. Lakey*, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) upheld disclosures involving a sonogram, the heart auscultation of the pregnant woman's fetus, and a description by the physician in order for a woman to obtain an abortion, noting that information about fetal development is relevant to a woman's decision-making.³²⁰ In *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit) upheld a law compelling physicians to inform women that abortion will "terminate the life of a whole, unique, living human being," highlighting what the court perceived to be the biological underpinnings of the statutory provision.³²¹ Similarly, the Eighth Circuit upheld a law requiring physicians to explain all known "medical risks" of abortion that included "the risk of suicide ideation and suicide," finding that suicide ideation and suicide were medical risks.³²²

The Fourth Circuit's decision in *Stuart* created a circuit split regarding the appropriate level of review for these informed consent

317. See *id.* Twenty-nine states direct the state health agency to develop written materials; eleven states require that the written materials be given to a woman seeking an abortion. *Id.*

318. See Duane, *supra* note 71, at 369 ("litigation of these laws has most often focused on elements of the laws unrelated to compelled speech; for example, requiring disclosures in person versus over the phone, mandating waiting periods, and compelling use of state-prepared materials versus . . . physician-prepared materials.").

319. See, e.g., *Tex. Med. Providers v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012); see also *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 904–05 (8th Cir. 2012); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008).

320. See *Lakey*, 667 F.3d at 578 (explaining that *Casey* and *Gonzales* "allow the state to regulate medical practice by deciding that information about fetal development is relevant to a woman's decision-making.").

321. See *Rounds*, 530 F.3d at 736 (finding that "this biological information . . . is at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*.").

322. See *Rounds*, 686 F.3d at 904 (explaining that "the disclosure of the observed correlation as an increased risk is not unconstitutionally misleading or irrelevant under *Casey* and *Gonzales*" and physicians who provide abortions should be capable of explaining to patients "the difference between relative risk and proof of causation.").

laws. In *Stuart*, the Fourth Circuit invalidated a state law similar to the law upheld by the Fifth Circuit involving a sonogram, the heart auscultation of the pregnant woman's fetus, and a description by the physician in order for a woman to obtain an abortion.³²³ Unlike the Fifth Circuit, the Fourth Circuit found that the law failed intermediate scrutiny, and strict scrutiny by implication, because it compelled speech that conveyed a particular opinion by seeking to convince women to reassess their abortion decision.³²⁴ The Fourth Circuit rejected the view that *Casey* mandates rational basis review of these laws.³²⁵ Notably, the Eleventh Circuit also took this position in *Wollschlaeger v. Governor of Florida*, where the court reviewed a law banning medical professionals from inquiring about gun ownership.³²⁶

2. Abortion Counseling Laws After *Becerra*

In *Becerra*, the Supreme Court invalidated the FACT Act's requirement that medical professionals disclose information about the possibility of abortion.³²⁷ In refusing to apply a lower level of review, the Court acknowledged that the First Amendment does not prevent regulation of professional conduct that incidentally burdens speech under *Casey*.³²⁸ The Supreme Court interpreted *Casey* as applying to cases where obtaining informed consent to a medical procedure is at issue.³²⁹ Accordingly, the Court found that the FACT Act was not an informed-consent requirement and the disclosure requirements did not regulate professional conduct.³³⁰ The Supreme Court highlighted that the requirements did not facilitate consent to a medical procedure and, in fact, applied to "all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed."³³¹

323. See *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014).

324. See *id.* at 253 (noting that "[b]y requiring providers to deliver this information to a woman who takes steps not to hear it . . . the state has . . . moved from 'encouraging' to lecturing, using health care providers as its mouthpiece.").

325. See *id.* at 249 (explaining that "[t]he single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny.").

326. See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1311 (11th Cir. 2017) (agreeing that "the *Casey* 'plurality did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review.'").

327. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018).

328. *Id.* at 2373.

329. *Id.*

330. See *id.* (finding in part that "the [licensed] notice does not facilitate informed consent to a medical procedure").

331. *Id.*

Becerra's impact on abortion counseling laws hinges on what it means for a disclosure requirement to facilitate consent to a medical procedure. The courts could interpret it as broadly as meaning that the disclosure has to occur as part of the process for obtaining informed consent to a procedure. In this case, *Casey* could likely cover not only disclosures pertaining to the procedure and its risks, but also disclosures about the beginning of personhood, the ability of the fetus to feel pain, and even support services, including prenatal care, childcare, and adoption services as long as they are required to occur as part of the informed consent process. However, the courts could also interpret it more narrowly to mean that the disclosure has to pertain directly to the procedure at issue. In this case, it is likely that *Casey* would not cover disclosures about personhood, the fetus, or support services. Whether *Casey* is controlling matters because the courts tend to use it as precedent for reviewing these laws under rational basis review.³³²

Becerra's impact on abortion counseling laws is likely to be particularly prominent with regards to requirements that medical professionals provide pregnant women seeking an abortion with materials from the state with information about the fetus and certain support services. The plurality in *Casey* upheld a requirement that medical professionals provide pregnant women with information about the fetus, government agencies that offer alternatives to abortion, and medical assistance benefits.³³³ Similarly, the FACT Act concerned a requirement that covered facilities provide pregnant women with information about the availability of public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion for eligible women.³³⁴ As Justice Stephen Breyer noted in his dissent, "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 [in the FACT Act], to require a medical counselor to tell a woman seeking prenatal care or other reproductive health care about childbirth and abortion services?"³³⁵

332. See, e.g., *Tex. Med. Providers v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012); see also *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 904–05 (8th Cir. 2012); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008).

333. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881 (1992).

334. See *Becerra*, 138 S. Ct. at 2369.

335. See *id.* at 2385 (Breyer, J., dissenting) ("[T]here is no convincing reason to distinguish between information about adoption and information about abortion . . . After all, the rule of law embodies evenhandedness, and what is sauce for the goose is normally sauce for the gander.") (quoting *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016)).

The impact of *Becerra* is likely to extend to medical disclosure laws beyond those that cover abortion providers.³³⁶ States have regularly imposed regulations requiring medical professionals to provide certain information to patients while providing certain procedures. Some of these disclosures pertain directly to the procedure at issue. However, some are given as part of the informed consent process while others are given after the procedure.³³⁷ Following *Becerra*, it is unclear if disclosures occurring after the procedure would be covered by *Casey*. Moreover, some requirements do not pertain to the procedure at issue, but rather relate more broadly to the underlying condition. For example, some states require medical professionals to provide a summary of symptoms and methods of diagnoses for gynecological cancers during a gynecological examination.³³⁸ Finally, some requirements do not even relate to medical procedures or conditions. Some states require providers of childbirth services to give information about certain conditions,³³⁹ safe infant sleeping practices,³⁴⁰ and child seat belts.³⁴¹ Although the Court noted in *Becerra* that it does not “question the legality of health and safety warnings long considered permissible,” Justice Breyer correctly noted in his dissent that this “disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification.”³⁴²

VI.

CONCLUSION AND POLICY RECOMMENDATIONS

CPCs pose a threat to women’s health and safety by improperly influencing women’s reproductive health decisions and interfering with their access to comprehensive health services in an effort to fur-

336. *See id.* at 2386 (Breyer, J., dissenting) (warning that “the majority’s cramped view of *Casey* and informed consent . . . undoubtedly would invalidate the many other disclosures that are routine in the medical context.”).

337. *Compare, e.g.,* ARIZ. REV. STAT. ANN. § 36-1702 (West 2019) (requiring physicians to provide egg donors certain factual information before performing the procedure) *with* TEX. HEALTH & SAFETY CODE ANN. § 86.013 (West 2019) (requiring certain facilities to provide women with a notice of breast density information after the completion of a mammogram).

338. *See, e.g.,* CAL. HEALTH & SAFETY CODE § 109278 (West 2019).

339. *See, e.g.,* TEX. HEALTH & SAFETY CODE ANN. § 161.501(a)(1)(F) (West 2019) (requiring information on pertussis disease); *see also* CAL. HEALTH & SAFETY CODE § 1254.6 (West 2019) (requiring information on sudden infant death syndrome).

340. *See, e.g.,* N.Y. PUB. HEALTH LAW § 2803-j (1-d) (McKinney 2019); *see also* MICH. COMP. LAWS ANN. § 333.5885(1) (West 2019).

341. *See, e.g.,* CAL. VEH. CODE § 27363.5 (West 2019) (requiring information about child seat belts).

342. *See* Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2381 (2018) (Breyer, J., dissenting).

ther their pro-life agenda.³⁴³ As states and local governments try to regulate the improper practices of CPCs through mandatory disclosure laws, CPCs will continue to challenge these laws on First Amendment grounds. The courts will look at *Becerra* for guidance on the appropriate level of review and overall constitutionality of these laws. States and local governments that wish to regulate CPCs through mandatory disclosure laws should consider *Becerra* and the experience of the initial mandatory disclosure laws in designing their laws.

Following *Becerra*, mandatory disclosure laws are likely to be subjected to heightened scrutiny. States and local governments that wish to ensure that their mandatory disclosure laws are subjected to a more deferential standard of review should consider modeling their laws after San Francisco's ordinance, which targets the deceptive advertising practices of CPCs, while imposing disclosure requirements only on CPCs that fail to comply with an advertising regulation.³⁴⁴ The City of Oakland recently adopted similar requirements.³⁴⁵ Like San Francisco's ordinance, the City of Oakland's ordinance is likely to withstand a First Amendment challenge as a regulation of commercial speech subject to rational basis review.³⁴⁶ While this model may help ensure that the requirement is subject to a more deferential level of review, it would only subject CPCs that fail to comply with the regulation to the disclosure requirements.

States and local governments that wish to adopt disclosure requirements applicable to a wider range of CPCs should ensure that they can withstand the applicable levels of scrutiny in *Becerra*. If they wish to adopt government message disclosure requirements, they should ensure that the requirements can withstand strict scrutiny.³⁴⁷ Based on the lessons learned from *Becerra*, government message requirements should not only target unlicensed CPCs, but should cover licensed and unlicensed CPCs, as well as other types of health care facilities.³⁴⁸ In addition, the requirements should refrain from recommending particular services or expressly encouraging women to consult with licensed providers.³⁴⁹ They should only communicate

343. See generally NARAL, *The Truth About CPCs Report 2017*, *supra* note 3, at 3–4.

344. S.F., CAL., ADMIN. CODE §§ 93.1–93.5 (2011).

345. OAKLAND, CAL., CODE § 5.06.110 (2016).

346. See *supra* Section VI.A.3 (discussing *Becerra's* impact on service disclosure requirements).

347. See *Becerra*, 138 S. Ct. at 2367 (applying strict scrutiny to the FACT Act's government message requirement).

348. *Id.*

349. *Id.*

information about the services that are available in the state.³⁵⁰ Although the courts have recognized a compelling interest in providing this information to pregnant women, states and local governments should ensure that they have evidence that less restrictive alternatives could not advance this interest.³⁵¹

Furthermore, states and local governments that wish to adopt status disclosure requirements should ensure that their laws can withstand the more exacting rational basis review in *Becerra*.³⁵² To present a compelling justification for these laws, states and local governments should have evidence that women who visit unlicensed CPCs do not already know that they are unlicensed facilities.³⁵³ Additionally, they should ensure that the disclosure requirements are not unduly burdensome.³⁵⁴ In *Becerra*, the Court found that requiring a disclosure in as many as thirteen different languages was unduly burdensome because it could drown the facility's own message. Circuit courts also considered whether the disclosures had to be distributed in oral, written, or electronic form.³⁵⁵ Accordingly, status disclosure requirements should provide flexibility in the mode of distribution and limit the number of applicable languages for the disclosures.

Finally, although *Becerra* concerned a mandatory disclosure law aimed at regulating the improper practices of CPCs, the Supreme Court's decision could have a significant impact on other types of medical disclosure laws, particularly abortion counseling laws. Since *Casey*, abortion counseling laws have been subject to rational basis review as a regulation of the medical practice.³⁵⁶ The Supreme Court's interpretation of *Casey* as applying to cases involving informed consent to a medical procedure could subject some of these laws to heightened scrutiny.³⁵⁷ Although some of these laws can be construed as facilitating informed consent to a medical procedure,

350. *Id.*

351. *Id.*; see *supra* Section VI.A.1 (discussing *Becerra*'s impact on government message requirements).

352. See *Becerra*, 138 S. Ct. at 2377 (applying rational basis review to the FACT Act's status disclosure requirement).

353. *Id.*

354. *Id.*

355. *Id.*; see *supra* Section VI.A.2 (discussing *Becerra*'s impact on status disclosure requirements).

356. See, e.g., *Tex. Med. Providers v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012); see also *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 904–05 (8th Cir. 2012); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008).

357. See *supra* Section VI.B.2 (discussing *Becerra*'s impact on abortion counseling laws).

many states have adopted disclosure requirements that are not tied to a procedure.³⁵⁸ As a result, *Becerra* could result in an influx of new challenges to abortion counseling laws.

358. *Id.*