NIFLA AND THE ARGUMENT AGAINST "PROFESSIONAL SPEECH"

INTRODUCTION

Since its founding, our nation has highly valued the freedom of speech. The Founders sought to ensure robust free speech protection, recognizing "an inalienable natural right to express one's thoughts."[1] In writing the founding documents, the Drafters emphasized the rights to write, speak, and publish as essential to the natural rights necessary when people organize politically.[2]

The First Amendment preserves the protection of free speech, prohibiting Congress from making any law "abridging the freedom of speech."[3] The amendment served and continues to serve as a "constitutional commitment to liberty—an undertaking to protect the people against tyranny."[4] This protection also prevents state governments from impinging on free speech rights through its incorporation by the Fourteenth Amendment.[5]

The First Amendment does not only prohibit government restriction of speech. It also prevents the government from compelling individuals or groups to speak.[6] The First Amendment protects against laws that "whether restrictive or compulsive, 'target speech based on its communicative content.'"[7] Some prominent examples of such protection against compelled speech include *West Virginia State Board of Education v. Barnette*,[8] *Wooley v. Maynard*,[9] and *Hurley v. Irish-American Gay Lesbian & Bisexual Group of Boston*.[10]

The Court affirmed protection against compelled speech in the 2018 case, *National Institute of Family & Life Advocates v. Becerra*

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1. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 267 (2017).

2. *Id.* at 268–69.

3. U.S. CONST. amend. I.

4. David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1701 (1991).

5. Gitlow v. New York, 268 U.S. 652 (1925).

6. NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018).

7. EMW Women's Surgical Ctr. v. Beshear, 920 F.3d 421, 425 (6th Cir. 2019) (quoting *NIFLA*, 138 S. Ct. at 2371).

8. 319 U.S. 624 (1943) (holding unconstitutional a requirement for students to salute the American flag).

9. 430 U.S. 705 (1977) (invalidating a law requiring the phrase "Live Free or Die" on state license plates).

10. 515 U.S. 557 (1995) (holding that a state could not require a parade organization to feature a message that was counter to the organizer's beliefs).

(*NIFLA*).[11] There, the Supreme Court held that "professional speech" is not a separate category of speech that should receive a different level of constitutional protection.[12] Rather, courts should consider it as any other speech with First Amendment strict scrutiny in order to protect against compelled speech.[13]

In the realm of free speech jurisprudence, content-based restrictions on speech generally are subject to strict scrutiny. This means that the laws are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[14] Generally, no laws pass this exacting standard.[15] This high bar for constitutionality also applies to laws that are neutral on their face.[16]

In contrast, some courts of appeals have recognized a separate category of professional speech that is not entitled to complete First Amendment protection.[17] While the standard may vary from court to court, the more deferential review requires that "prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest."[18] This standard requires a state to have a rational interest in protecting its citizens through professional regulations.[19] Such laws cannot be more comprehensive than necessary to achieve the state's objective.[20]

Recognizing the need for government regulation in some areas of professional speech, the *NIFLA* Court outlined two exceptions to strict scrutiny. The Court allows an exception for pure commercial speech and an exception for conduct regulations that only "incidentally burden" speech.[21] Courts will analyze laws in these exceptions under a more deferential standard of review.[22]

Though I agree with the Court that there should not be a separate classification for "professional speech" that is categorically afforded less protection from government-compelled speech, I do not believe that there are any additional situations in which courts should give the government additional deference beyond those two exceptions. The two exceptions are exceedingly broad and cover any circumstance

11. 138 S. Ct. at 2378.
12. *Id.* at 2372.
13. *Id.*
14. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
15. *Id.*
16. *Id.* at 164.
17. *See, e.g.*, King v. Governor of N.J., 767 F.3d 216, 233 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).
18. *King*, 767 F.3d at 233.
19. *Id.* at 235.
20. *Id.*
21. NIFLA v. Becerra, 138 S. Ct. 2361, 2372–73 (2018).
22. *Id.* at 2372.

where government regulation of speech should receive lower scrutiny. Indeed, courts should read such exceptions narrowly to protect against the danger of compelled speech.

This Note first outlines the *NIFLA* case and the two exceptions it lays out. It then describes the dangers of compelled speech and the arguments against it. Next, I examine the breadth of the exceptions and further support my argument by highlighting the current trends toward protecting free speech. Finally, I address counterarguments, ultimately concluding that they do not overcome the need to protect free speech by preventing a new "professional speech" category.

I. THE *NIFLA* HOLDING

A. Government regulations that amount to compelled speech are reviewed under strict scrutiny unless they are considered commercial speech under Zauderer *or a conduct regulation that only incidentally burdens speech.*

In *NIFLA*, the Supreme Court held that compelled speech regulations are presumptively impermissible content restrictions.[23] Such regulations "alter a speech's content by forcing actors to modify or utter speech that they otherwise would not."[24] Government compulsion does not have to be ideological to trigger strict scrutiny.[25] Freedom from compulsion to speak a government message is protected by the First Amendment.[26]

For a law to survive strict scrutiny, it must be narrowly tailored to further a compelling government interest.[27] This is an extremely high bar, as evidenced by the fact that the Supreme Court has upheld only two speech restrictions.[28] The laws in those cases involved national security and the integrity of the judiciary.[29]

B. There are two exceptions to strict scrutiny in the professional speech context.

Though most laws regulating speech must pass the high bar of strict scrutiny review, there are some narrow exceptions to strict

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23. *Id.* at 2371, 2375.

24. J. Aidan Lang, *The Right to Remain Silent: Abortion and Compelled Physician Speech*, 62 B.C. L. REV. 2091, 2103 (2021).

25. EMW Women's Surgical Ctr. v. Beshear, 920 F.3d 421, 436 (6th Cir. 2019).

26. Maia Dunlap, *Challenging Abortion Informed Consent Regulations through the First Amendment: The Case for Protecting Physicians' Speech*, 2019 U. CHI. LEGAL F. 443, 462 (2019).

27. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

28. Robert McNamara & Paul Sherman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2017–2018 CATO SUP. CT. REV. 197, 205.

29. *See* Holder v. Humanitarian L. Project, 561 U.S. 1 (2010); Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015).

scrutiny for government regulation of speech. Courts use rational basis review for laws that regulate purely commercial speech and for laws that "regulate speech as only a lesser, necessary component of regulating conduct," sometimes known as the "incidental burden standard."[30]

Zauderer[31] is one of the most comprehensive discussions of the commercial speech exception. In that case, the Court held that an Ohio law required the appellant to "include in his advertising purely factual and uncontroversial information about the terms under which his services will be available."[32] The Court emphasized "that because [the] disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'"[33] These factual and uncontroversial disclosures were much less intrusive on First Amendment rights than outright bans on specific speech.

Additionally, the law intended to eliminate consumer confusion and deception. Therefore, the Court held that the law was acceptable.[34] The speaker's rights were protected "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[35]

In effect, there is a more deferential review for laws that require professionals to share factual, noncontroversial information as part of their commercial speech.[36] This standard applies to many commercial speech regulations that attempt to prevent information imbalance or provide consumer protection by requiring specific disclosures by professionals.[37]

The standard for conduct regulations that incidentally burden speech is less clear than that of commercial speech. Compulsion of speech here is a byproduct of a conduct regulation, or "as a subsidiary component of governing conduct—corporate responsibility—in effect regulating commercial activity to promote public health."[38] Examples of such laws include laws requiring disclosure of a product's ingredients or requiring practitioners to post their state license.[39]

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30. Clay Calvert, *Is Everything A Full-Blown First Amendment Case After* Becerra *and* Janus*? Sorting Out Standards of Scrutiny and Untangling "Speech As Speech" Cases from Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73, 137 (2019).

31. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985).

32. *Id.* at 651.

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

34. *See id.*

35. *Id.*

36. *See id.*

37. *See* Lang, *supra* note 24, at 2103–04.

38. *Id.*

39. *Id.*

Justification for such regulations is the states' police powers through which legislatures can regulate professions.[40]

Laws that fall into one of these two exceptions are analyzed under rational basis review.[41] This more deferential standard of rational basis only requires that a statute be rationally related to a legitimate government interest.[42]

C. The facts of NIFLA.

In 2018, the Supreme Court issued a ruling that cemented protection against compelled speech in *National Institute of Family and Life Advocates v. Becerra*.[43] There, the Court considered the constitutionality of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency ("FACT") Act, which required clinics to provide a variety of notices.[44] The Act required licensed clinics to notify women that, among other things, California provides free or low-cost abortions.[45] It also required the clinics to provide the contact information for abortion facilities.[46] Unlicensed clinics had to inform women that California had not licensed the clinic to provide medical services.[47] These requirements amounted to compelled speech because the affected centers were openly pro-life, and directing women to abortion information would be antithetical to their missions.[48]

California relied on cases and scholarship recognizing the professional speech doctrine, "a concept that the government may more freely restrict individuals communicating in their professional capacity than private citizens," to defend the statute.[49] The justification for the regulation was the states' police power, which allows states to regulate the health, safety, and welfare of their citizens.[50]

D. The requirements for licensed facilities.

In looking first at the requirement for licensed facilities, the Court held that the notice for licensed centers was not an informed-consent requirement, nor was it a regulation of professional conduct.[51] The Court held that the requirement regulated "speech as

40. Dunlap, *supra* note 26, at 462.
41. *Id.*
42. *Id.*
43. *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2365 (2018).
44. *Id.* at 2368.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 2371.
49. Lang, *supra* note 24, at 2114.
50. *Id.* at 2114–15.
51. *NIFLA*, 138 S. Ct. at 2373.

speech," triggering First Amendment protection.[52] As such, the law was not informed consent for a medical procedure because it applied to any interaction between the facility and its clients, even if no medical procedure was "ever sought, offered, or performed."[53] Additionally, other facilities that provide the same services were not required to include a notice.[54] Because the licensed notice regulated speech as speech, the Court could not utilize deferential review.[55]

The Court concluded that California could inform women about its free or low-cost services in other ways "without burdening a speaker with unwanted speech."[56] The Court affirmed that "California cannot co-opt the licensed facilities to deliver its message for it.[57] '[T]he First Amendment does not permit the State to sacrifice speech for efficiency.'"[58]

E. The requirements for unlicensed facilities.

The Court then looked to the unlicensed facility regulation that required facilities to post a government-drafted notice stating that the "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."[59] The Act also regulated the size, font size, and location of the notices.[60]

Though the parties disagreed over whether the unlicensed notice was subject to the deferential commercial speech review under *Zauderer*,[61] the Court held that it did not need to decide if that standard applied.[62] California had the burden to prove that the requirement was not unjustified or unduly burdensome.[63] The state did not reach this burden.[64] The only justification California supplied for the regulation was ensuring that pregnant women in California could get licensed medical care,[65] even though it is already a crime to practice medicine without a license in California.[66]

The Court further explained that "[e]ven if California had presented a non-hypothetical justification for the unlicensed notice,

52. *Id.* at 2374.
53. *Id.* at 2373.
54. *Id.* at 2374.
55. Dunlap, *supra* note 26, at 449.
56. *NIFLA*, 138 S. Ct. at 2376 (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (2018)).
57. *Id.*
58. *Id.* (quoting *Riley*, 487 U.S. at 795).
59. CAL. HEALTH & SAFETY CODE § 123472(b)(1) (West 2016).
60. *NIFLA*, 138 S. Ct. at 2370.
61. *Id.* at 2376–77.
62. *Id.* at 2377.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

the FACT Act unduly burdens protected speech."[67] The requirements created an undue burden because the statutory notice "impose[d] a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest."[68] Additionally, the unlicensed notice could require that a facility with a sign "that says 'Choose Life' would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages."[69] Such a requirement would essentially "drown out" the facility's message.[70] For these reasons, the Court also held the unlicensed center notice requirement unconstitutional.[71]

F. The Court is unpersuaded by the Ninth Circuit's categorization of "professional speech" with its own protection.

In its analysis, the Court acknowledged California's proposal of a separate category for professional speech.[72] Professional speech is any speech by "individuals that is based on [their] 'expert knowledge and judgment,' or that is 'within the confines of [the] professional relationship.'"[73] If speech meets this definition, some courts, like the Ninth Circuit, used it as an exception to the rule that content-based speech regulations must be reviewed under strict scrutiny.[74] The Supreme Court, on the other hand, does not recognize professional speech as a separate category because "[s]peech is not unprotected merely because it is uttered by 'professionals.'"[75]

Indeed, the Court has "been reluctant to mark off new categories of speech for diminished constitutional protection."[76] A primary reason for this is the nation's foundational emphasis on protecting free speech.[77] The Court has only given less protection for professional speech for two specific circumstances:[78] commercial

67. *Id.* at 2377.
68. *Id.*
69. *Id.* at 2378.
70. *Id.*
71. *See id.*
72. *See id.* at 2371.
73. *Id.* (alteration in original) (citations omitted).
74. *Id.*
75. *Id.* at 2371–72.
76. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part).
77. *See supra* notes 1–5 and accompanying text.
78. *NIFLA*, 138 S. Ct. at 2372.

speech[79] and conduct regulations that incidentally burden speech.[80] The Court held that neither exception applied to the California regulations at issue.[81]

G. The exception for commercial speech.

The Court held that the *Zauderer* standard did not apply in this case because "most obviously the licensed notice is not limited to 'purely factual and uncontroversial information about the terms under which . . . services will be available.'"[82] The *Zauderer* standard for commercial speech only applies to "purely factual and uncontroversial information."[83] The regulation in *NIFLA* required clinics to disclose information about state-sponsored services that the clinics themselves often did not provide.[84] The services in the required disclosure included abortion, which is "anything but an 'uncontroversial' topic."[85]

The requirement did not apply to the unlicensed notice as well.[86] The requirement "targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech" by forcing the clinics to share information about services they intentionally did not provide.[87] The commercial speech exception did not apply here because the disclosures did not address purely factual and uncontroversial information.[88]

H. The exception for conduct regulations that incidentally burden speech.

In addition to the *Zauderer* commercial speech exception, the Court also discussed the review for regulations of professional conduct that "incidentally burden speech."[89] The Court stated that professional speech is not an exception to the rule that "the First Amendment does not prevent restrictions directed at commerce or

79. *Id.* The Court lists such examples: *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 250 (2010); and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978).

80. *NIFLA*, 138 S. Ct. at 2372 (citing Planned Parenthood of Se. Pa. v. Casey*,* 505 U.S. 833, 884 (1992)).

81. *Id.*

82. *Id.*

83. *Id.* (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995)).

84. *Id.*

85. *Id.*

86. *Id.* at 2378.

87. *Id.*

88. *Id.* at 2372.

89. *Id.* at 2373.

conduct from imposing incidental burdens on speech."[90] The Court recognized that though "drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it."[91]

Because the regulation compelled disclosure of the state-provided abortion services, despite the pro-life organization having no involvement in abortion procedures, the Court held that the regulation was not merely incidental to speech.[92] The regulation did not deal with the conduct of the professionals in the clinic, so it could not fall under this exception from strict scrutiny.[93] Though the Court drew a clear line in this case, the opinion "provided little substantive guidance for how courts should determine whether a law fits into the second exception—speech incidental to conduct—and thus warrants deferential judicial review."[94] The Court stated that it "express[ed] no view on the legality of a similar disclosure that is better supported or less burdensome."[95]

I. The Court leaves open the possibility for a separate category for professional speech.

Though the Court stated that neither California nor the Ninth Circuit has "identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles," it did not "foreclose the possibility that some such reason exists."[96] Deferential standards for commercial speech and conduct regulation did not apply here.[97] However, the Court suggested that there might be some reason to utilize a more deferential standard for professional speech beyond those two exceptions.[98] Because California only provided one interest to justify its regulation, the Court did not engage in the analysis of what might create such a reason.[99] Though the Court denied the opportunity to create a separate category for "professional speech" that would be offered lower scrutiny in this case, it did not foreclose the possibility outright. [100]

II. THE DANGER OF COMPELLED SPEECH

Like the danger inherent in the government prohibition of speech, there is equal danger in the government requiring citizens to

90. *Id.* (alteration omitted) (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)).
91. *Id.* (citing *Sorrell*, 564 U.S. at 567).
92. Lang, *supra* note 24, at 2116–17.
93. *NIFLA*, 138 S. Ct. at 2372–73.
94. Lang, *supra* note 24, at 2117.
95. *NIFLA*, 138 S. Ct. at 2378.
96. *Id.* at 2375.
97. *Id.* at 2372.
98. *Id.* at 2375.
99. *Id.*
100. *Id.*

speak a particular message. The First Amendment embodies the principle "that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[101] The freedom of speech includes the freedom not to speak.[102] This freedom secures the ability to determine what ideas and words one wants to express to the world as one's own. For that reason, the government "cannot tell people that there are things they must say."[103]

The First Amendment allows people to express a countless variety of views and ideas. However, when the state mandates a government-endorsed message, it directly contradicts the fundamental right that the government cannot abridge freedom of speech. When the government forces someone to speak a state-sponsored message, that person's speech is no longer free but wholly controlled by the state. By requiring a specific government message, the state "plainly violates the First Amendment."[104]

While the issues dealt with here are professional in nature, the danger of compelled speech can extend well beyond the professional sphere. But even within the professional sphere, the compulsion to speak a government message in a person's professional capacity can harm their conscience, moral convictions, and perceived reputation, as *NIFLA* demonstrates.[105]

Such harm can be exponentially expounded in government messages outside the workplace. Allowing weakened protection in the workplace can open the door to compelled speech in other areas of life. The courts should not diminish protection against compelled speech to any further degree because of these risks and the principles inherent in the First Amendment. Instead, the Court should heighten protection for professional speech.

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101. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

102. *See e.g.*, *Turner*, 512 U.S. at 641 ("Government action . . . that requires the utterance of a particular message favored by the Government[ ] contravenes [the] essential right [of free speech]."); Wooley v. Maynard, 430 U.S. 705, 713 (1977) (holding that "the State may not constitutionally require an individual to participate in the dissemination of an ideological message").

103. *Agency for Int'l Dev.*, 570 U.S. at 213 (quoting Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 61 (2006)).

104. *Id.*

105. *NIFLA*, 138 S. Ct. at 2396–97 (Kennedy, J., concurring).

III. PROFESSIONAL SPEECH SHOULD NOT BE A UNIQUE CATEGORY SUBJECT TO LOWER SCRUTINY

A. Professional speech should not be its own category subject to lower scrutiny because the NIFLA *exceptions are broad enough to cover situations wherein the courts give government regulations more deference. Additionally, courts should construe the exceptions narrowly.*

The *NIFLA* court held that there was no reason to separate professional speech as a unique category of speech not subject to ordinary strict scrutiny First Amendment protection.[106] However, the Court explicitly stated that it was not "foreclose[ing] the possibility" that there might be an eventual reason for it.[107] Despite this seemingly open door, the Court should not recognize professional speech as its own category.

1. Historical intent and protection.

First, the default from *NIFLA* is that lower scrutiny is "the exception, not the rule."[108] The intent of that ruling came from the Founders' commitment to protecting free speech from government interference in the First Amendment.[109] Professional speech occurs in the context of work or someone's profession. Work can be inherent to who a person is, and any compulsion to speak can run afoul of the protections of the First Amendment. The workplace does not alter First Amendment protections.[110] When the risks are as high as forcing someone to speak in a professional capacity, government means should be narrowly tailored to reach a compelling end.

Considering the nature of professional speech regulations, heightened First Amendment protection is essential for this area of the law. As seen in *NIFLA*, professional speech regulations can take the form of compelled speech.[111] When the government compels a person to speak a particular message in their professional capacity, such regulation "alters the content of their speech."[112] In the *NIFLA* example, the petitioners were required to give a government-drafted speech about obtaining an abortion, "the very practice petitioners were devoted to opposing."[113]

There is also a history of Supreme Court protection for First Amendment rights in the professional context. This historical protection includes strict scrutiny review of content-based regulations

106. *Id.* at 2375.
107. *Id.*
108. Lang, *supra* note 24, at 2119.
109. U.S. CONST. amend. I.
110. *See NIFLA*, 138 S. Ct. at 2372.
111. *Id.* at 2371.
112. *Id.*
113. *Id.*

for the noncommercial speech of lawyers.[114] Additionally, the Court has emphasized the particular danger of content-based regulations in the medicine and public health fields "where information can save lives."[115] If doctors must disclose some information at the expense of other guidance or their own medical opinion, their patients could suffer.

2. The extent of the risk to free speech.

The consequences of forcing someone to speak a government message in their professional capacity are too costly to risk. The existing exceptions are broad enough to include any necessary regulations, such that there is no reason to lower the protection for words that someone must speak in the workplace. The standard of strict scrutiny reflects the fundamental principle that governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content."[116]

Beyond the historical and First Amendment principle protection of professional speech, allowing the compulsion of professionals' speech "poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[117] Such government regulation of professional speech can destroy the "uninhibited marketplace of ideas in which truth ultimately prevails."[118] The marketplace of ideas is crucial in the areas that are likely to face regulation, like healthcare, legal advice, and financial matters.[119] The best way to ensure that the government does not control the content and message of matters is to ensure that any regulations are narrowly tailored for a compelling government interest because "the people lose when the government is the one deciding which ideas should prevail."[120]

B. Professional speech is difficult to define, and government discretion is easily abused.

Additionally, professional speech should not be its own category because it is difficult to define.[121] Courts of appeals have addressed such regulations for a wide variety of professionals; one case even

114. *Id.* at 2374. The Court lists several cases as examples of this, including *Reed v. Town of Gilbert*, 576 U.S. 155, 167–68 (2015); *In re Primus*, 436 U.S. 412, 432 (1978); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 798 (2018); and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010).

115. *NIFLA*, 138 S. Ct. at 2374.

116. *Id.* at 2371. (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

117. *Id.* at 2374.

118. McCullen v. Coakley, 573 U.S. 464, 476 (2014).

119. *NIFLA*, 138 S. Ct. at 2374–75.

120. *Id.*

121. *Id.* at 2375.

involved fortune tellers.[122] For some courts, all that is necessary to qualify as a profession is a personalized service that is licensed by the state.[123] This overinclusive definition gives "states unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement."[124] Such extensive power would allow states to choose what speech to regulate by simply creating a licensing requirement. This ability would give states a powerful tool to impose "invidious discrimination of disfavored subjects."[125] A separate category of protected speech "would exempt all speech uttered by individuals in professional capacities as varied as accounting, consulting, law, dentistry, architecture, investment banking, and contracting could entirely swallow the protection for free speech that the Founders enshrined in our Constitution."[126] Such breadth of regulation threatens the marketplace of ideas and the First Amendment's protections and purpose.

C. The personal nature of professional speech.

Often, when someone speaks as a professional, the speaker represents to the listener a personal endorsement or agreement because of his or her status as an expert. This close association between the message and the speaker gives professional speech a potentially personal nature. The risk that the government could mandate a speaker's speech simply because of a licensing requirement is why these regulations should receive the highest level of protection if they are not purely commercial or substantially conduct regulations. The courts should give deference to those affected by such laws, the professionals that the regulations govern. Professionals are paid for their knowledge or services. Any law beyond pure commercial speech or conduct regulations should be scrutinized to protect professionals' speech and conscience rights. Any lower level of protection for professional speech counters Supreme Court precedent and the First Amendment's purpose. The framework established by *NIFLA* covers any ground for regulations with legitimate ends that do not amount to compelled speech.

III. THE *NIFLA* FRAMEWORK IN PRACTICE

Since the *NIFLA* decision, courts have utilized the framework for professional speech regulation in various circumstances. In one case, *New Hope Family Services v. Poole*,[127] the Second Circuit analyzed New York's 2013 regulation that prohibited "discrimination against applicants for adoption services on the basis of 'race, creed, color,

122. *Id.*
123. *Id.*
124. *Id.*
125. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423–24 n.19 (1993).
126. Tingley v. Ferguson, 47 F.4th 1055, 1079 (9th Cir. 2022).
127. 966 F.3d 145 (2d Cir. 2019).

national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability.'"[128] Per New Hope Family Services policy, which was informed by its religious beliefs, the organization recused itself from considering adoption applications by same-sex couples.[129] Instead of rejecting their applications, the organization referred couples to government agencies or other authorized adoption providers.[130]

New Hope argued that the Office of Children and Family Services ("OCFS"), who promulgated the rule, violated the organization's free speech as an adoption agency.[131] By complying with the New York law, the organization argued that it could not facilitate adoptions and, at the same time, express its belief that it is not in the best interest of a child to be adopted by a single person or a same-sex couple.[132] The court explained that "even conduct can claim the protections of Free Speech where '[a]n intent to convey a particularized message [is] present, and . . . the likelihood [is] great that the message would be understood by those who viewed' or learned of the conduct."[133]

The court ultimately held that "New Hope had a plausible claim that by compelling it to place children with unmarried and same-sex couples, OCFS was necessarily compelling New Hope to engage in the speech required for that conduct—speech with which New Hope did not agree."[134] By identifying that an adoption placement with a single parent or a same-sex couple was in the best interests of a child and approving such placement, New Hope had to communicate the government's viewpoint, which ran counter to its own.[135] Therefore, the district court could not dismiss the case for lack of a compelled speech issue that warranted First Amendment protection.[136] The *NIFLA* framework guided this analysis, and the case was not unduly burdensome for the court to decide.

IV. THE BREADTH OF THE COMMERCIAL SPEECH EXCEPTION

The commercial speech exception is broad enough to cover any potential areas of concern regarding disclosures, product information, and other similar regulations. One example of this exception is *Stuart v. Camnitz*.[137] In that case, the Fourth Circuit held that the regulations at issue were "quintessential compelled speech" and not pure commercial speech.[138] The challenged statute required

128. *Id.* at 149.
129. *Id.* at 157.
130. *Id.* at 158.
131. *Id.* at 149.
132. *Id.* at 175–76 (discussing N.Y. COMP. CODES R. & REGS. tit. 18, § 421.3(d)).
133. *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 404 (1989)).
134. *Id.* at 176.
135. *Id.* at 177.
136. *Id.* at 178.
137. 774 F.3d 238 (4th Cir. 2014).
138. *Id.* at 246.

physicians to perform an ultrasound, display the image, and "describe the fetus to women seeking abortions."[139] The court held that such regulations "force[d] physicians to say things they otherwise would not say. Moreover, the statement compelled here is ideological; it conveys a particular opinion."[140] In addition, "the state freely admits that the purpose and anticipated effect of the Display of Real–Time View Requirement is to convince women seeking abortions to change their minds or reassess their decisions."[141] The required disclosures were factual, but their factual nature did "not divorce the speech from its moral or ideological implications."[142] The speech was no longer purely commercial because of its ideological message and the context of the regulations.[143]

Though the state can regulate the practice of medicine, the statute in this case moved out of the realm of commercial speech and into that of compelled speech.[144] Because of the controversial nature of the information required, the disclosure could not stand.[145] The statute did not get the lower level of scrutiny that courts give purely commercial speech, and the doctors were protected from compelled speech.[146] Though there is room for commercial speech regulations in the medical profession, regulations cannot extend too far as to require doctors to speak an ideological message.[147]

In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*,[148] the Eighth Circuit considered whether required disclosures by a physician were "untruthful, misleading or not relevant to the patient's decision to have an abortion" to determine if the regulation amounted to compelled speech.[149] This analysis was for the question of the law's controversiality.[150] The court held that the laws at issue were not untruthful, misleading, or irrelevant.[151] Therefore, the laws did not violate the physicians' free speech rights.[152] Laws that regulate purely commercial speech would not be characterized as untruthful, misleading, or irrelevant and, therefore, are subject to lower scrutiny.[153]

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139. *Id.* at 242.
140. *Id.* at 246.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 247.
146. *Id.* at 248.
147. *Id.* at 246.
148. 686 F.3d 889 (8th Cir. 2012).
149. *Id.* at 893.
150. *Id.*
151. *Id.* at 906.
152. *Id.*
153. *See, e.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1995).

Allowing pure commercial speech regulations assuages many concerns about the government's ability to regulate the health and safety of its citizens. Pure commercial speech has clear guidelines.[154] The exception covers issues of information imbalance for consumers and disclosure requirements for medical procedures and similar professional speech regulations.[155]

V. THE BREADTH OF THE INCIDENTAL BURDEN EXCEPTION

The incidental burden exception also provides comprehensive protection for government regulation of professional conduct. In analyzing Kentucky's Ultrasound Informed Consent Act for a violation of the First Amendment, the Sixth Circuit stated that it would not use strict scrutiny if the regulation related to a medical procedure, was truthful and not misleading, and was relevant to the patient's decision as to whether or not to have an abortion.[156] The court determined that if the statute had the same material attributes as the informed consent statute in *Casey*,[157] "no heightened First Amendment scrutiny applies because, as *NIFLA* instructed, an informed-consent law like the *Casey* statute is a regulation of professional conduct that only incidentally burdens professional speech."[158]

Because of the lower standard of scrutiny for informed consent outlined by *NIFLA*, "there is no burden placed on the State to justify that its prior regulation 'was defective in facilitating informed consent' or that 'H.B. 2 filled any gaps in existing informed-consent legislation,'" as the dissent argued.[159] Even if there were such a burden, it would be met in this statute.[160] The court held that the Kentucky statute:

> [L]ike the Pennsylvania statute in *Casey,* provides truthful, non-misleading, and relevant information aimed at informing a patient about her decision to abort unborn life. Therefore, although the statute requires doctors to disclose certain truthful and non-misleading information relevant to the abortion procedure, it does not violate their First Amendment rights because the required disclosures are incidental to the Commonwealth's regulation of doctors' professional conduct.[161]

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154. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

155. *See, e.g.*, South Dakota v. Rounds, 686 F.3d 889, 905 (8th Cir. 2012).

156. EMW Women's Surgical Ctr. v. Beshear, 920 F.3d 421, 428 (6th Cir. 2019).

157. *Id.* at 429.

158. *Id.*

159. *Id.* at 432.

160. *Id.*

161. *Id.*

As an informed consent statute, the statute regulated speech "as part of the practice of medicine."[162] Therefore, the law was not subject to strict scrutiny.[163]

Disagreeing with the majority's holding, the dissent stated that through the law at hand, the "Commonwealth is regulating the content of physician speech, not the practice of medicine, and is doing so to promote the Commonwealth's chosen message."[164] The *EMW* dissent reiterated the holding of *NIFLA* regarding conduct regulations, saying that "a regulation that affects physician speech receives deferential review only when that speech is auxiliary to a medical practice."[165] The dissent highlighted the extent to which these conduct regulations can go: "When the state regulates the content of physician speech in a manner that is inconsistent with the practice of medicine, we must apply heightened scrutiny, full stop."[166] The differing views on this decision indicate this exception's divisiveness and the potential for decisions based on this exception to be met with disapproval, depending on how a court decides to weigh the burden on speech.

The Ninth Circuit has also dealt with the incidental burden exception in *Tingley v. Ferguson*.[167] First, the Ninth Circuit addressed its previous ruling in *Pickup v. Brown*.[168] In that case, the court applied intermediate scrutiny to the category of speech it called "professional speech."[169] The court recognized that although it relied on "professional speech" in its previous decision, the holding still applied because it rested upon the incidental burden of speech through professional conduct, not the categorization of professional speech itself.[170]

The statute at issue was a California law banning conversion therapy.[171] The court held that the law primarily regulated professional conduct and only incidentally burdened the therapists' speech.[172] Though other circuits may disagree about whether prohibitions on conversion therapy for minors regulate conduct or more significantly regulate speech, the court stated that these disagreements and *NIFLA* did not impact the holding.[173] The court

162. *Id.* at 427.
163. *Id.* at 429.
164. *Id.* at 453 (Donald, J., dissenting).
165. *Id.* at 447 (Donald, J., dissenting).
166. *Id.*
167. Tingley v. Ferguson, 47 F.4th 1055, 1066 (9th Cir. 2022).
168. Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).
169. *Tingley*, 47 F.4th at 1075.
170. *Id.*
171. *Id.* at 1063.
172. *Id.* at 1083.
173. *Id.* at 1077.

used the exception of a conduct regulation that incidentally burdens speech to justify using lower scrutiny.[174]

Because "the exception for heightened scrutiny for regulations of professional conduct survive[d] *NIFLA*," the court in *Tingley* used rational basis review to justify the Washington state law preventing therapists from using "conversion therapy" for minors.[175] Under rational basis review, a law is presumed to be valid if it is rationally related to a legitimate state interest.[176] The court held that "the Washington legislature acted rationally when it decided to protect the 'physical and psychological well-being' of its minors by preventing state-licensed health care providers from practicing conversion therapy on them."[177]

This decision further illustrates the broad reach of the incidental burden exception. Though most of what a therapist does is speak with their clients, the court held the regulation fell within the conduct regulation category because "when a health care provider acts or speaks about treatment with the authority of a state license, that license is an 'imprimatur of a certain level of competence.'"[178] Therapists' speech involves clinical treatment, not simply holding a conversation, allowing the state to regulate their practice.[179] Other states and courts can find different answers to these questions or disagree on the extent to which they want to regulate professionals.

The Ninth Circuit has analyzed this exception in other cases. In one example, *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*,[180] the court held that a California law regulated content and not conduct.[181] The California law at issue required students enrolling in private postsecondary schools to take an examination prescribed by the U.S. Department of Education.[182] The court raised the concern that licensing requirements could lead to the state's ability to regulate speech, stating that the "First Amendment deprives the states of 'unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.'"[183] Because the exceptions to the requirement at issue targeted the content of what was being taught and the identity of the speaker, it "demonstrate[d] that the Act does more than merely impose an

174. *Id.*
175. *Id.*
176. *Id.* at 1078.
177. *Id.*
178. *Id.* at 1082.
179. *Id.* at 1083.
180. Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer, 961 F.3d 1062 (9th Cir. 2020).
181. *Id.* at 1073.
182. *Id.* at 1065.
183. *Id.* at 1069 (quoting NIFLA v. Becerra, 138 S. Ct. 2361, 2375 (2018)).

incidental burden on speech: it 'target[s] speech based on its communicative content.'"[184] The court could not uphold the law.[185]

In *Capital Industries, Inc. v. Stein*,[186] the Fourth Circuit addressed this exception with a law regulating the legal profession.[187] The regulation restricted the practice of law to bar members and entities owned by bar members.[188] The court held that the statute did not impact the communicative aspects of the practice of law but rather the requirements of who may become a lawyer.[189] The court held that any speech effects of the law were "merely incidental to the primary objective of regulating the conduct of the profession."[190] The law remained in effect.[191]

The Fifth Circuit dealt with this exception in an occupational licensing case.[192] The company Vizaline argued that the state's surveyor licensing requirement violated its First Amendment rights.[193] The court used *NIFLA* to hold that "occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections" and that the district court needed to analyze whether the licensing requirements regulated pure speech, speech incidentally to a conduct regulation or pure conduct.[194]

The wide variety of regulations involved with this exception illustrates its breadth. The *NIFLA* court itself listed additional examples, including malpractice, anti-competitive agreements, client solicitation, and informed consent.[195] These few examples of the many potential circumstances demonstrate that the conduct regulation with an incidental burden on speech exception is widely applicable to many areas that the government may have a legitimate interest and authority to regulate under lower judicial scrutiny.

VI. PROTECTION FOR PROFESSIONAL SPEECH IS TRENDING TOWARD HIGHER PROTECTION

In addition to the significant breadth of the two *NIFLA* exceptions, the Court should not create a professional speech category that provides less protection because the Court is already trending towards higher protection for professional speech. The 2018 case *Janus v. American Federation of State, County & Municipal*

184. *Id.* at 1070–71 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 162 (2015)).
185. *Id.* at 1073.
186. 922 F.3d 198 (4th Cir. 2019).
187. *Id.* at 207.
188. *Id.*
189. *Id.* at 208.
190. *Id.*
191. *Id.*
192. Vizaline, L.L.C. v. Tracy, 949 F.3d 927 (5th Cir. 2020).
193. *Id.* at 930.
194. *Id.* at 931.
195. NIFLA v. Becerra, 138 S. Ct. 2361, 2372–73 (2018).

Employees, Council 31[196] highlights this trend. In that case, the Court held that requiring public employees to subsidize union activities violated the nonmembers' free speech rights because it compelled them to "subsidize speech on matters of public concern."[197] Echoing *NIFLA*, the Court explained that "compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[198] The Court reemphasized the danger of compelled speech:

> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.[199]

The Court ultimately held that public unions could not force state employees to pay union dues because by paying those dues, the employees give up their First Amendment rights.[200] The unions cannot presume wavier of employees' First Amendment rights by taking out union dues without the consent of the employees.[201]

Such explicit protection for the First Amendment rights of professionals reinforces the idea that courts should interpret laws to provide more protection to those fundamental rights, not less. The Court decided *NIFLA* and *Janus* in the same term, a clear indication that both private and public professionals' free speech rights are of high importance to the Justices in 2018, most of whom are still on the bench today.[202] This additional declaration of protection from compelled speech by the Supreme Court further indicates the necessity to provide avenues of protection wherever possible.

VII. AREAS OF POTENTIAL CONCERN

Although the exceptions to strict scrutiny for professional speech are quite broad, the lines may be so blurred that it is difficult to determine the exceptions. On the other hand, a narrow reading of the exceptions could prevent the government from being able to enact necessary regulations to promote public welfare. As the *NIFLA* dissent identifies, "virtually every disclosure law could be considered

196. 138 S. Ct. 2448, 2460 (2018).
197. *Id.*
198. *Id.* at 2463.
199. *Id.* at 2464.
200. *Id.* at 2486.
201. *Id.*
202. *Id.*; *see also* NIFLA v. Becerra, 138 S. Ct. 2361, 2361 (2018).

'content based,' for virtually every disclosure law requires individuals to speak a particular message."[203]

Regarding commercial speech, the *NIFLA* majority drew the lines clearly. The slew of cases in addition to *Zauderer* that deal with commercial speech also provide clarity.[204] Laws are excepted if they "require professionals to disclose factual, noncontroversial information in their commercial speech" and the disclosures "[relate] to the services that the regulated entities provide."[205] These standards are explicit. They require factual, noncontroversial information related to the regulated service. Any question of whether a regulation is controversial answers the question itself: If the court or the parties do not agree on whether a regulation is controversial, the regulation in question is, by definition, controversial.[206] Parties' disputes on the matter demonstrate the importance of heightened protection from forcing a government message of something over which the parties disagree.

The requirement that a regulation be related to the particular services also cabins the reach of this exception. This exception provides significant latitude for the disclosures likely to be the government's primary concern in enacting these professional regulations. It covers a broad reach of regulations that are easily discernable from the case law.

An admittedly more difficult question is what defines "pure conduct" and what makes a burden on speech "incidental." This question is especially consequential because "whether a law compels speech as part of regulating conduct or purely controls speech is an important determination because it triggers the application of rational basis review rather than strict scrutiny."[207] Though the standard is a somewhat "nebulous" and has led to competing approaches by different courts,[208] its opaquer lines do not bar the exception's usefulness, as the cases described above illustrate.

Some cases are clear on the issue.[209] In contrast, others will involve a more in-depth contextual analysis of the nature of the professional regulation and whether the impact on the professional's speech is merely incidental or if it requires higher protection.[210] The

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203. *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

204. *See e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 557 (1980); Bigelow v. Virginia, 421 U.S. 909 (1975); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997); L.A. Police Dep't v. United Reporting Publ'g Co., 528 U.S. 32 (1999).

205. *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

206. Per Cambridge Dictionary, the definition of controversial is "causing disagreement or discussion." *Controversial*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/controversial (last visited Apr. 29, 2024).

207. Lang, *supra* note 24, at 2104–05.

208. *Id.* at 2105.

209. *NIFLA*, 138 S. Ct. at 2361.

210. Del Castillo v. Sec'y, Fla. Dep't of Health, 26 F.4th 1214 (11th Cir. 2022).

reality is that we ask courts consistently to analyze issues and make calls on how one factor weighs over another.[211] Courts have long been entrusted with the power to answer difficult constitutional questions about speech and other significant areas of constitutional law. The judicial system allows for appeals for the very purpose of providing parties who disagree with an outcome to have their opposition heard. And ultimately, the political system provides yet another avenue for change to the law by replacing those in office who promulgate the disfavored regulations. While the incidental burden exception is not always clear cut, its default is higher protection for the speaker,[212] a win for protecting First Amendment rights.

The *NIFLA* dissent makes another compelling point around the determination of when the exceptions apply, saying that "because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."[213] Though this framework does invite a case-by-case approach to some questions of professional regulations, the potential ad hoc nature of these disputes is acceptable because of the significance of the consequences. Such analysis can protect speakers from being forced to share a government message, one of the reasons that the First Amendment exists. Any such regulation that a legislature believes should be given less scrutiny that is not covered by an exception should be modified to fit an exception. Doing so protects the guarantees of the First Amendment and ensures free speech protections.

CONCLUSION

Professional speech can impact the deepest part of who someone is. Allowing regulations beyond those most essential for upholding government interest outlined in *NIFLA* can create dangerous situations for people speaking in their professional capacities. The exceptions in *NIFLA* are broad enough to allow for state police power protection while maintaining the strength of the First Amendment, even in the professional sphere. By not creating a separate category of "professional speech," the Court can ensure that it protects professionals from compelled speech through strict scrutiny analysis. The Court should seek to provide more protection, not less, especially from government-compelled speech.

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211. Morgan v. Virginia, 328 U.S. 373 (1946); Casey v. Planned Parenthood of Se. Pa., 505 U.S. 833, 833 (1992).

212. The default is higher protection; the exceptions are what allows for a deferential rational basis review.

213. *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

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