No. 16-56130

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOUNTAIN RIGHT TO LIFE, INC., dba
PREGNANCY & FAMILY RESOURCE CENTER,
BIRTH CHOICE OF THE DESERT, HIS NESTING PLACE,

Plaintiffs/Appellants

v.

KAMALA HARRIS, Attorney General of the State of California, in her official capacity,

Defendant/Appellee.

Preliminary Injunction Appeal (9TH CIRCUIT RULE 3-3)

On Appeal from the Central District of California (Eastern Division)
Case No. ED5:16−cv−00119−TJH(SPx)

Plaintiffs/Appellants' Opening Brief

Mathew D. Staver
Horatio G. Mihet
Mary E. McAlister
Daniel J. Schmid
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776 (telephone)
(407) 875-0770 (facsimile)
court@lc.org
Attorneys for Plaintiffs/Appellants

CORPORATE DISCLOSURE STATEMENT
FRAP 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Mountain Right to Life, Inc., dba Pregnancy & Family Resource Center, Birth Choice Of The Desert and His Nesting Place, state that they are all non-profit corporations and that there is no parent corporation or publicly held corporation that owns 10 percent or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331 because plaintiffs raised questions under the United States Constitution and 42 U.S.C. §1983. The order denying Plaintiffs' motion for a preliminary injunction is an appealable interlocutory decision under 28 U.S.C. §1292(a)(1).

The court's order denying Plaintiffs' motion for preliminary injunction ("Order") was entered on July 11, 2016. (Excerpts of Record, "EOR" 000001-000010.) Plaintiffs filed a timely appeal on August 9, 2016. (EOR 000011-000013).

As an appeal from an order denying a motion for a preliminary injunction, this Court has jurisdiction under 28 U.S.C. §1292(a)(1).

STATEMENT OF THE ISSUES

1. California Assembly Bill 775 ("AB775") requires that facilities which counsel pregnant women post and disseminate government-prescribed messages or be fined $500 for the first violation and $1,000 for each subsequent violation. The content of the prescribed messages differs based on whether the facility is "licensed" or "unlicensed" as defined in the bill. The district court erred in finding that, as to the notice required for licensed facilities, AB775 is a constitutionally permissible regulation of professional speech, which is subject to and satisfies intermediate scrutiny.

This issue was raised and ruled on in the District Court's order at pp. 6-7 (EOR 000006-000007). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and findings of fact for clear error. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

2. The district court erred in finding that, as to the notice required for unlicensed facilities, AB775 survives strict scrutiny review.

This issue was raised and ruled on in the District Court's order at pp. 7-8 (EOR 000007-000008). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

3. The district court erred in finding that AB775 is a neutral, generally applicable law and therefore subject only to rational basis review on the question of whether it violates Plaintiffs' First Amendment rights to free exercise of religion.

This issue was raised and ruled on in the District Court's order at pp. 8-9 (EOR 000008-000009). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

4. The district court erred in holding that Plaintiffs would not suffer irreparable injury in the absence of injunctive relief.

This issue was raised and ruled on in the District Court's order at pp. 9-10 (EOR 000009-000010). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

5. The district court erred in failing to consider the remaining preliminary injunction factors.

This issue was raised and ruled on in the District Court's order at p. 10 (EOR 000010). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

STATUTORY ADDENDUM

The verbatim text of AB775 is reproduced in the Addendum to this Brief.

STATEMENT OF THE CASE

This court should overturn the district court's denial of Plaintiffs' motion for a preliminary injunction against AB775, which compels pregnancy care centers such as Plaintiffs to post and disseminate government-prescribed messages that conflict with the messages communicated by the centers. Plaintiffs filed the underlying action under 42 U.S.C. §1983 seeking declaratory and injunctive relief,

damages and attorneys' fees on the grounds that AB775 violated Plaintiffs' rights to free speech and free exercise under the First and Fourteenth Amendments of the United States Constitution. (EOR 000147-000180).

Plaintiffs' motion for preliminary injunction was taken under submission without hearing by the district court and the court issued its ruling denying the motion. (EOR 000001-0000010). That ruling was entered on July 11, 2016. (EOR 000187). Plaintiffs filed a notice of appeal on August 9, 2016. (EOR 000014).

STATEMENT OF FACTS

I. AB775 History and Provisions

AB775 was signed into law on October 9, 2015, codified as California Health and Safety Code §§123470-123473 and became effective on January 1, 2016. (EOR 000151). Under AB775, facilities which counsel pregnant women, including Plaintiffs, are now required to post and disseminate a government-prescribed message or be fined $500 for the first violation and $1,000 for each subsequent violation. (EOR 000151-000157, Statutory Addendum, "SA," 001-004). The compelled message differs, depending upon whether a facility is classified as a "licensed covered facility" or "unlicensed covered facility." (EOR 000151-000157, SA 001-004).

AB775 was co-sponsored by Defendant Harris, NARAL Pro-Choice America and Black Women for Wellness and introduced by Assemblyman David Chiu. A

driving force behind the bill was concerns about "Crisis Pregnancy Centers," like Plaintiffs, not offering information about abortion. (EOR 000071).

> According to a 2011 report by the Public Law Research Institute of UC Hastings College of the Law, CPCs are pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center. CPCs are local non-profit organizations, generally receiving substantial funding and resources from at least one large pro-life umbrella organizations such as: Care Net, International Heart Beat, and the National Institute of Family and Life Advocates. CPCs typically do not offer services that conflict with pro-life pregnancy options, like abortion referrals or procedures. In contrast, full-service organizations that provide pregnancy-related services offer a wider variety of services including administering medical tests, performing medical procedures (including abortions), and providing counseling in pregnancy options. (EOR 000071).
>
> In the fall of 2009 the Assembly Business, Professions and Consumer Protection Committee, concerned that CPCs throughout California were disseminating medically inaccurate information about pregnancy options available in the state, requested a report by the University of California, Hastings College of Law regarding CPCs' practices and potential legislative options for regulating them. (EOR 000071).

AB775 defines a "licensed covered facility" as:

> [A] facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:
>
> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
>
> (3) The facility offers pregnancy testing or pregnancy diagnosis.

> (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
> (5) The facility offers abortion services.
> (6) The facility has staff or volunteers who collect health information from clients. (SA 002-003).

AB775 defines an "unlicensed covered facility" as:

> [A] facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:
>
> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
> (2) The facility offers pregnancy testing or pregnancy diagnosis.
> (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
> (4) The facility has staff or volunteers who collect health information from clients. (SA 003).

The following facilities are exempt from AB775's notice requirements:

> (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
> (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program. (SA 003).

Licensed facilities are required to post or distribute the following notice, written in English and "in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located:"

> 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 the telephone number].

(EOR 000154-000155, SA 003-004). The notice must be either posted at the entrance to the facility in at least 22-point type on a sign that is at least 8½ x 11 inches, in at least 14-point type on a document that is handed to clients when they arrive, or as a digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. (SA 003-004).

Unlicensed facilities must post conspicuously in two places on site and in "any print and digital advertising materials including Internet Web sites," the following notice in English and "in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located," "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." (SA 004). The notice must be on a sign at least 8½ x 11 inches and written in no less than 48-point type, and posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services. The notice must also be posted "clearly and conspicuously" in advertising material, *i.e.*, "in larger point

type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language." (SA 004).

II. Plaintiffs and their Mission

Plaintiffs are three faith-based, non-profit crisis pregnancy centers which are subject to AB775. Plaintiff Mountain Right to Life, Inc., doing business as Pregnancy & Family Resource Center ("PRC"), is a faith-based nonprofit center in San Bernardino County that is licensed to provide ultrasound services. (EOR 000157-000158). PRC was founded upon and operates according to Christian principles that permeate all aspects of its care for pregnant women. Central tenets of PRC's mission are the sanctity of human life, that human life begins at conception, that abortion destroys human life and that parenting or adoption are preferred alternatives to abortion. (EOR 000157-000158). PRC provides limited, non-diagnostic ultrasound, free pregnancy tests, relationship counseling, accurate information regarding a woman's choices when facing an unplanned pregnancy, counseling and referrals to community resources as well as other free services. (EOR 000158). PRC does not refer for, recommend, encourage, or facilitate anyone to obtain abortions, as doing so is against its mission, core values and beliefs. (EOR 000158). PRC receives no state or federal funds, but relies entirely upon donations from churches, other non-profit organizations and individuals.

(EOR 000159). PRC is a "licensed covered facility" under AB775 and so is required to post, in multiple languages under threat of fines, the government prescribed message that:

> California has public programs that provide immediate free or low-cost … abortion …. To determine whether you qualify, contact the county social services office at [insert the telephone number].

(EOR 000159). This is not a message that PRC could or would choose to disseminate on its own, because advertising the availability of "free or low-cost" abortions is offensive to PRC, and is directly contrary to PRC's mission, purpose and sincerely held religious beliefs. (EOR 000159-000160).

Plaintiff Birth Choice of the Desert ("BCD") is a faith-based non-profit crisis pregnancy center in La Quinta that provides free pregnancy testing, counseling and referrals to a licensed medical provider for ultrasound services. (EOR 000161). BCD is a faith-based organization that is based upon Christian principles. (EOR 000162). Abortion is contrary to its beliefs and mission, so BCD does not refer for, recommend, encourage, or facilitate anyone to obtain abortions. (EOR 000161, EOR 000163). BCD is not licensed by the State of California to provide ultrasound and other medical services, but is actively seeking funding for a mobile ultrasound unit and is seeking licensing to become a medical clinic qualified to perform ultrasounds. (EOR 000161, EOR 000163). Presently, BCD is an "unlicensed covered facility" under AB775 and so must post at its pregnancy

center and in its "print and digital advertising" in multiple languages 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." (EOR 000162). When Birth Choice acquires a mobile ultrasound unit and becomes licensed as a medical facility, it will become subject to the requirements for "licensed covered facilities" under AB775. (EOR 000163). The government-prescribed message required for licensed facilities is not a message that BCD would choose to disseminate on its own, because advertising the availability of "free or low-cost" abortions is offensive to BCD, and is directly contrary to BCD's mission, purpose and sincerely held religious beliefs. (EOR 000162). The fact that BCD would be required to disseminate that offensive message upon obtaining state licensure is impeding and preventing BCD's efforts to obtain licensure and funding for ultrasound equipment. (EOR 000164).

His Nesting Place ("HNP") operates a maternity home for women facing unplanned pregnancies and operates a crisis pregnancy center that offers free pregnancy tests, food, baby items, counseling and the Gospel of Jesus Christ to needy women in Long Beach. (EOR 000166-000167). HNP holds and promotes a Christian worldview, including core tenets of the sanctity of human life, that human life begins at conception, that abortion destroys human life and that parenting or adoption are preferred alternatives to abortion. (EOR 000166-

000167). HNP receives no state or federal funds and does not charge women for its services. (EOR 000166-000168). HNP offers women information about the options available for caring for themselves and their children, information on educational and training opportunities, counseling and medical referrals, but does not refer for, recommend, encourage, or facilitate anyone to obtain abortions. (EOR 000167). HNP is an "unlicensed covered facility" under AB775. (EOR 000168).

III. Defendant

For purposes of this Preliminary Injunction Appeal, the Defendant is California Attorney General Kamala Harris. (EOR 000151).[1]

SUMMARY OF ARGUMENT

AB775 compels licensed pro-life pregnancy centers to become the state's pamphleteers and mouthpieces, advertising the state's message that free and low cost abortions are available to women facing unintended pregnancies who come to the centers seeking alternatives to abortion. AB775 also commandeers the communication fora of unlicensed pregnancy care centers, compelling them to display multiple copies of messages in multiple languages telling visitors that the

[1] KAREN SMITH, M.D., Director of California Department of Public Health was a Defendant in the case below, but was dismissed by the district court. Since the order dismissing her as a Defendant is not an appealable order at this time, it is not part of this appeal and she is not listed as an appellee for purposes of this preliminary injunction appeal. Plaintiffs retain the right to appeal her dismissal at the appropriate time.

centers are unlicensed. Despite evidence of the devastating consequences these requirements will have on Plaintiffs and the families they serve, the district court denied Plaintiffs' motion for a preliminary injunction without addressing all of the factors required under *Cottrell*, 632 F.3d at 1131.

As for the factors the district court did address, it applied the wrong legal standards to find that Plaintiffs failed to show a likelihood of success on the merits, or even to raise a substantial question as to the validity of AB775 (EOR 000006-000007). The court incorrectly concluded that AB775 regulates "professional speech" and therefore is analyzed using intermediate scrutiny, contrary to this Court's conclusion in *Pickup v. Brown*, 740 F. 3d 1208 (9th Cir. 2013). The district court also misapplied the intermediate scrutiny test under *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) to find that AB775 could satisfy the standard. (EOR 000006-000007). The district court also erred when it determined that AB775's provisions regarding unlicensed facilities satisfied strict scrutiny under *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). Finally, the district court misapplied *Employment Division Dept. of Human Resources v. Smith*, 494 U.S. 872, 881-82 (1990) when it concluded that AB775 is neutral and generally applicable and therefore subject to only rational basis review related to Plaintiffs' claim that the statute violates the Free Exercise Clause.

The district court summarily disposed of the question of irreparable injury and failed to properly address the remaining factors required for a preliminary injunction. *Arc of California v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). Because of these errors, Plaintiffs' motion for preliminary injunction was improperly denied and this Court should reverse the district court's decision.

STANDARD OF REVIEW

This Court reviews a decision to grant or deny a preliminary injunction for abuse of discretion. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (citing *Cottrell*, 632 F.3d at 1131). In deciding whether the district court abused its discretion, this Court employs a two-part test: "first, we 'determine de novo whether the trial court identified the correct legal rule to apply to the relief requested'; second, we determine 'if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Id.* A decision based on an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion. *Id.* The District Court's conclusions of law are reviewed *de novo* and its findings of fact for clear error. *Id.*; *Cottrell*, 632 F.3d at 1131.

The District Court erred when it denied Plaintiffs' motion for a preliminary injunction.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT PLAINTIFFS FAILED TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS OR EVEN RAISE A SUBSTANTIAL QUESTION REGARDING THE CONSTITUTIONALITY OF AB775.

In analyzing Plaintiffs' free speech claims related to "licensed covered facilities," the district court misapplied this Court's decision in *Pickup v. Brown*, 740 F. 3d 1208 (9th Cir. 2013) when it concluded that AB775 is a constitutionally permissible regulation of "professional speech" that is subject to intermediate scrutiny. (EOR 000006-000007). The court then erred in finding that AB775 satisfied intermediate scrutiny. (EOR 000006-000007). In analyzing AB775 in the context of the free speech claims for the "unlicensed covered facilities," the court applied strict scrutiny, but erred in finding that AB775 satisfied the standard. (EOR 00007-000008). In analyzing Plaintiffs' free exercise claims, the district court erred in concluding that AB775 is a neutral law of general applicability subject only to rational basis review. (EOR 000008-000009).

A. The District Court Erred When It Concluded That AB775 Is A Permissible Regulation of Professional Speech That Is Subject To And Satisfies Intermediate Scrutiny.

1. AB775 Should Be Subject To Strict Scrutiny Under Pickup.

The district court erred when it determined that AB775's notice requirement for "licensed covered facilities" is "professional speech" subject to intermediate scrutiny under the First Amendment continuum this Court adopted in *Pickup*.

(EOR 000006). The court mistakenly concluded that because the notice regarding free and low cost abortions applies to "licensed covered facilities" it necessarily involves individualized physician-patient communication related to the patient's medical condition and treatment options, which this Court placed along the midpoint of its continuum. *Pickup*, 740 F.3d at 1228. However, the context in which the notice is to be provided here shows that it is, in fact, public dialogue outside of a physician-patient relationship, and therefore is at the apex of First Amendment protection, *i.e.*, subject to strict scrutiny, under the *Pickup* continuum. *Id.* at 1227.

The district court failed to undertake the contextual analysis necessary to determine where AB775 should fall along this Court's continuum. *See Pickup*, 740 F.3d at 1225-29 (analyzing the differential protection accorded speech and conduct depending upon the nature of the relationship, nature of the speech and timing). The fact that speech occurs in a licensed health care facility does not mean that is automatically placed on the midpoint of this Court's continuum and subject to intermediate scrutiny. *Id.* at 1228. Instead, a restriction on professional speech will fall along that midpoint when it regulates speech that occurs in the context of a physician-patient relationship. *Id.* For example, the state can require that physicians disclose information about certain risks of abortion to patients whom they are treating. *Id.* (citing *Planned Parenthood of Southeastern Pennsylvania v.*

Casey, 505 U.S. 833, 884 (1992)). However, "[o]utside the professional relationship, such a requirement would almost certainly be considered impermissible compelled speech. *Cf. Wooley v. Maynard*, 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (holding that a state could not require a person to display the state motto on his or her license plate)." *Id.* As Justice White explained, the question of whether the speech is occurring within or outside of a relationship between a professional and his client is critical to determining whether a regulation is constitutional:

> 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 function 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, or of the press."

Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring).

Therefore, when a statute goes beyond regulating physician-patient communications to compelling or restricting speech by a professional on a matter of public concern, it goes from the midpoint of this Court's continuum to the apex, where First Amendment protections are at their greatest. *Pickup*, 740 F.3d at 1227. As this Court explained, a regulation prohibiting physicians from advising their patients to use treatments outside the mainstream would be a mid-point restriction on professional speech subject to intermediate scrutiny. *Id.* However, a regulation

prohibiting physicians from publicly advocating for such treatments would be impermissible unless it could survive strict scrutiny. *Id.* "Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment." *Id.* at 1227-28.

That is in keeping with the Supreme Court's longstanding tenet that "speech on 'matters of public concern' ... is 'at the heart of the First Amendment's protection.'" *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759 (1985)). Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 453. Abortion and abortion rights are matters of great public concern. *Johnston v. Koppes*, 850 F.2d 594, 596 (9th Cir. 1988).

Contrary to the district court's conclusion, AB775 stands at the apex, not the mid-point of the continuum. AB775 is not confined to established professional relationships as was the disclosure requirement in *Casey*. Instead, it imposes its compelled speech on pregnancy care facilities prior to forming a professional relationship with any client, and regardless of whether a professional relationship

is ever established. The notices must be posted in a conspicuous place in the facilities' waiting rooms or by distributing the information to those entering the facilities via a written or digital notice distributed so that it can be read at the time of arrival. (SA 003-004). There is no requirement that the person seeing the notice actually become a client or need or receive pregnancy care, only that they enter the facility and immediately receive a "conspicuous message" that free and low cost abortions are available. (SA 003-004). The state is not regulating professional speech, but requiring that pregnancy care centers become its pamphleteers, even requiring the publication of pamphlets, for the message of free and low cost abortions, a message that is antithetical to the centers' mission.

The district court abused its discretion when it determined that AB775 is a regulation of professional speech, falling on the midpoint of the Court's continuum and subject to only intermediate scrutiny. As a result, the district court erred when it determined that Plaintiffs failed to even raise a substantial question regarding the constitutionality of AB775, let alone establish a substantial likelihood of prevailing on the merits.

2. AB775 Is Subject To Strict Scrutiny As A Content-Based Restriction On Speech.

Moreover, the district court further erred in failing to subject AB 775 to strict scrutiny because it is content-based and, therefore, is "presumptively unconstitutional and may be justified only if the government proves that [it is]

narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). So should have the district court here, where the state is mandating that pregnancy centers speak a particular message regarding free and low cost abortions that the centers would not and ,in accordance with their missions, could not otherwise make.

Furthermore, AB775's differential treatment of speech related to pregnancy and family planning vis-à-vis other health situations creates a paradigmatic content-based restriction similar to the restriction struck down in *Reed*, 135 S. Ct. at 2227. AB775 only applies if organizations discuss the issues of pregnancy and family planning. Consequently, organizations such as Plaintiffs that counsel pregnant women are faced with the choice of compelled government speech or crippling fines, while organizations that counsel women (and others) on other issues such as addiction, weight control or mental health are not so burdened. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* In *Reed*, the challenged sign ordinance imposed increasingly onerous restrictions on signs based upon whether they were ideological, political, or temporary directional

signs relating to a "qualifying event," defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id.* at 2224-25. Therefore, organizations such as the plaintiff church in *Reed* faced more restrictive regulations for signs directing people to worship services than did organizations advocating for political candidates or directing people to yard sales. *Id.*

Similarly, here, organizations such as PRC, and even unlicensed organizations such as HNP and BCD, that want to convey the message that a woman facing an unplanned pregnancy has alternatives for care of herself and her child are compelled to utter a state-prescribed message or be fined while organizations that want to convey the message that a person facing alcohol or drug addiction or with chronic physical or mental illness has alternatives for recovery can do so without being compelled to utter a state-prescribed message or be fined. This differential treatment based upon the subject matter of Plaintiffs' speech is the very definition of a content-based regulation that is presumptively unconstitutional and must be analyzed using strict scrutiny. *Id.*

The district court failed to even acknowledge that AB775 is content-based, compounding its error of applying only intermediate scrutiny.

3. AB775 Does Not Satisfy Intermediate Scrutiny.

Even if intermediate scrutiny were the proper standard (which *Pickup* and *Reed* say it is not), the district court erred when it concluded that AB775's compelled speech requirement satisfies the standard. (EOR 000006-000007). Under intermediate scrutiny, "the State must show at least that the statute directly advances a substantial governmental interest **and** that the measure is drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (emphasis added). There must be a "fit between the legislature's ends and the means chosen to accomplish those ends," which as this Court has noted, is a "demanding" requirement. *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648-49 (9th Cir. 2016) (citing *Sorrell*, 564 U.S. at 572).

Importantly to this case, intermediate scrutiny seeks to ensure "not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message." *Sorrell*, 564 U.S. at 572. The legislative history reveals the sponsors' concerns about and bias against "crisis" and "pro- life" pregnancy centers, and also reveals that NARAL Pro Choice America is a co-sponsor of the bill and that all but centers such as Plaintiffs' faith-based organizations are exempt from the bill. (EOR 000071). Those facts raise the specter of suppression of disfavored messages requiring a rigorous application of judicial scrutiny.

a. AB775 does not advance a substantial state interest.

The district court found two potential state interests it believed AB775 could satisfy, neither of which is actually addressed by the statute. (EOR 000006-000007). Relying upon the flawed premise that AB775's compelled speech requirement is "professional speech," the district court said that the provision "directly advances" the state's "more than substantial interest in the practice of medical professionals within [its] boundaries." (EOR 000006, citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)). In fact, however, AB775 is not part of the state's "broad power to establish standards for licensing practitioners and regulating the practice of professions" addressed in *Goldfarb*. 421 U.S. at 792. AB775 does not impose regulations upon physicians or other licensed health care professionals related to the practice of medicine on individual patients. Instead, AB775 compels that facilities which offer services, some of which require a state license, utter a state-prescribed message regardless of whether and before any physician-patient relationship has been or will be established. The state-mandated notice advertising free and low cost abortion services must be either posted at the entrance to the facility, on a document that is handed to clients when they arrive or as a digital notice that can be read at the time of check-in or arrival. (SA 003-004). The only Plaintiff that would presently be regarded as a "licensed covered facility"

having to post the state's message about free and low cost abortions is PRC. (EOR 000159). The only service that PRC provides that requires a license is limited, non-diagnostic ultrasound, which is only one of many services offered at no cost to expectant mothers. (EOR 000158). Many of the people coming into PRC's offices do not seek or receive the ultrasound service, and some might not even be pregnant or in need of medical care, and therefore are wholly outside of any physician-patient relationship over which the state has "broad power to regulate." *Goldfarb*, 421 U.S. at 792. Therefore, contrary to the district court's conclusion, AB775 does not "directly advance" a state interest in regulating the medical profession. (EOR 000006).

The district court also erred when it cited *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) for the proposition that AB775

> [D]irectly advances California's compelling interest of ensuring that its residents know their reproductive rights and the health care resources available to them when they make personal reproductive health care decisions because the Act's required notice is disseminated to patients at California licensed family planning facilities. (EOR000006-000007).

First, the state interest asserted in *Madsen* is not that states ensure that their residents know their reproductive rights and the resources available to them. *Id.* Instead, the Supreme Court referenced that "the State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Id.* It is impossible for a state to **ensure** that its

residents **know** their reproductive rights unless it is going to force residents to read something and then conduct an examination of their knowledge. AB775's requirement that facilities post the state-mandated message about free and low cost abortions does not ensure that those who read the message know about their reproductive rights and available resources. It only ensures that a message antithetical to the mission of the pregnancy care centers is offered at the time anyone enters the facility. Furthermore, as to the actual state interest alluded to in *Madsen*, there is no evidence that California residents' freedom to seek pregnancy services is impaired by pregnancy centers such that AB775 is necessary. In fact, the very existence of centers such as Plaintiffs' is evidence that Californians have choices in pregnancy care.

Additionally, AB775 cannot be said to "directly advance" a substantial state interest in informing residents of reproductive rights by providing the information to "patients at California licensed family planning facilities," since the statute specifically exempts many family planning facilities from its provisions, namely, clinics directly conducted, maintained, or operated by governmental agencies, and licensed primary care clinics that are enrolled as Medi-Cal providers and providers in California's Family Planning, Access, Care, and Treatment Program ("FPACT"). (SA 003). If the information mandated by AB775 is required to

advance the state's interest, then it should be mandated for all family planning facilities.

b. AB775 is not narrowly tailored.

The broad exemptions present in AB775's requirements also belie any claim that it is narrowly tailored to advance any state interest, and in particular the district court's conclusion that "[t]he Act's notice requirement fits the California legislature's ends because the required notice keeps individuals fully informed of the continuum of their options while being provided time-sensitive, pregnancy-related medical care." (EOR 0000007). The exemptions granted by AB775 ensure only that individuals entering non-governmental, pro-life pregnancy centers see the state-mandated advertisement of free and low cost abortion services.

As this Court affirmed in *Retail Digital Network*,

> What is required is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective."

810 F.3d at 649 (citing *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)). Narrow tailoring is required to ensure that "the [government's] interests are proportional to the resulting burdens placed on speech." *Id.* (citing *Sorrell*, 564 U.S. at 572). This prevents "the government from too readily sacrific[ing] speech for efficiency." *Id.* (citing *McCullen v. Coakley*, 134 S.Ct.

2518, 2534 (2014)). That is precisely what AB775 has done here, *i.e.*, sacrificed Plaintiffs' rights to be free from uttering a state-mandated message antithetical to their mission for the sake of efficiently advertising the state's message about the availability of free and low cost abortions.

The Second Circuit found that an abortion notification requirement less onerous than the AB775 mandate failed the narrow tailoring test and its analysis shows the errors in the district court's analysis here. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014).[2] The disclosure at issue in *Evergreen* required only that the facilities indicate whether they provide or refer for abortions, emergency contraception, or prenatal care, not, as is the case here, to advertise the availability of free and low cost abortions. *Id.* Nevertheless, the court found that the disclosure was not narrowly tailored, but "overly burdens Plaintiffs' speech." *Id.*

> When evaluating compelled speech, we consider the context in which the speech is made. *Riley* 487 U.S. 796–97, 108 S.Ct. 2667]. Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives. "[E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (internal quotation

---

[2] *Cert. denied sub nom. Evergreen Ass'n, Inc. v. City of New York, N.Y.*, 135 S. Ct. 435 (2014), and *cert. denied sub nom. Pregnancy Care Ctr. of New York v. City of New York, N.Y.*, 135 S. Ct. 435 (2014).

> marks omitted). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795, 108 S.Ct. 2667. 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.

Id. Citing to the Supreme Court's concern about compelling disclosure of financial information when seeking donations in *Riley*, the Second Circuit concluded that the state-mandated 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." *Id.* at 249-50. Just as a potential donor might not await an explanation but slam the door in the face of a solicitor after hearing the state-mandated message in *Riley*, so too might women who want to discuss something other than abortion walk away from a pregnancy care center if immediately confronted with information about abortion. *Id.* Instead, "the centers must be free to formulate their own address," particularly about a controversial political topic such as abortion. *Id.* As is true with AB775, the New York ordinance required that pregnancy care centers "affirmatively espouse the government's position on a contested public issue" so that it "deprives Plaintiffs of their right to communicate freely on matters of public concern." *Id.* at 250–51. Because the New York ordinance deprived the centers of that freedom, it was not

narrowly tailored and could not withstand either strict or intermediate scrutiny. *Id.* at 250.

The district court abused its discretion when it failed to apply a similar analysis to the AB775 compelled speech requirement, which is far more burdensome than was the requirement in *Evergreen*.[3] Here, rather than merely stating whether they provide or offer referrals for abortion, non-exempt pregnancy centers must advertise that there are free and low cost abortions available and offer the telephone number for the taxpayer-funded services. (SA 003-004). Visitors and donors who oppose abortion will be accosted by the notification even before they can talk to anyone at the facility and get an explanation. As was true with the potential donor in *Riley*, potential donors here will take one look at the notice and refuse to provide funding for the pregnancy care centers. Visitors who are seeking alternatives to abortion will immediately see an advertisement for free and low cost abortions and believe that the pregnancy care center will not provide them with the alternatives they are seeking. In that way, the notice requirement will actually diminish instead of enhance the information that women receive. If that is indeed

---

[3] The district court employed cafeteria-style judicial analysis in its use of the *Evergreen* case, relying on *Evergreen* for its (wrong) conclusion with respect to the compelled speech requirement for unlicensed facilities compelled speech, but ignoring the Second Circuit's teaching on the compelled speech requirement for licensed facilities.

the purpose of AB775, then the notice requirement utterly fails to advance that interest.

The district court erred when it concluded that AB775's notice requirement could satisfy intermediate scrutiny, compounding the error of concluding that it need only satisfy the intermediate standard. This Court should reverse the determination and remand for issuance of a preliminary injunction.

B. The District Court Erred When It Determined That AB775's Notice Requirement for Unlicensed Facilities Satisfies Strict Scrutiny.

When analyzing AB775's notice requirements for unlicensed facilities, the district court switched from an intermediate scrutiny to strict scrutiny analysis, but improperly concluded that the notice provision satisfied the standard. (EOR 000009). In the case of unlicensed facilities, the State's interest in regulation, and consequently, its ability to articulate a compelling state interest is even more minute than in the regulation of "licensed covered facilities." Since the facilities are unlicensed, the state cannot rely upon its interest in regulating the medical profession. Consequently, the compelled speech cannot qualify as "professional speech" under the *Pickup* continuum. *Pickup*, 740 F.3d at 1228.

Furthermore, since Plaintiffs BCD and HNP do not charge women for their services (EOR 000161, 000166-000167), they are not engaging in commercial speech. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (the

core notion of commercial speech is "speech which does no more than propose a commercial transaction"), *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (Commercial speech is expression related solely to the economic interests of the speaker and its audience.). Therefore, the state cannot assert a compelling interest in preventing fraudulent, deceptive or misleading advertising or the promotion of illegal activity on the part of the "unlicensed covered facilities." *Central Hudson*, 447 U.S. at 563-64. Since the "unlicensed covered facilities" are not engaging in professional or commercial speech, the State cannot justify imposing a compelled speech requirement absent proof of a demonstrable threat to a compelling public interest. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This is true because rights secured by the First Amendment, including the right against compelled speech, *Wooley*, 430 U.S. at 717, have "a sanctity and a sanction not permitting dubious intrusions." *Id.* Consequently, "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Id.* "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* Defendants "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009). The district court erred

when it found that Defendants had met their burden, particularly with regard to demonstrating the existence of real harms needing the state's intervention.

1. The District Court Erred When It Concluded That The State Had Demonstrated A Compelling State Interest In Mandating Disclosures Regarding Licensed Medical Professionals.

The district court disposed of the strict scrutiny analysis in a cursory discussion that did not accord sufficient analysis of the state's purported evidence of harm, or more accurately, lack of evidence of harm.

> Here, the Act's notice requirement for unlicensed covered facilities advances California's compelling interest in ensuring that people know when they are receiving medical care from licensed professions [sic] and when they are not. *See Evergreen Ass'n, Inc.*, 740 F.3d at 247. (ER 0000008).

However, merely stating the truism that there is a compelling interest in ensuring that people know whether they are receiving care from a licensed physician, does not satisfy the state's demanding burden under strict scrutiny. *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 799 (2011). Instead, "the State must specifically identify an 'actual problem' in need of solving … and the curtailment of free speech must be actually necessary to the solution." *Id.* (citations omitted). That burden can only be met by solid evidentiary proof that there is an existing, tangible problem that needs to be solved; "ambiguous proof will not suffice." *Id.* at 800. In *Brown,* the Supreme Court found that California did not meet its burden, even with its presentation of several reports from psychologists

who purported to find a connection between violent video games and aggressive behavior in children. *Id.* By contrast, in *Evergreen*, the city had considered "a wide variety of testimony related to these interests, including testimony and reports from medical professionals, social workers, clergy, and reproductive health workers about misleading practices, patient experiences, and the dangers of delay in access to reproductive care." 740 F.3d at 246. That evidence, unlike the cursory evidence in *Brown*, established the kind of concrete and particularized harm that can meet the government's burden of establishing a compelling state interest. *See id.*

There is no such evidence in this case. In fact, the state has not even produced the kind of evidence it produced in *Brown*, *i.e.*, scientific reports suggesting the existence of a problem. 564 U.S. at 800. Indeed, there are no scientific studies nor testimony documenting misleading practices or patient experiences with unlicensed providers. Instead, the legislation is based upon statements developed by pro-abortion advocates, including NARAL Pro-Choice America, a statement about the rate of unintended pregnancies and a university study addressing pro-life crisis pregnancy centers' failure to offer abortion services or referrals. (ER 000071). No evidence was offered to suggest, as was true in *Evergreen*, that California women have experienced problems caused by unlicensed providers requiring that all crisis pregnancy centers be compelled to

provide a state-mandated notice. The district court's contrary conclusion based upon *Evergreen*'s inapposite circumstances was in error.

2. The District Court Erred When It Concluded That The Disclosure Requirement Is Narrowly Tailored.

Since the state failed to establish real and particularized harm necessary to show a compelling state interest, it necessarily failed to show that the disclosure requirements for "unlicensed covered facilities" "will in fact alleviate these harms in a direct and material way" so as to satisfy the requirement of narrow tailoring. *Video Software Dealers Ass'n*, 556 F.3d at 962. The district court erred when it concluded that the state had satisfied the requirement for narrow tailoring.

As was true with the compelling state interest factor, the court offered only a conclusory statement with no analysis of the actual terms of the statute or its failure to address the issues it is supposed to solve.

> Further, the Act's notice requirement is narrowly tailored because it merely discloses the licensing status of the medical facility's employees. *See Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799 n.11 (1988) (EOR 000008).

The district court's statement misunderstands the nature and extent of the disclosure requirement for "unlicensed covered facilities." First, unlicensed facilities such as BCD and HNP are not "medical facilities," but care centers offering non-medical advice, resources and counseling to women facing unplanned pregnancies. (EOR 000161-000166). In addition, the disclosure is not merely the

posting of a statement that the facility is or is not licensed. (SA 000003-000004). Instead, AB775 requires that the statement: "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" be printed in at least **48-point type in English and in "the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located."** (SA 004) (emphasis added). In Los Angeles County, where HNP is located (EOR 000150), that would mean that **11 versions** of the 29-word notices would have to be provided in 48-point type.[4] In Riverside County, where BCD is located (EOR 000151), **two versions** would have to be provided in 48-point type.[5] Each of those versions must be posted conspicuously at the entrance and at least one other place in the waiting area of the facility, which in the case of HNP would mean **22 separate documents containing 29 words in 48-point type** and in BCD's case would mean **four separate documents containing 29 words in 48-point type** posted on their walls.

---

[4] Arabic, Armenian, Cambodian, Chinese, English, Farsi, Korean, Russian, Spanish, Tagalog and Vietnamese. California Department of Health Care Services, *Threshold and Concentration Languages For Two Plan, GMC, and COHS Counties as of March 2014, http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2014/APL14-008.pdf.*

[5] Spanish and English. *Id.*

(SA 4)[6]. In addition, the same notice in "conspicuous type" in 11 (HNP) or two (BCD) languages must appear in **all** of the centers' print and digital advertising. (SA 4). That is a far cry from the dicta in *Riley* that the district court relied upon, *i.e.*, one verbal statement that a fundraiser is/is not a professional. *Riley*, 487 U.S. at 799 n11. Such a statement made at the beginning of a fund-raising solicitation might be regarded as a narrowly tailored solution to an established problem of deceptive fund-raising. *Id.* However, multiple copies of a 29-word disclaimer in 48 point type in multiple languages is not narrowly tailored to address a perceived but not proven need for pro-life pregnancy centers, but not others, to provide information about the licensing of their staff.

In fact, rather than supporting the district court's conclusion, *Riley* actually demonstrates the error in the court's analysis. As the Supreme Court affirmed, the First Amendment directs that "government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id.* at 800-01. (citing *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 537–38 (1980)). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 801 (citing *NAACP v. Button*, 371

---

[6] The onerous burden of these notices is illustrated in Addendum 2 to this Brief, which has the notices for the licensed and unlicensed facilities printed in the required typefaces.

U.S. 415, 438 (1963)). The Court pointed out that instead of a prophylactic, imprecise, and unduly burdensome rule to reduce alleged donor misperception, the state had more benign and narrowly tailored options such as publishing the information itself and vigorously enforcing existing laws, assuming that it could meet the compelling interest factor. *Id.*

Similarly here, if the state could establish a compelling interest in requiring that unlicensed pro-life crisis pregnancy centers tell visitors that they are unlicensed (which it has not), it would have more narrowly tailored and less intrusive ways of disseminating the information. As the Supreme Court said about the notice in *Riley*, the state could publish the information itself. Also, the state can enforce existing laws regarding advertising and disclosures regarding medical treatment. As was true in *Evergreen*, *if the state established a compelling state interest in notifying visitors that unlicensed facilities are unlicensed, then* the state could require a simple statement of a few words such as "we are not a licensed medical facility." However, such a statement would survive strict scrutiny only if it "targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). A narrowly tailored regulation of speech is one that achieves the government's interest "without unnecessarily interfering with First Amendment freedoms." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Requiring that a statement

be written in 48-point type in multiple languages posted in multiple places and in "conspicuous type" on every print and digital advertisement created by a non-governmental pro-life pregnancy center essentially forecloses most First Amendment activity on the part of the center. Rather than being precisely targeted to provide only the information the state claims needs to be provided (which has not been established), the disclosure requirement is designed to commandeer pregnancy care centers' communication outlets with a state-mandated warning that the unlicensed non-medical facility is not a licensed medical facility. If the non-profit centers have sufficient resources remaining to create their own messages and visitors read beyond the multiple warnings, they might then be able to disseminate their actual message of help for an unplanned pregnancy. The disclosure requirement is interference with First Amendment activity writ large, not, as the district court said, an innocuous non-intrusive notice that "is the least restrictive means of achieving California's interest." (EOR 000008).

The district court erred when it concluded that AB775's notice requirement satisfied strict scrutiny. This Court should overturn the decision and direct that a preliminary injunction issue.

C. The District Court Erred When It Concluded That AB775 Is A Neutral Law Of General Applicability And Therefore Subject Only To Rational Basis Review.

The district court ostensibly relied on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), but in fact misapplied that precedent and *Employment Division Dept. of Human Resources v. Smith*, 494 U.S. 872, 881-82 (1990), when it concluded that AB775 is neutral and generally applicable and therefore subject to only rational basis review.

> Here, the Act is facially neutral since it makes no reference to any religious practice, conduct, belief, or motivation; further, the Act is operationally neutral because it applies to all covered facilities, regardless of religious affiliation, unlike the "religious gerrymandering" at issue in *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 542. Moreover, the Act is a law of general applicability because it does not, in a selective manner, impose burdens on conduct that is motivated by religious belief. (EOR 000009).

The district court failed to engage in the contextual analysis necessary to determine whether AB775 is neutral and generally applicable, which analysis would have shown that it is not and therefore should have been analyzed using strict scrutiny, not rational basis review. *Smith*, 494 U.S. at 881-82.

As the district court correctly stated, AB775 is facially neutral, but it is not, as the district court claimed, operationally neutral. The district court engaged in no analysis, but merely concluded that since AB775 does not mention religion in any of its provisions it is not a "religious gerrymander" as was the statute struck down in *Lukumi*. (EOR 000009). Looking at the *Lukumi* statute and AB775 in context,

which the district court did not do, reveals that AB775 in fact is substantially similar to the statute struck down by the Supreme Court.

The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination to forbid "subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* Therefore, the court must look not only at the text, but also at the effect of the law in its real operation. *Id.* at 535. As was true with the Florida law, the true object of AB775, *i.e.*, to diminish the effectiveness of faith-based pro-life pregnancy care centers, becomes evident when the operational effect of the statute is considered. *Id.* at 535. In *Lukumi*, the city purported to have adopted the ordinances to address suffering and mistreatment of animals being slaughtered and health risks associated with improper disposal of carcasses. *Id.* However, the definitions and exemptions in the ordinance, none of which actually referenced religion, when read in context with the stated purpose, revealed the true purpose of banning a disfavored religious ritual. *Id.* The net results of the prohibitions and exemptions of the law was a "gerrymander" that prohibited only the ritual animal sacrifices performed by one religious sect, which was impermissible targeting of

religion for disfavored treatment. *Id.* at 536-37. Clever drafting ensured that the name of the sect or even the term "religion" was not part of the ordinance, but that did not mean that it was neutral and generally applicable. *Id.*

The same is true with AB775. Defendants claim that AB775 was enacted to provide pregnant women with additional access to information about "public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery," and information about whether a facility's staff members are licensed medical professionals. (EOR 000070). However, AB775 does not compel that all facilities that serve women's health care needs provide the government-mandated message or pay a fine. (SA 002-004). Instead AB775 designates only certain "covered" facilities, *i.e.*, that have a primary purpose of providing family planning or pregnancy-related services, and that satisfy two or more of the following:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
> (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
> (3) The facility offers pregnancy testing or pregnancy diagnosis.
> (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
> (5) The facility offers abortion services.
> (6) The facility has staff or volunteers who collect health information from clients. (SA 002-003).

In addition, AB775 has individualized exemptions for:

> (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
> (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program. (SA 003).

If the state's true purpose is to ensure that all women have access to information about health education, counseling and contraception as well as abortion, then it would require that all facilities which serve women's health needs provide the government-drafted message. Also, if the state's purpose is to ensure that all women have access to the information, then it would not exempt government-owned and affiliated facilities. In fact, by limiting the compelled speech to centers that are primarily concerned with "pregnancy-related services," the state is signaling that its true object is to require that pregnancy care centers -- what the legislative history described as pro-life crisis pregnancy centers (EOR 000071) -- provide information about low cost and no cost abortions. This is further borne out by the Legislature's emphasis on the urgency of getting information to women. If the concern is the provision of overall health education and contraception information, then there is no particular urgency. However, there is a particular urgency in providing information regarding abortion, since abortions can only legally be performed in the early stages of pregnancy. Also if the state's purpose is merely to help spread the word about health care resources, there is no

need for punitive fines for failure to provide the information or for state-mandated content.

Furthermore, the statements of AB775's primary author reveal that the statute is not neutral and generally applicable, but specifically targeted at faith-based centers such as Plaintiffs which are founded upon sincerely held religious beliefs that preclude them from referring women for abortions.

> [U]nfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.…CPCs are facilities, both licensed and unlicensed, which present themselves as comprehensive reproductive health centers, but are commonly affiliated with, or run by organizations whose stated goal is to prevent women from accessing abortions.

(EOR 0000086-000087). Thus, while the text of the law might not specify that it is targeting faith-based crisis pregnancy centers, its exemptions for all but crisis pregnancy centers and the pejorative discussions about such centers during hearings on the bill remove any doubt that AB775 was specifically targeted at faith-based pregnancy centers such as Plaintiffs.

These factors point to an underlying purpose of requiring that women coming to pro-life crisis pregnancy centers be immediately solicited with the

state's message advertising free and low cost abortions. Pregnancy care centers that do not have a faith-based objection to abortion would not oppose the message regarding free and low cost abortions, and so would not need to be compelled to transmit the message. The only reason to impose fines of up to $1,000 per incident for non-transmission of the message would be to force those for whom abortion is a violation of their sincerely held religious beliefs to transmit the objectionable message or cease operation. Therefore, while AB775 does not specifically mention "religion" or "faith-based" clinics, its operational effect is to punish those, like Plaintiffs, whose sincerely held religious beliefs preclude them from promoting abortion.

AB775 represents the kind of "subtle departures from neutrality," and "covert suppression of particular religious beliefs" that were fatal to the facially neutral law in Florida. *Lukumi* 508 U.S. at 534. The district court erred when it failed to acknowledge Ab775's masked hostility toward religion and instead concluded that "the Act is operationally neutral." (EOR 000009).

The district court also erred when it failed to acknowledge that, as a hybrid Free Exercise and Free Speech claim, Plaintiffs' challenge is subject to strict scrutiny, not rational basis review under *Smith*, 494 U.S. at 881-82. The First Amendment bars application of a neutral, generally applicable law to religiously-motivated action when the law also affects "other constitutional protections, such

as freedom of speech and of the press" or the right of parents to direct the upbringing of their children. *Id.* at 881.

> Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, *cf. Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors).

Id. In those cases, as here, the challenged provisions must survive strict scrutiny review, not the rational basis standard adopted for the pure free exercise challenges of neutral and generally applicable laws. *Id.*

Since AB775 is not neutral and generally applicable and violates not only Plaintiffs' free exercise, but also free speech rights, it must be analyzed using a strict scrutiny standard. *Id.* As detailed more fully above, AB775 cannot meet even intermediate scrutiny, let alone the most demanding standard known to First Amendment jurisprudence. The district court erred when it concluded that AB775 is neutral and generally applicable and therefore need only satisfy rational basis review.

The district court's errors in analyzing Plaintiffs' Free Speech and Free Exercise claims mean that its conclusion that Plaintiffs failed to even raise a substantial question regarding the constitutionality of AB775 is fatally flawed and should be reversed by this Court.

II. THE DISTRICT COURT ERRED WHEN IT FOUND THAT PLAINTIFFS DID NOT SHOW A LIKELIHOOD OF IRREPARABLE INJURY.

The district court abused its discretion when it summarily disposed of the irreparable injury factor by misstating the legal standard for likelihood of success on the merits and then merely concluding without analysis that Plaintiffs did not show irreparable injury. (EOR 000009).

> However, as discussed above, the Crisis Pregnancy Centers have *failed to establish that the Act violates their First Amendment rights*. Accordingly, the Crisis Pregnancy Centers failed to establish irreparable harm. (EOR 000009) (emphasis added).

Contrary to the district court's characterization, Plaintiffs do not bear the burden of "establishing that the Act violates their First Amendment rights." *Arc of California v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). Instead, Plaintiffs need only show that they are likely to succeed on the merits. *Id.* (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). More particularly, under this Court's sliding scale approach, Plaintiffs need only show that there are "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff" with at least a likelihood of irreparable injury and that the injunction is in the public interest to obtain injunctive relief. *Cottrell*, 632 F. 3d. at 1131, 1135.

"[A]t an irreducible minimum, the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation."

Pimentel v. Dreyfus 670 F.3d 1096, 1105-1106 (9th Cir. 2012). This is a far cry from the district court's statement that Plaintiffs needed to establish that AB775 violated their First Amendment rights, which is a standard more applicable to summary judgment or trial. *See, e.g., Sammartano v. First Judicial Dist. Court* 303 F.3d 959, 973 (9th Cir. 2002) (finding error in a similar misstatement of the applicable rule).

In *Sammartano* as here, the district court refused to assume the existence of irreparable injury because it found that Appellants had not "clearly established" that their First Amendment rights had been violated. *Id.*

> However, even if the merits of the constitutional claim were not 'clearly established" at this early stage in the litigation, the fact that a case raises serious First Amendment questions compels a finding that there exists "the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants'] favor." *Viacom Int'l, Inc. v. FCC*, 828 F.Supp. 741, 744 (N.D. Ca. 1993). "Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Id*. (citing *San Diego Committee v. Governing Board*, 790 F.2d 1471 (9th Cir.1986)). Because the test for granting a preliminary injunction is "a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness," when the harm claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness. *See San Diego Committee*, 790 F.2d at 1473 n. 1.

Id. at 973-74. This Court found that the district court erred when it failed to find irreparable injury in *Sammartano*. *Id.* at 974. It should make a similar finding here.

As the Second Circuit found when analyzing a similar abortion notification requirement, when a law compels faith based pregnancy centers to make abortion-related disclosures or face penalties it is "clearly a direct limitation on speech that creates a presumption of irreparable harm." *Evergreen*, 740 F.3d at 246 (citing *Riley*, 487 U.S. at 795). As the Supreme Court concluded, if "the government were freely able to compel ... speakers to propound political messages with which they disagree ... protection of a speaker's freedom would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575–76 (1995). "Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576. Such a deprivation of First Amendment rights "even for minimal periods of time" unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

As this Court has held, "an alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). The district court's refusal to properly analyze the question of irreparable injury based on an incorrect legal standard related to the merits of Plaintiffs' claim was an abuse of discretion that merits reversal.

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO ADDRESS THE REMAINING PRELIMINARY INJUNCTION FACTORS.

The district court erred when it gave only a passing reference to the balancing of hardships factor and wholly failed to address the question of the public interest. (EOR 000010). As is true with the court's discussion of irreparable injury, the reference to the remaining factors misstates the Plaintiffs' burden regarding the merits of the claim while also concluding without analysis that Plaintiffs did not meet the balancing of hardships factor.

> The Court need not consider the remaining factors because the Crisis Pregnancy Centers have failed to show a highly[sic] likelihood of success or that the balance of hardships tips sharply in their favor. *See Arc of Cal.*, 757 F.3d at 983.

(EOR 000010). As discussed immediately above, the Plaintiffs' burden is not to show a "high likelihood of success" on the merits, but that at a minimum there are "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff" with at least a likelihood of irreparable injury and that the injunction is in the public interest to obtain injunctive relief. *Cottrell*, 632 F. 3d. at 1131, 1135. Even under the Supreme Court's stricter formulation of the test, Plaintiffs are not required to show a "high likelihood of success," but a "likelihood of success." *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7, 20 (2008). That second successive misstatement of the applicable test illustrates the ubiquitous error in the district court's order and the need for reversal.

A. The District Court Erred When It Concluded That Plaintiffs Failed to Show The Balance Of Hardships Tips In Plaintiffs' Favor.

The district court seemingly contradicted itself when it said that it need not consider the remaining factors, but then concluded without analysis that Plaintiffs did not satisfy the balance of hardships factor. (EOR 000010). If the district court claims to not need to consider the balancing of hardships it should not conclude that Plaintiffs failed to meet the standard. Conversely, if the district court wants to conclude that Plaintiffs failed to meet the standard, then it should say it is considering the factor and offer findings supporting its conclusion. Since the Court failed to properly consider the factor, this Court should review it de novo. *Farris v. Seabrook*, 677 F.3d 858, 865 (9th Cir. 2012).

Granting an injunction will preserve the status quo *ante*, which will enable Plaintiffs to continue their operations without having to advertise free and low cost abortions or blanket their walls and internet postings with multiple messages in 48 point type until the court can determine whether the First Amendment permits such compelled speech. This will protect the foundational First Amendment rights that the Supreme Court has characterized as "lying at the foundation of free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The loss of such fundamental freedoms outweighs any purported harm that the state

could assert would occur if Plaintiffs are not compelled to be the state's pamphleteers.

As discussed more fully above, the state has not articulated a compelling state interest that is served by compelling only pro-life pregnancy centers to speak the state's message regarding free and low cost abortions. The state might assert an interest in not having its laws enjoined, but this Court has rejected the argument that such an interest creates a right that can trump the First Amendment rights of citizens affected by the law. *Indep. Living Ctr. of S. California, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 132 S. Ct. 1204 (2012). "[I]n assessing the relative harms to the parties, we reject the Director's suggestion that, merely by enjoining a state legislative act, we create a per se harm trumping all other harms." *Id.*

> [A] state may suffer an abstract form of harm whenever one of its acts is enjoined. To the extent that is true, however, it is not dispositive of the balance of harms analysis. If it were, then the rule requiring "balance" of "competing claims of injury," *Winter*, 129 S.Ct. at 376, would be eviscerated. Federal courts instead have the power to enjoin state actions, in part, because those actions sometimes offend federal law provisions, which, like state statutes, are themselves enactment[s] of its people or their representatives.

Id.. That is precisely the case here. Balancing the threat to Plaintiffs' fundamental constitutional rights of free speech and free exercise of religion issue with the state's interest in not having legislation enjoined tips the scale strongly in favor of

Plaintiffs. The district court's contrary conclusion supported by no factual findings was in error.

B. The District Court Erred When It Failed To Consider Whether Granting An Injunction Would Be In The Public Interest.

The district court further abused its discretion when it failed to even consider the public interest factor. This Court's sliding scale standard permits some flexibility in examining the prerequisites for injunctive relief. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). However, in cases where the public interest is involved, the district court **must** examine whether the public interest favors the plaintiff. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing *Caribbean Marine Services* 844 F.2d at 674; *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 471 (9th Cir.1986) (emphasis added)).

The protection of constitutional rights is of the highest public interest. *Elrod*, 427 U.S. at 373. "[F]ree speech 'serves significant societal interests'. . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986). That interest in receiving information is particularly important in cases

such as this involving compelled speech related to abortion. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014).

As this Court has acknowledged, the public interest inquiry primarily addresses the effect that a challenged law will have on non-parties rather than parties. *Sammartano*, 303 F.3d at 974. Compelled speech laws such as AB775 and similar regulations related to abortion are particularly suspect because they can directly affect listeners as well as speakers. *Stuart*, 774 F.3d at 246. Listeners "may have difficulty discerning that the message is the state's, not the speaker's, especially where the 'speaker [is] intimately connected with the communication advanced.'" *Id*.

That is certainly the case here where the speakers, crisis pregnancy centers, are mandated by the state to be intimately connected with a message about the availability of free or low cost abortions by having to conspicuously post the statements in their facilities or to hand a printed notice to each visitor even before the visitor speaks to a staff member. The listeners, pregnant women seeing or receiving the message about free and low cost abortions immediately upon entering a center, will have difficulty discerning that the message comes from the state instead of the facility, thus altering the content of the faith-based pro-life message presented by Plaintiffs. Women will receive conflicting messages, *i.e.*, that they can receive free and low cost abortions, but that seeking abortion is harmful for

their health and the health of their unborn child. The state mandated notices and disclosures interferes with the Plaintiffs' ability to speak and the women to hear the pro-life message that Plaintiffs are committed to speaking.

As was true in *Sammartano*, "the potential for impact on nonparties is plainly present here." 303 F.3d at 974. Therefore, the public interest favors issuance of a preliminary injunction. The district court's failure to even consider the public interest factor was in error, and this Court should reverse the district court's order denying injunctive relief.

CONCLUSION

The district court erred when it determined that Plaintiffs did not establish even a serious question about the constitutionality of AB775, let alone a likelihood of success on the merits. The court erred in finding that Plaintiffs had not established irreparable harm and then failed to address the other criteria for a preliminary injunction.

For these reasons, Plaintiffs request that this Court reverse the district court's order denying a preliminary injunction and order the court to grant Plaintiffs' motion for preliminary injunctive relief.

Dated: September 6, 2016.

Respectfully Submitted,

/s/ Mary E. McAlister
Mathew D. Staver
Horatio G. Mihet
Mary E. McAlister
Daniel J. Schmid
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776 (telephone)
(407) 875-0770 (facsimile)
court@lc.org
Attorneys for Plaintiffs/Appellants

STATEMENT OF RELATED CASES

Pursuant to 9th Cir. Rule 28-2.6, Plaintiffs advise the Court that currently pending before it are *A Women's Friend Pregnancy Resource Clinic, et al., v. Harris* (Case No. 15-17517, filed Dec. 24, 2015), *Livingwell Medical Clinic, Inc. v. Harris*, (Case No. 15-17497, filed Dec. 22, 2015), and *National Institute Of Family And Life Advocates, d/b/a NIFLA, et. al., v. Harris* (Case No. 16- 55249, filed February 18, 2016). These cases involve First Amendment challenges to the law at issue here, AB775.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because:

✓ this brief contains 12,680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because:

✓ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman 14 point , *or*

this brief has been prepared in a monospaced spaced typeface using _____ with_____.

/s/ Mary E. McAlister
Attorney for Plaintiffs-Appellants

September 6, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2016, I caused the foregoing to be electronically filed with this Court. Service will be effectuated via this Court's ECF/electronic notification system on the following counsel of record.

Attorneys for Defendants:
KAMALA D. HARRIS
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
JONATHAN M. EISENBERG
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6505
Fax: (213) 897-5775
Email: Jonathan.Eisenberg@doj.ca.gov

/s/ Mary E. McAlister
Attorney for Plaintiffs-Appellants

STATUTORY ADDENDUM

STATE OF CALIFORNIA

Assembly Bill No. 775

CHAPTER 700

An act to add Article 2.7 (commencing with Section 123470) to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, relating to public health.

[Approved by Governor October 9, 2015. Filed with Secretary of State October 9, 2015.] legislative counsel's digest

AB775, Chiu. Reproductive FACT Act.

Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, as defined, or when necessary to protect her life or health. Existing law specifies the circumstances under which the performance of an abortion is deemed unauthorized.

This bill would enact the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, which would require a licensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women. The bill would also require an unlicensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that the facility is not licensed as a medical facility by the State of California.

The bill would authorize the Attorney General, city attorney, or county counsel to bring an action to impose a specified civil penalty against covered facilities that fail to comply with these requirements.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) All California women, regardless of income, should have access to reproductive health services. The state provides insurance coverage of reproductive health care and counseling to eligible, low-income women.

Some of these programs have been recently established or expanded as a result of the federal Patient Protection and Affordable Care Act.

(b) Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California

women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

(c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.

(d) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities that are unable to immediately enroll patients into the Family PACT or Presumptive Eligibility for Pregnant Women Medi-Cal programs to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources.

(e) It is also vital that pregnant women in California know when they are getting medical care from licensed professionals. Unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or obtaining care, that these facilities are not licensed to provide medical care.

SEC. 2. The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

SEC. 3. Article 2.7 (commencing with Section 123470) is added to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, to read:

Article 2.7. Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:
(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
(5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
(4) The facility has staff or volunteers who collect health information from clients.

(c) This article shall not apply to either of the following:
(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies. (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

123472. (a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.
(1) The notice shall state: "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 the telephone number]."

(2) The information shall be disclosed in one of the following ways: (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type. (B) A printed notice distributed to all clients in no less than 14-point type.(C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.
(3) The notice may be combined with other mandated disclosures.

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall 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."

(2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.

(3) The notice in the advertising material shall be clear and conspicuous.
"Clear and conspicuous" means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

123473. (a) Covered facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

(1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility. (2)

Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

(b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

ADDENDUM 2:
Examples of required notices in actual typeface requirements

Required disclosure for licensed facilities in 22 point type:

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 the telephone number].

California Health and Safety Code §§123472 (a)(1),(2).

Required disclosure for unlicensed covered facilities in 48-point type:

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.

California Health and Safety Code §§123472(b)(1),(2).