CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners

v.

XAVIER BECERRA, Attorney General of the State of California, in his official capacity,

Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of California, in concert with NARAL Pro-Choice California, enacted Assembly Bill 775 ("AB775"), which compels Petitioners, non-profit, faith-based and pro-life crisis pregnancy centers to disseminate state-mandated advertisements for free and low cost abortions, or face cumulative fines. Under the law, the first message that people entering Petitioners' pregnancy centers must see is a state-mandated notice telling them that there are free and low cost abortions available by calling a certain telephone number. Before Petitioners' staff can say a word about Petitioners' life-affirming message and mission, visitors are told that they need only pick up the phone to get free or low cost abortions. AB775 forces Petitioners to speak a message that is profoundly at odds with their religious beliefs, and directly contrary to the message Petitioners actually wish to speak. The Ninth Circuit affirmed the denial of injunctive relief, concluding AB775 is merely a regulation of professional speech which passes intermediate First Amendment scrutiny.

The Questions Presented for this Court's review are:

1. Whether a law compelling faith-based nonprofit crisis pregnancy centers to advertise free or low-cost abortions available from the state, a message in direct contradiction to the organizations' sincerely held religious beliefs, is a content-based restriction of speech subject to strict scrutiny under *Reed v. Town of Gilbert*, 125 S. Ct. 2218 (2015).

2. Whether a law compelling faith-based nonprofit crisis pregnancy centers to advertise free or low-cost abortions available from the state, a message in direct contradiction to the organizations' sincerely held religious beliefs, conflicts with *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988), and other precedents of this Court and the Courts of Appeal.

3. Whether a law compelling faith-based nonprofit crisis pregnancy centers to advertise free or low-cost abortions available from the state, a message in direct contradiction to the organizations' sincerely held religious beliefs, conflicts with *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and other precedents of this Court and the Courts of Appeal.

PARTIES

Petitioners are Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center; Birth Choice of the Desert and His Nesting Place.

Respondent is the Attorney General for the State of California, Xavier Becerra.

CORPORATE DISCLOSURE STATEMENT

Petitioners, Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center; Birth Choice of the Desert and His Nesting Place are California nonprofit corporations. None of the Petitioners have a parent corporation or are publicly held.

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The Ninth Circuit's decision affirming the district court's denial of a preliminary injunction (App. 1a) is unpublished and available at *Mountain Right To Life, Inc., dba Pregnancy and Family Resource Center; Birth Choice of the Desert; His Nesting Place, Plaintiffs-Appellants, v. Xavier Becerra, Attorney General of the State of California, in his official capacity, Defendant-Appellee*, No. 16-56130, 2017 WL 2655865 (9th Cir. June 19, 2017).

The district court's decision denying Petitioners' motion for a preliminary injunction (App. 5a) is unpublished and available at *Mountain Right To Life, et al., Plaintiffs, v. California Attorney General Kamala Harris, et al., Defendants*, CV 16-00119 TJH (SPx), 2016 WL 3883923 (9th Cir. July 8, 2016).

In the decision below, the Ninth Circuit relied on its decision in *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("NIFLA"), reprinted at App. 21a.

JURISDICTION

The Ninth Circuit issued its decision on June 19, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law … abridging the freedom of speech." U.S. Const. Amend. I.

The text of AB775 is set forth in the Appendix to this Petition, at 74a.

INTRODUCTION

In a thinly disguised effort to shut down messengers who will not advocate for abortion, California, acting in concert with NARAL Pro-Choice California, enacted Assembly Bill 775 ("AB775"), which compels non-profit crisis pregnancy centers to disseminate state-mandated advertisements for free and low cost abortions, or face cumulative fines. Under the law, the first message that people entering crisis pregnancy centers must see is a state-mandated notice telling them that there are free and low cost abortions available from the State. Before center staff can say a word, visitors are told that they need only pick up the phone to get free or low cost abortions. The centers' pro-life message is diluted, and in some cases lost entirely.

AB775 sabotages the free speech and free exercise rights of Petitioners and other nonprofit crisis pregnancy centers, undermining the First Amendment rights that lie at the heart of liberty and cannot be restricted unless the state can satisfy the most exacting scrutiny. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). Acting contrary to that unequivocal directive, the Ninth Circuit has determined that content-based compelled speech is more acceptable when it relates to promoting abortion, and so it need only satisfy a diluted version of intermediate scrutiny. As a result, faith-based pro-life pregnancy centers must promote the state's pro-abortion message on the pain of debilitating fines.

AB775 also penalizes faith-based organizations for exercising their sincerely held religious beliefs by requiring that they promote abortion, which is profoundly contrary to their core beliefs.

Because the Ninth Circuit's decision contravenes this Court's precedents and conflicts with decisions from other circuits addressing substantially similar content-based laws, this Court should grant review.

The need for this Court's review is further evidenced by the fact that the Ninth Circuit's validation of the content-based

compelled speech requirements for pro-life pregnancy centers has spawned similar laws affecting the free speech and free exercise rights of faith-based pregnancy care centers. On July 12, 2017, Hawaii's governor signed into law SB501, which is virtually identical to AB775.[1] On July 26, 2016, Illinois' governor signed into law SB1564, which imposes on pro-life pregnancy centers abortion advertising requirements similar to AB775's.[2] On July 19, 2017, the Northern District of Illinois issued a preliminary injunction halting the enforcement of SB1564, on the ground that plaintiffs are likely to prevail in challenging its constitutionality.[3] This proliferation of "copycat" laws points to the urgent need for this Court's review.

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[1] Senate Bill 501, 29th Legislative Session (2017) *available at* http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=501&year=2017 (last visited July 25, 2017).

[2] SB 1564, Public Act 99-690, codified at 745 Ill. Stat. §§70/6-70/6.2.

[3] Order granting Preliminary Injunction, *NIFLA, et. al. v. Rauner,* No. 16 C 50310 (N.D. Ill. July 19, 2017).

STATEMENT OF THE CASE

Petitioners' Pro-Life Ministries

Petitioners are non-profit, faith-based, pro-life pregnancy counseling centers that provide free, confidential information and services to women facing unplanned pregnancies. (App. 159a-173a). Petitioners were founded upon and operate according to Christian principles–including that human life begins at conception and abortion destroys human life–which permeate all aspects of their services. (*Id.*). The organizations are founded upon the tenets that human life is sacred and that both the mother and her unborn child must be loved and supported throughout the pregnancy and beyond as the mother chooses parenting or adoption. (*Id.*).

Petitioners receive no state or federal funds. (*Id.*). Instead, they are funded through donations from organizations and individuals who share Petitioners' sincerely held religious beliefs about the sanctity of life. (*Id.*). Petitioners cannot in any way support, provide for, refer or otherwise promote abortion. (*Id.*). To do otherwise would violate their sincerely held religious beliefs and jeopardize the support from their donors and supporters. (*Id.*).

Petitioner Mountain Right to Life, Inc., doing business as Pregnancy & Family Resource Center ("PRC"), is licensed to provide limited non-diagnostic ultrasound services, as well as free pregnancy tests, relationship counseling, medical care referrals, information regarding maternity homes, and counseling regarding employment and education options. (App. 160a).

Petitioner Birth Choice of the Desert ("BCD") provides pregnancy tests, counseling and medical referrals. (App. 163a-164a). BCD is not presently licensed to perform limited non-diagnostic ultrasounds, but its board of directors has approved purchasing an ultrasound unit that would enable it to seek licensing to offer those services. (*Id*).

Petitioner His Nesting Place ("HNP"), operates a maternity home for women facing unplanned pregnancies and a crisis pregnancy center that offers free pregnancy tests, food, baby items, counseling, job training and other services to support mothers and their unborn children. (App. 169a).

AB775 and Its Effects

Under AB775 Petitioners and other operators of non-profit pro-life pregnancy care centers must post and disseminate one of two

government-prescribed messages in a government-prescribed manner, or be fined $500 for the first violation and $1,000 for each subsequent violation with no cap. (App. 82a).

Petitioner PRC, and if BCD obtains a license to perform limited non-diagnostic ultrasounds, then BCD, must post the following advertisement in at least 22-point type in a conspicuous place at the entrance to the facility, or in at least 14-point in a printed notice handed to visitors, "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." (App. 79a-80a).

> 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]. (App. 80a).

Petitioner HNP and, until it obtains a license to do limited non-diagnostic

ultrasounds, BCD, must post the following statement in at least two conspicuous places at their facilities in at least **48-point type** in multiple languages and in "conspicuous" type in multiple languages in **all** print **and** digital advertising:

> 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.

(App. 81a).

The multiple language requirement in AB775 means that HNP, as a resident of Los Angeles County, has to provide two copies of **11 versions** of the 29-word notices in 48-point type.[4] BCD, as a resident of Riverside County,

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[4] Arabic, Armenian, Cambodian, Chinese, English, Farsi, Korean, Russian, Spanish, Tagalog and Vietnamese. *See* California Department of Health Care Services, *Threshold and Concentration Languages For Two Plan, GMC, and COHS Counties as of July 2016,* http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2017/APL17-011.pdf (last visited July 26, 2017).

has to provide two copies of **two versions** in 48-point type.[5] PRC, which is located in San Bernardino County, has to provide **two versions** of its required disclosure.[6]

The legislative purpose of the bill purports to be "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." (App. 77a). However, AB775 carves out exemptions from the notice requirements:

> (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.

(App. 79a).

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5 Spanish and English. *Id.*

6 Spanish and English. *Id.*

The bill's sponsors claimed that the exemptions were justified because of pre-emption concerns as to the federally affiliated clinics. (App. 124a). As for the Medi-Cal and FPACT Program clinics, the sponsors claimed that the exemption was justified because those facilities provide "the entire spectrum of services," *i.e.* abortions, contraceptives and other pregnancy related services. (App. 125a). In other words, according to the sponsors, if a clinic provides abortions it automatically provides notice to clients about the availability of free and low-cost abortions (apparently irrespective of the fact that such free and low cost abortions would adversely affect the clinic's income). *Id*.

In fact, the legislative history shows that the true purpose of the legislation is to chill and quash the speech of organizations which have sincerely held religious beliefs against referring for or performing abortions. (App. 91a). This is apparent from the co-sponsor of the bill, NARAL Pro-Choice California, and from the words of the legislative sponsor, Assemblyman David Chiu:

> The author contends that, **unfortunately**, 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.

(App. 91a) (emphasis added).

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. (App. 74a).

PROCEDURAL HISTORY

This is the fourth petition asking this Court to review the Ninth Circuit's improper validation of AB775. **The other three are presently before this Court awaiting conference review on September 25, 2017**.[7]

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[7] *National Institute Of Family and Life Advocates, dba NIFLA, et al., Petitioners, v. Xavier Becerra, Attorney General of California,*

Petitioners filed a Complaint and Motion for Preliminary Injunction in the Central District of California on January 21, 2016. Petitioners challenged AB775, both on its face and as applied, as violative of their free speech and free exercise rights under the First and Fourteenth Amendments to the U.S. Constitution.

The district court took Petitioners' motion for a preliminary injunction under submission after the briefing was completed, and on July 11, 2016, entered its order denying the motion. (App. 5a). With regard to the notice requirement for licensed facilities, the court applied intermediate scrutiny and concluded that AB775 "is a constitutionally permissive regulation of professional speech." (App. 16a). As for the notice requirement for unlicensed facilities, the court applied strict scrutiny and concluded that the provision "advances California's compelling interest in ensuring

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et al., Respondents, No. 16-1140; *Livingwell Medical Clinic, Inc., et al, Petitioners, v. Xavier Becerra, Attorney General of the State of California, in his official capacity, et al., Respondents,* No. 16-1153; *A Woman's Friend Pregnancy Resource Clinic and Alternative Women's Center, Petitioners, v. Xavier Becerra, Attorney General of the State of California, Respondent*, No. 16-1146.

that people know when they are receiving medical care from licensed professionals and when they are not," and "is narrowly tailored because it merely discloses the licensing status of the medical facility's employees." (App. 16a-17a). On that basis, the court concluded that Petitioners failed to demonstrate a likelihood of success that AB775 violates Petitioners' free speech rights. (App. 17a). Similarly, the district court concluded that Petitioners failed to demonstrate a likelihood of success on the merits of their free exercise claim because AB775 is neutral and generally applicable, and satisfies rational basis. (App. 19a).

Petitioners filed a preliminary injunction appeal. On June 19, 2017, a three-judge panel of the Ninth Circuit affirmed the district court's denial of injunctive relief. (App. 1a). The panel concluded that the case was controlled by the Ninth Circuit's earlier opinion in *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("*NIFLA*"), which affirmed denials of preliminary injunctive relief in similar challenges to AB775. (App. 3a).

In *NIFLA*, the Ninth Circuit concluded that AB775 is a content-based restriction on speech, but that it need not meet the exacting standards of *Reed v. Town of Gilbert*, 125 S. Ct. 2218 (2015), because circuit courts have applied less rigorous scrutiny to content-based speech

restrictions related to abortion. (App. 48a). The court also concluded that AB775 regulates professional speech and therefore need only satisfy intermediate scrutiny under the Ninth Circuit's free speech "continuum" announced in *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2013) (App. 53a). The court found that, with regard to the notice for licensed facilities, AB775 survived intermediate scrutiny. (App. 59a). With regard to the notice requirement for unlicensed facilities, the court found that it would survive any level of constitutional scrutiny. (App. 65a). Finally, with regard to the free exercise claim, the Ninth Circuit concluded that AB775 is neutral and generally applicable and therefore need only satisfy, and does satisfy, rational basis review. (App. 68a).

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY APPLICABLE TO CONTENT-BASED SPEECH RESTRICTIONS.

A. The Ninth Circuit's Application of

Intermediate Scrutiny To A Content-based Law Conflicts With This Court's Adoption of Strict Scrutiny Review in Reed and Earlier Precedents.

Where, as the Ninth Circuit admits is true about AB775, a statute imposes content-based restrictions on speech, "those provisions can stand only if they survive strict scrutiny." *Reed*, 125 S.Ct. at 2231. This Court was unequivocal in its conclusion that content-based speech restrictions must undergo the highest level of scrutiny to prevent overt and covert government censorship of disfavored topics. *See id.* at 2233 (Alito, J., concurring).

> Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified *only* if the government proves that they are narrowly tailored to serve compelling state interests.

Id. at 2226 (emphasis added).

A law is content-based if it applies to particular speech because of the topic discussed or the idea or message expressed, *i.e.,* it draws distinctions based on the message the speaker

conveys. *Id.* at 2227. "Some facial distinctions based on message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. *Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny*." *Id.* at 2227 (emphasis added).

In *Reed*, this Court handed down a firm rule: laws that are content-based on their face must satisfy strict scrutiny. *Id.*; *see also id.* at 2233 ("As the Court holds, what we have termed 'content-based' laws *must satisfy strict scrutiny*.") (Alito, J., concurring)(emphasis added). If there was any doubt, the concurrences also note that, under *Reed*, content discrimination is "an *automatic* strict scrutiny trigger, leading to almost certain legal condemnation." *Id.* at 2234 (Breyer, J., concurring) (emphasis added); *id.* at 2236 ("Says the majority: When laws single out specific subject matter, they are 'facially content based'; and when they are facially content based, *they are automatically subject to strict scrutiny*." (Kagan, J., concurring) (emphasis added)).

In addition, laws that appear to be facially neutral can be content based if they cannot be justified without reference to the content of the regulated speech, or were

adopted because of disagreement with the message the speech conveys. *Id.* at 2227. All such laws must be subject to strict scrutiny. *Id.*

Of particular relevance is this Court's explanation of why content-based restrictions are suspect: "'The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" *Id.* at 2229 (quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J. dissenting)). Similarly, the *Reed* Court reiterated that the state cannot use the guise of "regulation of professional speech" to escape strict scrutiny review. *Id.* "'[I]t is no answer to say that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438-39 (1963)). "A law that is content based on its face is subject to strict scrutiny *regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech*." *Id.* at 2228 (emphasis added). Indeed, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such

statutes to suppress disfavored speech." *Id.* at 2229.

Reed reinforces this Court's longstanding rejection of speech controls disguised as regulations. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez,* 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). The Constitution "'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.'" *Id.* at 717 (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)). Content-based restrictions pose "substantial and expansive threats to free expression." *Id.* Consequently, content-based restrictions on speech have been permitted only in very limited circumstances, *i.e.*, incitement to lawless action, obscenity, defamation, child pornography, speech integral to criminal conduct, "fighting words," fraud and true threats. *Id.* Adhering to those limited exceptions protects the free exchange of ideas inherent in the free speech clause. *Id.* at 718.

Absent from that list, or from this Court's precedents, is the exception for speech related

to abortion upon which the Ninth Circuit relied for its departure from strict scrutiny review. The *NIFLA* panel affirmed that *Reed* "expressly stated that '[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests,' *Id.* at 2226." (App. 46a). However, the panel brazenly concluded that *Reed* "does not require us to apply strict scrutiny in this case," because "*we* have recognized that not all content-based regulations merit strict scrutiny." (App. 46a) (emphasis added) (citing *United States v. Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc)). By "we," of course, the Ninth Circuit meant itself, as if it could somehow overrule this Court.

Notably the case cited by the Ninth Circuit for the proposition that *Reed* does not require strict scrutiny review, *Swisher*, recognized the limited exceptions to strict scrutiny described in *Alvarez* and found that the law under review could not survive strict scrutiny. *Swisher,* 811 F.3d at 317-18. The en banc court in *Swisher* specifically declined to add to the list of exceptions set forth in *Alvarez*, and therefore does not support the *NIFLA* panel's conclusion that *Reed*'s strict scrutiny analysis is not controlling.

B. The Ninth Circuit's Decision Conflicts With McCullen.

The *NIFLA* panel's attempt to create a new abortion exception to strict scrutiny review of content-based speech restrictions also contradicts this Court's invalidation of an abortion-related speech restriction in *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). While this Court determined that the Massachusetts abortion buffer zone statute in *McCullen* was content-neutral, it also stated that, if it were content-based, it would have to survive strict scrutiny. *Id.* at 2530.

In *McCullen*, the petitioners argued that the abortion clinic buffer zone law was content-based because it discriminated only against abortion-related speech and, by exempting clinic workers from the provisions, favored one viewpoint about abortion over another. *Id.* "If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest." *Id.* (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Contrary to the Ninth Circuit's opinion, a content-based restriction on speech related to abortion, like other content-based restrictions, is always subject to strict scrutiny. *See id.*

Nevertheless, the *NIFLA* panel said that it was not required to apply strict scrutiny to AB775 because "courts have routinely applied a lower level of scrutiny when states have compelled speech concerning abortion-related disclosures." (App. 48a) (citing *Stuart v. Camnitz*, 774 F.3d 238, 246, 248 (4th Cir. 2014); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008)). However, as the panel recognized, those circuit court decisions were themselves based on misinterpretations of this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The circuit courts used *Casey* and *Gonzales* to justify more deferential standards of review. (App. 48a). However, as the *NIFLA* panel acknowledged, neither *Casey* nor *Gonzales* announced a level of scrutiny to apply in abortion-related disclosure cases, but merely reiterated that states can regulate professional speech. (App. 52a). Consequently, neither *Casey* nor *Gonzales* supports the *NIFLA* panel or other circuit courts' contention that strict scrutiny does not apply to abortion regulations.

Therefore, the conclusion that content-based restrictions on speech related to abortion

are not subject to strict scrutiny has no basis in this Court's precedents. In fact, it is directly contradicted by *McCullen*. Therefore, this Court should grant review to resolve the conflict on this issue of great constitutional significance.

C. The Ninth Circuit's Determination That The Act Need Only Satisfy Intermediate Scrutiny As A Regulation Of Commercial Professional Speech Conflicts With This Court's Precedents According Strict Scrutiny Review When Services Are Provided Pro Bono.

The *NIFLA* panel's determination that AB775 regulates commercial professional speech so that it only need satisfy intermediate scrutiny also directly conflicts with this Court's precedents regarding communications by professionals offering information and services pro bono. *NAACP v. Button*, 371 U.S. 415 (1963); *In Re Primus*, 436 U.S. 412 (1978). In *Button*, the Court concluded that the non-profit NAACP's solicitation of people to bring civil rights suits was protected First Amendment activity. 371 U.S. at 428-29. The solicitation was not regarded as regulable "professional

speech" but as a mode of political expression effectuated through group activity falling within the sphere of associational rights guaranteed by the First Amendment. *Id.*

In *Primus*, this Court similarly differentiated between regulating attorney solicitation for pecuniary gain and restricting communications related to the availability of pro bono services to address civil rights violations. *Primus*, 436 U.S. at 434-35. This Court said that, while the state can "proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences," the same is not true for information provided by a non-profit organization relating options for addressing particular issues. *Id.* at 437 (contrasting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978)). In the latter case, the information is not in the nature of a commercial transaction, but is the dissemination of information aimed at helping the recipient make decisions. *Id.* at 437-38. As such, it is akin to political and ideological expression and "must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights.'". *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)).

Here, Petitioners are non-profits providing free services, including non-

diagnostic ultrasounds, pregnancy testing, medical referrals and similar life-affirming information for unplanned pregnancies. (App. 160a-169a). As was true in *Primus*, Petitioners are not seeking to enter into a commercial transaction or otherwise obtain pecuniary gain from their interactions with clients. Instead, as was true in *Primus*, Petitioners are seeking to communicate information to pregnant woman to inform them of their life-affirming options for dealing with the issue of an unplanned pregnancy. (App. 160a-169a).

Under *Primus* and *Button*, Petitioners' activities are protected First Amendment expression, the regulation of which must be subject to strict scrutiny review. The Ninth Circuit's conclusion that it is professional speech subject to only intermediate scrutiny conflicts with this Court's precedents and should be reviewed by this Court.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY APPLICABLE TO LAWS COMPELLING THE CONTENT OF SPEECH.

The *NIFLA* panel's departure from strict scrutiny review also contradicts this Court's precedents holding that laws compelling speech are presumptively unconstitutional unless they can survive strict scrutiny. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("*AID*"). "'At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). Therefore, "'freedom of speech prohibits the government from telling people what they must say.'" *Id.* (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61, (2006)). *See also, West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). When, as is the case with AB775, the state enacts a direct regulation of speech that mandates what the speaker must say, it "plainly" violates the First Amendment. *AID*, 133 S.Ct. at 2327.

Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," this Court considers laws mandating speech to be content-based restrictions. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). While "[t]here is certainly some difference

between compelled speech and compelled silence . . . in the context of protected speech, the difference is without constitutional significance." *Id.* at 796. Indeed, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Id.* (emphasis original). "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Turner Broadcasting*, 512 U.S. at 642; *see also Riley*, 487 U.S. at 798 ("We believe, therefore, that [compelled] content-based regulation is subject to exacting First Amendment scrutiny.").

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. The state "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id* at 579.

Here, AB775 is compelling precisely what this Court condemned in *Riley* and *Hurley*. The state is compelling Petitioners to affirm that visitors to their facilities can call to obtain free and low cost abortions in one breath and then express their sincerely held religious beliefs against abortion in the next. As the author of the bill admitted, the state is interfering with Petitioners' speech precisely to discourage the disfavored message against abortion. (App. 91a). Such regulations are unconstitutional unless they can survive the most exacting strict scrutiny. Indeed, AB775 and the panel's decision affirming it are running roughshod over "the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley*, 487 U.S. at 799; *Turner Broadcasting*, 512 U.S. at 642.

Nevertheless, the Ninth Circuit subjected AB775 to only intermediate scrutiny, in direct contravention of this Court's longstanding precedent. This decision is irreconcilable with

this Court's jurisprudence. This Court should grant review.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE PRECEDENTS OF OTHER CIRCUITS CONCERNING THE APPROPRIATE LEVEL OF SCRUTINY APPLICABLE TO CONTENT-BASED AND COMPELLED SPEECH RESTRICTIONS.

A. The Ninth Circuit's Application of Intermediate Scrutiny Conflicts With Decisions of the Second And Fourth Circuits Addressing Substantially Similar Abortion Notification Laws.

The Ninth Circuit's departure from the strict scrutiny review required under *Reed, McCullen*, and *Riley* conflicts with decisions in the Second and Fourth circuits which invalidated content-based abortion notification provisions substantially similar to AB775. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184 (4th Cir. 2013) (en banc); *Greater Baltimore Ctr. for Pregnancy*

Concerns, Inc. v. Mayor & City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012), *reversed on procedural grounds on reh'g en banc*, 721 F.3d 264 (4th Cir. 2013). This inter-circuit split on the critically important issue of the standard of review for content-based speech restrictions should be resolved by this Court.

1. The Panel's Decision Below Conflicts with The Second Circuit's Decision in Evergreen Ass'n Applying Strict Scrutiny.

In *Evergreen Ass'n*, the Second Circuit applied strict scrutiny to invalidate government-mandated disclosures that, like AB775, required pregnancy services centers immediately to accost their visitors with a prescribed message. 740 F.3d at 238. The disclosures did not as explicitly promote abortion as do the disclosures in AB775, but were still found to be subject to strict scrutiny under *Riley* and *Turner Broadcasting*. *Id.* at 249. While AB775 requires that licensed facilities state that California offers free and low cost abortions, the city law in *Evergreen Ass'n* required only that the facilities state whether they provide referrals for abortion and that the state recommends that women see a physician. *Id.* at 238. Still, that law was found to be an impermissible content-based

restriction on the pregnancy centers' free speech rights because it would alter the speech a pregnancy services center would otherwise engage in with clients. *Id.* at 249-50.

The Second Circuit found that the compelled speech involved "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." *Id.* at 249. Such "'expression on public issues has always rested on the highest rung on the hierarchy of First Amendment values.'" *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). "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.* at 249 (citing *Riley*, 487 U.S. at 795).

> The Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues of prenatal care, emergency contraception, and abortion. The centers must be free to formulate their own address.

Id. at 249-50.

Regarding the compelled advertising of the state's purported recommendation that pregnant women consult a physician, the Second Circuit said, "the Government Message mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue deprives Plaintiffs of their right to communicate freely on matters of public concern." *Id.* at 250. The government cannot mandate that pregnancy service centers affirmatively espouse the government's position on a contested public issue through regulations that threaten to fine, de-fund or forcibly shut down non-compliant entities. *Id.* at 250-51. Therefore, the physician notification provision also could not survive strict scrutiny. *Id.* at 251.

The Ninth Circuit's determination that a mandated message (which much more explicitly promotes abortion than did the disclosure in *Evergreen Ass'n*) is merely a regulation of professional speech subject to intermediate scrutiny conflicts with the Second Circuit's decision which, consistent with *Riley* and *Tuner Broadcasting*, concludes that such compelled speech on important public issues must be subject to strict scrutiny. The conflict should be resolved by this Court.

2. The Panel's Decision Below Conflicts with The Fourth Circuit's Decisions in Centro Tepeyac and Greater Baltimore Ctr. Applying Strict Scrutiny.

The Fourth Circuit applied strict scrutiny to invalidate two regulations that, like AB775, sought to compel pregnancy care centers to disseminate the government's messages. *Centro Tepeyac,* 722 F.3d 184; *Greater Baltimore Ctr. for Pregnancy Concerns,* 683 F.3d 539. In both cases, the court found that the challenged provisions regulated non-commercial, fully protected speech, not, as the Ninth Circuit claims regarding AB775, commercial professional speech.

In *Centro Tepeyac,* the en banc court affirmed the district court's determination that compelling pregnancy care centers to advertise the state's encouragement of pregnant women to see physicians was a content-based speech restriction under *Riley*. 722 F.3d at 189. In addition, while some aspects of the pregnancy centers' speech could be regarded as commercial, "such commercial speech would at least be 'intertwined with [fully protected] speech,' in any event triggering strict scrutiny." *Id.* (citing *Centro Tepeyac v. Montgomery Cnty.*, 779 F.Supp.2d 456, 463-64 (D.Md.2011)). The

court upheld the district court's conclusion that the mandated notice did not satisfy strict scrutiny. *Id.* at 192.

Similarly, in *Greater Baltimore Ctr. for Pregnancy Concerns,* the Fourth Circuit found that a city ordinance that compelled pregnancy centers to post notices disclosing that they do not provide abortions was subject to strict scrutiny because it impeded fully protected, non-commercial speech. 683 F.3d 539, 555–56.[8] "Content-based [speech] regulations are presumptively invalid." *Id.* (quoting *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992)). "The City thus bears the burden of rebutting the presumption of invalidity. Indeed, '[i]t is rare that a regulation restricting speech because of its content will ever be permissible.'" *Id.* (citation omitted). The challenged ordinance did not represent one of the rare occasions, but

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[8] On rehearing en banc, the Fourth Circuit reversed the panel decision and remanded the case to the district court on the other, procedural question raised on appeal, *i.e.*, whether the district court improperly failed to permit discovery before transforming the motion to dismiss to one for summary judgment. 721 F.3d 264 (4th Cir. 2013). The en banc panel did not reverse the panel's affirmation of the finding that the notice was subject to strict scrutiny.

was invalid because it was "not narrowly tailored to promote the City's interest so as to justify its intrusion on the Pregnancy Center's speech." *Id.* at 559. (citing *Riley*, 487 U.S. at 791 for the proposition that the ordinance violates the First Amendment's presumption that "speakers, not the government, know best both what they want to say and how to say it.").

In both cases, the Fourth Circuit, consistent with *Riley*, *Turner Broadcasting* and this Court's other precedents, decided that compelling pro-life pregnancy centers to act as the government's messengers regarding the availability of abortion is antithetical to the First Amendment and must withstand strict scrutiny. The Ninth Circuit's contrary conclusion does not comport with these decisions.

As Judge Wilkinson said, "[b]ecause the dangers of compelled speech are real and grave, courts must be on guard whenever the state seeks to force an individual or private organization to utter a statement at odds with its most fundamental beliefs." *Centro Tepeyac* 722 F.3d at 193 (Wilkinson, J. concurring). The Second and Fourth Circuits appropriately heeded that advice. The Ninth Circuit did not, and has created a conflict on the critically important issue of whether the government can compel speakers to utter the government's

message by labeling it "professional speech" and subjecting it to deferential intermediate scrutiny. This Court should resolve the conflict.

B. The Ninth Circuit's Conclusion That the Act Is A Permissible Regulation of Professional Speech Conflicts With Decisions in the Fourth and Eleventh Circuits.

The Ninth Circuit's decision that AB775 is a constitutionally permissible regulation of professional speech conflicts with Fourth Circuit and Eleventh Circuit decisions invalidating content-based regulations of physician speech. *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc). The Ninth Circuit's decision that the compelled promotion of California's free and low cost abortions is a valid regulation of commercial professional speech conflicts with the other circuits' rulings that comport with *Riley* and *Reed* and find such disclosures constitutionally impermissible.[9]

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[9] Petitioners do not concede that AB775 should be characterized as a regulation of professional speech, but present these cases to further illustrate the conflict between the Ninth

1. The Ninth Circuit's Decision Conflicts With The Fourth Circuit's Decision In Stuart.

In *Stuart,* the Fourth Circuit found that a requirement that physicians perform an ultrasound and describe the physical attributes of the unborn child before performing an abortion was quintessential compelled speech that impermissibly restricted physicians' speech. 774 F.3d at 250. In finding that the provision had to satisfy at least heightened scrutiny, the *Stuart* court said:

> Compelled speech is particularly suspect because it can directly affect listeners as well as speakers. 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. at 246 (quoting *Hurley*, 515 U.S. at 576). Compelled speech is particularly suspect when, as in *Stuart* and here, the compelled statement is ideological. *Id.* In Stuart, the state admitted

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Circuit's decision in *NIFLA* and other circuits examining similar speech restrictions.

that the purpose and anticipated effect of the challenged provision was to convince women seeking abortions to change their minds or reassess their decisions. *Id.*

That intended effect on the listener was particularly pertinent to the Fourth Circuit's determination that the provision could not survive under either intermediate or strict scrutiny. *See id.* at 246-48. "The court can and should take into account the effect of the regulation on the intended recipient of the compelled speech, especially where she is a captive listener." *Id.* at 250.

> This statutory provision interferes with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient's psychological health, interfering with the physician's professional judgment, and compromising the doctor-patient relationship. We must therefore find the Display of Real–Time View Requirement unconstitutional.

Id. "The coercive effects of the speech are magnified when the physician is compelled to

deliver the state's preferred message in his or her own voice." *Id.* at 253.

The same captive listener, *i.e.*, a woman facing an unplanned pregnancy, the same effects upon the listener's psychological health, and the same coercive effect of Petitioners having to deliver the state's message "in their own voice" via prominent notifications on site and online, are present in AB775. Women entering Petitioners' faith-based facilities that are committed to alternatives to abortion must be immediately accosted with the message that they can obtain free and low cost abortions. The visitor will be confused before even engaging with Petitioners' staff. Just as the message in *Stuart* was admittedly ideological, *i.e.* seeking to dissuade women from abortion, the message in AB775 is admittedly ideological, *i.e.,* aimed at preventing pro-life organizations from dissuading women to obtain abortions. (App. 90a). As was true of the regulation invalidated in *Stuart*, AB 775 interferes with the relationship between Petitioners' staff and clients by immediately putting staff on the defensive, having to explain the state-mandated message that is antithetical to Petitioners' chosen message.

The Ninth Circuit's failure to acknowledge these same constitutional infirmities in AB775 conflicts with the Fourth

Circuit's decision. Because the effects of compelled speech on the listener and speaker are critically important to protecting the cherished free speech rights of Petitioners and their clients, this Court should accept review and resolve the conflict.

2. The Ninth Circuit's decision conflicts with the Eleventh Circuit's decision in Wollschlaeger.

Similarly, the Ninth Circuit's decision in *NIFLA* conflicts with the Eleventh Circuit's en banc decision invalidating a content-based speech restriction that was less burdensome on fundamental rights than AB775. *Wollschlaeger,* 848 F.3d at 1318. The statute at issue in *Wollschlaeger* did not, as AB775 does here, compel speakers to utter a state-mandated message antithetical to the foundational tenets of their organizations. *Id.* at 1307. Medical professionals were limited in what they could say or do with regard to their patients' gun ownership, but were not compelled, as Petitioners are here, to disseminate a state-mandated advertisement advocating a position on the issue. *Id.* Nevertheless, in keeping with this Court's decision in *Reed*, the Eleventh Circuit determined that portions of the law limiting what physicians could say were

content-based restrictions on speech that could not withstand either heightened or strict scrutiny. *Id.* at 1311.

As the *Wollschlaeger* court said, review of content-based provisions must be "skeptical of the government's ability to calibrate the propriety and utility of speech on certain topics." *Id.* at 1308. The state must present sufficient evidence to demonstrate that the harm it is seeking to alleviate through the speech restriction is real, not conjectural, and that the restriction is narrowly tailored to alleviate the problem. *Id.* at 1312. Florida offered anecdotal evidence from six citizens whose rights were interfered with by intrusive questioning from physicians. *Id.* The en banc court found that was not enough to justify limiting physicians' ability to speak about gun ownership and invalidated the provisions. *Id.*

Here, California had no evidence of women's rights being infringed by pro-life pregnancy centers not espousing the state's pro-abortion message. (App. 89a-113a). Instead, the State offered opinions regarding the nature of Petitioners' and other organizations' pro-life resource centers, saying that it is "unfortunate" that they exist. (App. 90a). California also offered surveys about how informed women are about abortion availability in the state, but did not tie the levels of information or lack of

information to the existence of pro-life pregnancy centers. (App. 89a-113a). Nevertheless, the *NIFLA* panel found that the state presented sufficient evidence to not merely limit the speech of pro-life pregnancy centers (as did the provision in *Wollschlaeger*) but to compel them to utter the state's message that advertises free and low cost abortions, procedures that are antithetical to the centers' raison d'etre. (App. 60a). That determination that AB775 is narrowly tailored to advance a significant state interest directly conflicts with the Eleventh Circuit's determination.

The *NIFLA* court's decision directly conflicts with the *Wollschlaeger* court's determination utilizing this Court's decision in *Reed*. Because the conflict affects the critical question of when a state can compel speech without violating the First Amendment, this Court should grant review and resolve the conflict.

IV. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY APPLICABLE TO LAWS SINGLING OUT RELIGIOUS

SPEECH FOR DISFAVORED TREATMENT.

The *NIFLA* court's determination that AB775 need only satisfy rational basis review for purposes of Petitioners' Free Exercise claim directly conflicts with this Court's longstanding precedents, just affirmed in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), which hold that laws which punish those exercising their sincerely held religious beliefs are presumed unconstitutional and must satisfy strict scrutiny. It also conflicts with decisions in the Third Circuit which found that apparently neutral laws that evince a discriminatory intent must satisfy strict scrutiny. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002).

A. The Ninth Circuit *NIFLA* Decision Conflicts With This Court's Free Exercise Precedents As Affirmed in *Trinity Lutheran.*

Laws, like AB775, through which the government seeks to coerce individuals or organizations to violate their sincerely held religious beliefs, are particularly suspect since

they strike at the heart of the Free Exercise clause, *i.e.,* protecting religious exercise from interference by the state. *Bowen v. Roy*, 476 U.S. 693, 700 (1986) (citing *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). This Court has consistently re-affirmed that the Free Exercise Clause guards against the government's imposition of "special disabilities on the basis of religious views or religious status." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). *See also*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). Laws which so penalize religious free exercise are subject to the most exacting scrutiny. *Lukumi*, 508 U.S. at 546.

Consequently, while *Smith* announced more deferential treatment for laws in which religious adherents were seeking special dispensation from an otherwise general criminal law, it did not alter this Court's longstanding application of strict scrutiny to laws that impose special penalties on religious exercise. 494 U.S., at 877.

In *Lukumi*, this Court looked beyond apparent facial neutrality and uncovered an improper discriminatory purpose of prohibiting sacrificial rituals integral to the plaintiffs' Santeria religion. 508 U.S. at 533. This Court

reiterated that, even after *Smith*, laws which explicitly or implicitly discriminate against religious practices or place special disabilities on religious exercise are invalid unless they can survive strict scrutiny. *Id.* As this Court explained:

> [I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, *see Employment Div., Dept. of Human Resources of Oregon v. Smith, supra*, 494 U.S., at 878–879, 110 S.Ct., at 1599–1600; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Id.

This Court explained that the Free Exercise Clause extends beyond facial discrimination to forbid "subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Id.* at 534 (citations omitted).

> 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. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

Id. (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

The Ninth Circuit eschewed these precedents when it failed to look beyond the provisions of AB775 before declaring it neutral and generally applicable, and therefore subject only to rational basis review. (App. 66a-68a). As was true of the statutes invalidated in *Lukumi*, looking below the surface of AB775 reveals a thinly masked hostility toward faith-based pregnancy centers which operate according to sincerely held religious beliefs that forbid them from performing or referring for abortions. (App. 90a).

> The author contends that, **unfortunately**, 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.

(App. 90a)(emphasis added).

The state also exempted from the notice requirements facilities that already provide or refer for abortions, under the guise that it is not necessary for those operations to provide the notice to clients. (App. 123a-125a). However, if the state intended that AB775 would be neutral and generally applicable, then it would not exempt facilities that provide abortions from informing clients of the availability of **free and low cost** abortions.

Just because a facility offers abortions or referrals does not mean that its clients know about free and low cost services or have any less entitlement to immediate notification of the availability of such subsidies. In fact, centers which charge for these services have an incentive to **not** tell clients about free and low cost services, which would cut into their income. Consequently, the need for women contemplating abortion to be informed of free or low cost abortions would arguably be greater than would the need for women seeking the services of pro-life pregnancy centers. The

exemption for facilities already providing abortions, therefore, does not arise from a concern about women being ill-informed about state abortion services. Instead of demonstrating that AB775 is neutral and generally applicable, the exemptions demonstrate that the state's true aim is to punish those centers that cannot as a matter of sincere religious belief advertise for free and low cost abortions. As was true of the exemptions struck down in *Lukumi*, the exemptions here demonstrate that the purported facial neutrality of AB775 is a thin façade masking hostility toward faith-based organizations that will not perform or refer their clients for abortions.

The *NIFLA* panel's determination that AB775 is neutral and generally applicable and therefore subject only to rational basis review directly conflicts with this Court's decisions in *Smith* and *Lukumi*, as well as this Court's affirmation of *Smith* and *Lukumi* in *Trinity Lutheran*. The conflict is exceptionally important as it undermines fundamental free exercise rights by condoning covert religious gerrymandering that punishes organizations and individuals who do not adhere to the state's ideology. This Court should accept review to resolve the conflict.

B. The Ninth Circuit's Decision in *NIFLA* Conflicts With Free Exercise Decisions In The Third Circuit.

The *NIFLA* court's determination that AB 775 is neutral and generally applicable and therefore need only satisfy rational basis also conflicts with decisions in the Third Circuit that, in keeping with *Lukumi*, looked beyond apparent facial neutrality to uncover impermissible religious discrimination.

In *Fraternal Order of Police*, the Third Circuit applied this Court's reasoning in *Lukumi* to strike down a police department decision that denied religious exemptions to its "no beard" policy. 170 F.3d at 367. The court found that the Department's claim that the "no beard" policy was necessary to foster a uniform appearance was undermined by the available exemption for medical reasons. *Id.* at 366. That exemption "raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* When the government makes such a value judgment, then the law is not neutral and

generally applicable and must survive strict scrutiny. *Id.*

Similarly, in this case, the state's argument that the notification regarding free and low cost abortions is necessary to ensure that all women are informed of their availability is undermined by exemptions for facilities that provide abortions. If it is critical that all women know that they can call a certain number and obtain information about free and low cost abortions, then the notice requirement should apply to all facilities that pregnant women might visit. Singling out for exemption those that provide abortions indicates that the state has made a value judgment that facilities which do not have religious objections to abortion are more valued than those who do have such objections. Under *Lukumi* and *Fraternal Order of Police*, that should trigger strict scrutiny review. The Ninth Circuit's contrary decision is in direct conflict.

In *Tenafly*, the Third Circuit followed *Lukumi* and *Fraternal Order of Police* and found that, despite being facially neutral, the challenged ordinance was not neutral and generally applicable and therefore had to satisfy strict scrutiny. 309 F.3d at 158-59.

> On its face, Ordinance 691 is neutral and generally applicable.

> But "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded [from constitutional challenge] by mere compliance with the requirement of facial neutrality." *Lukumi,* 508 U.S. at 534, 113 S.Ct. 2217. We must look beyond the text of the ordinance and examine whether the Borough enforces it on a religion-neutral basis, as "the effect of a law in its real operation is strong evidence of its object."

Id. at 167.

That extra-textual review revealed that beneath the neutral façade was religiously motivated discrimination as the borough permitted exemptions from the Ordinance for secular and even non-Orthodox Jewish religious symbols. *Id*. at 167-68.

> Just as the exemptions for secularly motivated killings in *Lukumi* indicated that the city was discriminating against Santeria animal sacrifice, and just as the medical exemption in *Fraternal Order of Police* indicated that the police department was discriminating against religiously

> motivated requests to grow beards, the Borough's invocation of the often-dormant Ordinance 691 against conduct motivated by Orthodox Jewish beliefs is "sufficiently suggestive of discriminatory intent," *Fraternal Order of Police*, 170 F.3d at 365, that we must apply strict scrutiny.

Id. at 168.

Likewise, in this case, the state's adoption of exemptions for facilities that provide abortions but do not necessarily notify clients of the free and low cost abortions which the state says is so critical for women to know is sufficiently suggestive of discriminatory intent to require strict scrutiny review. The individualized exemptions mean that AB775 is not neutral and generally applicable under *Lukumi* and therefore not entitled to deferential rational basis review.

The Ninth Circuit's contrary conclusion and application of rational basis to AB775 conflicts with *Fraternal Order of Police*, *Tenafly* and *Lukumi* on the critically important issue of what level of scrutiny must be applied to a facially neutral but operationally religiously biased statute. Because of the importance of the issue, this Court should grant review.

CONCLUSION

The Ninth Circuit's decision in *NIFLA*, under which the district court's decision in this case was affirmed, conflicts with the free speech and free exercise precedents of this Court and the Courts of Appeals. Because these issues involve the extraordinarily important question of the proper standard of review for violations of cherished First Amendment rights, this Court should grant this Petition to resolve the conflicts.

Dated: August 4, 2017.

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APPENDIX

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals,
Ninth Circuit.

MOUNTAIN RIGHT TO LIFE, INC., DBA Pregnancy and Family Resource Center; Birth Choice of the Desert; His Nesting Place,
Plaintiffs-Appellants,
v.
Xavier BECERRA, Attorney General of the State of California, in his official capacity,
Defendant-Appellee.

No. 16-56130
|
Submitted June 9, 2017* Pasadena, California
|
Filed June 19, 2017

Appeal from the United States District Court for the Central District of California, Terry J.

Hatter, District Judge, Presiding, D.C. No. 5:16-cv-00119-TJH-SP

Attorneys and Law Firms

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Jonathan Michael Eisenberg, Deputy Attorney General, California Department of Justice, Los Angeles, CA, for Defendant-Appellee

Before: LIPEZ,[**]BEA, and HURWITZ, Circuit Judges.

MEMORANDUM[***]

***1** California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("the Act") requires licensed crisis pregnancy centers to notify clients that they may be eligible for free or low-cost abortions and unlicensed facilities to notify clients that they are not state-licensed. In this action, three faith-based, non-profit crisis pregnancy centers, Mountain Right to Life, Inc. (d/b/a Pregnancy and Family Resource Center), Birth Choice of the Desert, and His Nesting

Place, argue that the Act violates the First Amendment free speech and free exercise of religion clauses. The district court denied Plaintiffs' motion for a preliminary injunction. We have jurisdiction over Plaintiffs' appeal from the denial of the injunction under 28 U.S.C. § 1292(a)(1) and affirm, because this case is controlled by our intervening opinion in *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("*NIFLA*").

1. The district court properly concluded that Plaintiffs cannot demonstrate a likelihood of success on the merits of their First Amendment free speech or free exercise claims. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The Act regulates licensed covered facilities' professional speech, and is therefore subject to intermediate scrutiny, which it survives. *NIFLA*, 839 F.3d at 838-42. The notice requirement for unlicensed covered facilities survives any level of review. *Id.* at 843-44. And as to the free exercise claim, the Act is a neutral law of general applicability that survives rational basis review. *Id.* at 844-45.

2. Because Plaintiffs have not shown a likelihood of success on the merits of their First Amendment claim, nor have they raised serious questions going to the merits, we need not consider the remaining *Winter* factors.

845 & n.11.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2017 WL 2655865 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without ral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Kermit Victor Lipez, United States Circuit Judge for the First Circuit, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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Only the Westlaw citation is currently available.
United States District Court,
C.D. California, Western Division.

Mountain Right To Life, et al., Plaintiffs,
v.
California Attorney General Kamala Harris, et al., Defendants.

CV 16-00119 TJH (SPx)
|
Signed 07/08/2016

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Order

Terry J. Hatter, Jr., Senior United States District Judge

The Court has considered Plaintiffs' motion for

preliminary injunction, and Defendant Dr. Karen Smith's motion to dismiss, together with the moving and opposing papers.

In October, 2015, the California Legislature enacted the Reproductive FACT Act ["The Act"], which came into effect on January 1, 2016. The Act's purpose is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them. Cal. Assem. Bill No. 775 (2015-2016 Reg. Sess.). The Act requires statutorily-defined healthcare facilities to post a proscribed notice in English and "any other appropriate language." Cal. Health & Safety Code § 123472. The content of the required notice is determined upon whether the facility is defined under the Act as a licensed covered facility or an unlicensed covered facility. Cal. Health & Safety Code § 123471.

Licensed covered facilities are either licensed by California or operated by a licensed entity whose primary purpose is providing family planning or pregnancy-related services, and perform at least two of six defined functions under Cal. Health & Safety Code § 123471(a). The Act requires licensed covered facilities to disseminate to their clients on site, in a public, print, or digital notice, the following:

> "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)."

Cal. Health & Safety Code § 123472(a).

Unlicensed covered facilities are those not licensed by California and do not have a licensed medical provider whose primary purpose is providing pregnancy-related services, and perform at least two of four defined functions under Cal. Health & Safety Code § 123471(b). The Act requires that unlicensed covered facilities disseminate, clearly and conspicuously, on site and in any print and digital advertising, the following notice: "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." Cal. Health & Safety Code § 123472(b).

A covered facility that violates the Act must be given reasonable notice of noncompliance,

informing the facility that it is subject to a civil penalty of $500.00 for a first offense, and $1000.00 for each subsequent offense, if it does not correct the violation within 30 days from the date the notice is sent to the facility. Cal. Health & Safety Code § 123473(a).

Here, Plaintiffs identify themselves as faith-based non-profit crisis pregnancy centers ["Crisis Pregnancy Centers"]. The Crisis Pregnancy Centers are covered facilities under the Act. Mountain Right to Life, Inc. is a licensed covered facility under Cal. Health & Safety Code § 123471(a), while Birth Place of the Desert and His Nesting Place are unlicensed covered facilities under Cal. Health & Safety Code § 123471(b). Birth Place of the Desert may become a licensed covered facility if it obtains an ultrasound license.

The Crisis Pregnancy Centers filed this lawsuit seeking injunctive relief to block enforcement of the Act. The Crisis Pregnancy Centers' claims are based on the freedom of speech and free exercise of religion clauses of the First Amendment of the United States Constitution. This action was filed on January 21, 2016, after the effective date of the Act.

Now, here, the Crisis Pregnancy Centers move for a preliminarily injunction to prevent Kamala Harris, as California Attorney General,

and Dr. Karen Smith, as Director of the California Department of Public Health, from enforcing the Act [collectively "California"]. Smith, also, moves to dismiss for lack of standing and failure to state a claim.

Smith's Motion to Dismiss

To establish the requisite case or controversy for subject matter jurisdiction against Smith, the Crisis Pregnancy Centers must show that injunctive relief would forestall Smith from enforcing the Act. *See Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992). Federal courts have jurisdiction over actions seeking to enjoin a state official, such as Smith, from enforcing a statute where the injunctive relief would forestall future enforcement of the statute, unless there is an indication that the official does not intend to pursue or encourage enforcement of the Act. *Long*, 961 F.2d at 152.

It is a well-recognized rule that the plain meaning of a statute controls and courts must presume that the legislature says in a statute what it means and means what it says. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2011). Further, where the legislature includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that the legislature acted intentionally and purposely in

the disparate inclusion or exclusion of that language, *Singh v. Holder*, 591 F.3d 1190, 1195 (9th Cir. 2010).

Here, the plain meaning of the Act establishes that Smith lacks authority for enforcing the Act because only the "[California] Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty" for violations of the Act. not the Director of the California Department of Public Health. *See National Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002). Moreover, despite the Crisis Pregnancy Centers' argument that Smith has inherent authority to enforce the Act as Director of California's Department of Public Health, the California legislature did not confer on Smith or any other California Department of Public Health employee with authority to enforce the Act. Further, the Court should presume that the California legislature acted intentionally and purposely when it excluded the Director of the California Department of Public Health from those who may enforce the Act. *See Singh v. Holder*, 591 F.3d at 1195.

Accordingly, there is no case or controversy against Smith because an injunction would not have any impact on her. *See Long*, 961 F.2d at 152.

Crisis Pregnancy Centers' Motion For Preliminary Injunction

To obtain a preliminary injunction, the Crisis Pregnancy Centers must establish: (1) A likelihood of success on the merits; (2) That they are likely to suffer irreparable harm in the absence of a preliminary injunction; (3) That the balance of equities tips in their favor; and (4) An injunction is in the public interest. *See Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). These factors are evaluated "via a sliding scale," such that "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Arc of Cal.*, 757 F.3d at 983.

The Ninth Circuit recently held that California, pursuant to its police powers, has authority to regulate licensed healthcare providers that the state legislature has deemed harmful, while, also, recognizing the professional speech doctrine. *See Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013). The level of review depends on whether the statute regulates public dialogue, professional speech or professional conduct. *Pickup*, 740 F.3d at 1229. The Ninth Circuit concluded that courts must apply a strict scrutiny test to statutes that

regulate a professional who is engaged in public dialogue, *Pickup*, 740 F.3d at 1227-28, while a rational basis test must be applied to statutes that regulate professional conduct, *Pickup*, 740 F.3d at 1229. However, under the professional speech doctrine, an intermediate scrutiny test must be applied to the regulation of professional speech that is "[a]t the midpoint of the continuum, within the confines of a professional relationship," because "First Amendment protection of a professional's speech is somewhat diminished." *Pickup*, 740 F.3d at 1228. The California statute at issue in *Pickup* prohibited licensed mental health providers from providing sexual orientation change efforts therapy to children under eighteen years of age. *Pickup*, 740 F.3d at 1227-29. While the Ninth Circuit recognized California's authority to regulate professional speech, it declined to apply the professional speech doctrine to the statute at issue because it was a regulation of professional conduct rather than of professional speech. *Pickup*, 740 F.3d at 1229. Accordingly, it remains unresolved in the Ninth Circuit when the Court must apply the professional speech doctrine.

However, a Fourth Circuit case, *Moore-King v. County of Chesterfield, Va.*, 708 F.3d 560 (4th Cir. 2013), is instructive to determine when courts should apply the professional speech doctrine. The Fourth Circuit observed that

under the professional speech doctrine, the government can license and regulate the speech of those individuals who provide services to their clients without running afoul of the First Amendment. *Moore-King*, 708 F.3d at 569. Accordingly, the Fourth Circuit held that the relevant inquiry in deciding when to apply the professional speech doctrine is whether the speaker is providing advice to a client in a private setting. *Moore-King*, 708 F.3d at 569. However, the Fourth Circuit did not indicate which level of constitutional review should be applied when the professional speech doctrine was applicable because it held that the regulation at issue was "squarely within the scope of [the professional] speech doctrine" and was a part of the county's generally applicable licensing and regulatory scheme. *Moore-King*, 708 F.3d at 569. Accordingly, this Court borrows the Fourth Circuit's test and apply the professional speech doctrine to the Act if the licensed Crisis Pregnancy Centers provide advice to clients in a private setting. *See Moore-King*, 708 F.3d at 569.

Here, Mountain Right to Life alleged that it provided medically supervised treatment to patients in a confidential setting. Moreover, the Act does not regulate the manner in which licensed covered facilities provide services. Thus, the Act does not regulate professional conduct. *See Pickup*, 740 F.3d at 1229.

Accordingly, the Act falls "at the midpoint of the continuum" because it is a regulation of a licensed professional's speech in a private setting, rather than a regulation of the professional's conduct or of the professional's public dialogue. *See Pickup*, 740 F.3d at 1227-28. Therefore, the Act is subject to an intermediate scrutiny test.

To survive intermediate scrutiny, the burden is on California to establish that the Act directly advances a substantial governmental interest and that the Act is drawn to achieve that interest. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011).

It is well-recognized that states have more than a substantial interest in the practice of medical professionals within their boundaries. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). It is, also, well-recognized that a state has a strong interest in protecting a woman's freedom to seek medical and counseling services in connection with her pregnancy. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 767 (1994). Here, California has established that the Act directly 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. *See* California Assembly Bill no. 775 §§ 1, 2. Therefore, the Act directly advances a substantial government interest.

Next, the Act's notice requirement must be drawn to achieve California's substantial governmental interest. "There must be a fit between the legislature's ends and the means chosen to accomplish those ends." *Sorrell*, 564 U.S. at 572. Here, the legislature sought to inform unaware individuals of the services available to them despite professional obligations to provide patients with all information that is relevant to fully-informed decision making and public-sector efforts to disseminate that information. *See* California Assembly Bill no. 775 §§ 1(b), (c). The 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. *See Sorrell*, 564 U.S. at 572. Accordingly, the Act's notice requirement is drawn to achieve California's substantial governmental interest.

Consequently, the Act is a constitutionally permissive regulation of professional speech as applied to licensed covered facilities. The Crisis

Pregnancy Centers, therefore, have failed to demonstrate a likelihood of success on the merits that the Act is unconstitutional as applied to licensed covered facilities.

To survive a strict scrutiny test of the Act as it is applied to the unlicensed covered facilities, California has the burden of establishing that the Act promotes a compelling government interest, is narrowly tailored, and uses the least restrictive means to achieve the governmental interest. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

The Act's notice requirement for unlicensed covered facilities is nearly identical to the "Status Disclosure" at issue in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 246-249 (2nd Cir. 2014). The Second Circuit, applying strict scrutiny, upheld the "Status Disclosure" statute, which required pregnancy services centers in New York City to "disclose whether or not they 'have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy center.'" *Evergreen Ass'n, Inc.*, 740 F.3d at 246.

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 and when they are not. *See Evergreen Ass'n, Inc.*, 740 F.3d at 247. 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). Finally, the Act's notice requirement is the least restrictive means of achieving California's interest because alternative options, such as licensing or advertising, will not alert all individuals who enter a facility that the facility does not employ a licensed medical provider because this is typically discrete factual information known only to the particular facility. *See Evergreen Ass'n, Inc.*, 740 F.3d at 247. Accordingly, the Act's notice requirement, as applied to unlicensed covered facilities, survives strict scrutiny. Therefore, the Crisis Pregnancy Centers failed to demonstrate a likelihood of success on the merits that the Act is unconstitutional as to the unlicensed covered facilities.

Next, the issue is whether the Act unconstitutionally interferes with the Crisis Pregnancy Centers' right to free exercise of religion as guaranteed by the First Amendment of the United States Constitution. In considering constitutional protection for the

free exercise of religion, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 530 (1993). Accordingly, the Act is subject to a rational basis test if it is neutral and generally applicable. *See Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999).

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. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543 (1993). Therefore, the Act is a law that is neutral and generally applicable. Accordingly, the Court applies a rational basis test to the Act.

To survive a rational basis test, the burden is on the Crisis Pregnancy Centers to establish

that the Act is not rationally related to a legitimate governmental purpose. *See Miller*, 176 F.3d at 1207. The Crisis Pregnancy Centers did not provide any evidence or make any argument that the Act is not rationally related to a legitimate governmental purpose. However, it is clear from the legislative intent that the purpose of the Act's notice requirement is legitimate because it was intended to ensure that women are able to quickly obtain the information and services they need to make and implement timely reproductive decisions. *See Madsen*, 512 U.S. at 767. Moreover, because the Act survives strict scrutiny, it, *a foriori*, survives a rational basis test.

Therefore, the Crisis Pregnancy Centers did not show a likelihood of success on the merits that the Act unconstitutionally infringes their free exercise of religion. Further, the Crisis Pregnancy Centers failed to raise serious questions going to the merits because the First Amendment issues that they raised have been resolved by the Ninth Circuit and the United States Supreme Court.

To obtain a preliminary injunction, the Crisis Pregnancy Centers must demonstrate that they are likely to suffer irreparable harm in the absence of preliminary relief. *Arc of Cal.*, 757 F.3d at 983. The Crisis Pregnancy Centers rely on the violation of their First Amendment

rights to support their argument that the Act subjects them to irreparable harm. 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.

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

It is ordered that Dr. Karen Smith's motion to dismiss be, and hereby is, **Granted.**

It is further Ordered that the Crisis Pregnancy Centers' motion for preliminary injunction be, and hereby is, **Denied**.

All Citations

Slip Copy, 2016 WL 3883923

839 F.3d 823
United States Court of Appeals,
Ninth Circuit.

National Institute of Family and Life Advocates, a Virginia corporation, DBA NIFLA; Pregnancy Care Center, a California corporation, DBA Pregnancy Care Clinic; Fallbrook Pregnancy Resource Center, a California corporation, Plaintiffs–Appellants,
v.
Kamala Harris, in her official capacity as Attorney General for the State of California; Thomas Montgomery, in his official capacity as County Counsel for San Diego County; Morgan Foley, in his official capacity as City Attorney for the City of El Cajon, CA; Edmund G. Brown, Jr., in his official capacity as Governor of the State of California, Defendants–Appellees.

No. 16-55249
|
Argued and Submitted June 14, 2016, San Francisco, California
|
Filed October 14, 2016

Synopsis
Background: Anti-abortion pregnancy centers brought action against state officials, seeking

preliminary injunction preventing enforcement of California law requiring licensed pregnancy-related clinics to disseminate notice stating existence of publicly-funded family-planning services, including contraception and abortions, and requiring unlicensed pregnancy-related clinics to disseminate notice stating that they were not licensed, alleging that the law violated their First Amendment rights to free speech and the free exercise of religion. The United States District Court for the Southern District of California, John A. Houston, J., 2016 WL 3627327, denied motion. Centers appealed.

Holdings: The Court of Appeals, D.W. Nelson, Circuit Judge, held that:

[1] centers' claims were constitutionally ripe;

[2] centers' claims were prudentially ripe;

[3] California law requiring licensed clinics to disseminate notice was content-based but viewpoint neutral regulation on speech;

[4] California law requiring licensed clinics to disseminate notice was subject to intermediate scrutiny;

[5] California law requiring licensed clinics to

disseminate notice survived intermediate scrutiny; and

[6] California law requiring unlicensed clinics to disseminate notice survived strict scrutiny.

Affirmed.

Appeal from the United States District Court for the Southern District of California, John A. Houston, District Judge, Presiding, D.C. No. 3:15–cv–02277–JAH–DHB

Attorneys and Law Firms

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Before: Dorothy W. Nelson, A. Wallace Tashima, and John B. Owens, Circuit Judges.

OPINION

D.W. NELSON, Senior Circuit Judge:

The National Institute of Family and Life Advocates, et al. appeal from the district court's denial of their motion for a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and

Transparency Act (the FACT Act or the Act). The Act requires that licensed pregnancy-related clinics disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. The Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed by the State of California. Appellants allege that the Act violates their fundamental rights, including their First Amendment guarantees to free speech and the free exercise of religion.

We affirm the district court's denial of Appellants' motion for a preliminary injunction. For the free speech claim, we conclude that the proper level of scrutiny to apply to the Act's regulation of licensed clinics is intermediate scrutiny, which it survives. With respect to unlicensed clinics, we conclude that the Act survives any level of scrutiny. For the free exercise claim, we conclude that the Act is a neutral law of general applicability, and that it survives rational basis review. Appellants, therefore, are unable to show the "most important" factor under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008): likelihood of success on the merits. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

BACKGROUND

I. The FACT Act

The FACT Act was created for the stated purpose of ensuring that "[a]ll California women, regardless of income,... have access to reproductive health services." Assem. Bill No. 775 § 1(a). It was enacted after the California Legislature found that a great number of California women were unaware of the existence of state-sponsored healthcare programs. *See id.* at § 1(a)-(c). These programs, which expanded under the Patient Protection and Affordable Care Act to include millions of California women, provide "low-income women ...immediate access to free or low-cost comprehensive family planning services and pregnancy-related care." *Id.* at § 1(c); *see also* Assem. Comm. on Health, Analysis of Assembly Bill No. 775. Specifically, the Legislature found that:

> 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.

Id. at § 1(b).

The Legislature also found that the ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers (CPCs). CPCs "pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions" in order to fulfill their goal of "interfer[ing] with women's ability to be fully informed and exercise their reproductive rights." Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3. The Legislature found that CPCs, which include unlicensed and licensed clinics, employ "intentionally deceptive advertising and

counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." *Id.* There are approximately 200 CPCs in California. *Id.*

Because "pregnancy decisions are time sensitive, and care early in pregnancy is important," the Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics unable to enroll patients in state-sponsored programs to state the existence of these services. Assem. Bill No. 775 § 1(c)-(d).

Thus, as required under the Act, all licensed covered facilities must disseminate a notice (the Licensed Notice) stating, "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]." Cal. Health & Safety Code § 123472(a)(1). The Act 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 also satisfies two or more of the following criteria:

> (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.

Id. §123471. The Act requires that the Licensed Notice be disclosed by licensed facilities in one of three possible manners:

> (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.

Id. §123472(a)(2).

The Act also covers unlicensed facilities. An unlicensed clinic 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 also satisfies two of the following criteria:

> (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.

Id. §123471(b). Unlicensed clinics must disseminate a notice (the Unlicensed Notice) stating, "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." *Id.* §123472(b)(1). The Unlicensed Notice must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." *Id.* §123472(b). Information in advertising material must be "clear and conspicuous," and the onsite notice must be "at least 8.5 inches by 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." *Id.* §123472(b)(2)–(3).

All violators of the Act "are liable for a civil penalty of five hundred dollars ... for a first offense and one thousand dollars ... for each subsequent offense." *Id.* § 123473(a).

II. Procedural History

Appellants are three religiously-affiliated non-

profit corporations.[1] The National Institute of Family and Life Advocates (NIFLA) is a national organization composed of numerous pregnancy centers, 111 of which are located in California. Seventy-three of the centers are licensed by the State of California, and thirty-eight provide non-medical services. Pregnancy Care Clinic is a licensed clinic that provides medical services such as ultrasounds, medical referrals, and education on family planning. Its staff includes two doctors of obstetrics and gynecology, one radiologist, one anesthesiologist, one certified midwife, one nurse practitioner, ten nurses, and two registered diagnostic medical sonographers. Fallbrook Pregnancy Center is an unlicensed clinic. It offers services such as free pregnancy tests that patients can take themselves, educational programs, and medical referrals. Fallbrook employs several nurses at its facility, and also contracts with a licensed medical provider for referrals for ultrasounds, which are provided in a separate mobile facility nearby. Prenatal sonographs are also offered by a contractor in a separate facility nearby.

Appellants are strongly opposed to abortion. None provide abortions or referrals for abortions. NIFLA's mission is to "empower the choice for life," and Pregnancy Care Clinic "provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint,

desiring to empower the women it serves to choose life for their child, rather than abortion." Fallbrook believes "that human life is a gift of God that should not be destroyed by abortion."

On October 13, 2015, Appellants brought suit against California Attorney General Kamala Harris (the AG), California Governor Edmund G. Brown, Jr., County Counsel for San Diego County Thomas Montgomery, and City Attorney of El Cajon Morgan Foley[2] in the Southern District of California. Appellants alleged that the FACT Act violates their First Amendment free speech and free exercise rights.[3] Appellants brought a motion for a preliminary injunction to enjoin enforcement of the Act prior to the full litigation of the action.

The district court denied Appellants' motion for a preliminary injunction. The court found that Appellants were unable to show a likelihood of success on their free speech claim. With respect to the Licensed Notice, the court held that the Act either regulated professional conduct subject to rational basis review, or professional speech subject to intermediate scrutiny, and the Act survived both levels of review. The court also held that the Act did not constitute viewpoint discrimination. With respect to the Unlicensed Notice, the court held that it withstood any level of scrutiny. In addition, Appellants could not show a likelihood of

success on the merits of their free exercise claim because, the court held, the Act is a neutral law of general applicability which survived rational basis review. The court then explained that even though Appellants raised "serious questions going to the merits," *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011), they could not demonstrate that the other *Winter* factors weighed in favor of granting a preliminary injunction.

STANDARD OF REVIEW

We review the grant or denial of a preliminary injunction for an abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). We review the district court's interpretation of underlying law *de novo*. *Id.*

ANALYSIS

I. Appellants' Claims Are Justiciable.

As a threshold matter, we must first decide whether Appellants' claims are justiciable. The County Counsel of San Diego argues that this action is not constitutionally ripe, and even if it were ripe, that we should decline to find jurisdiction for prudential reasons.

We reject these arguments.

A. Appellants' Claims Are Constitutionally Ripe.

"[T]he Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 1999) (en banc) (quoting *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945)). A plaintiff must face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," not an "alleged injury [that] is too imaginary or speculative to support jurisdiction." *Id.* (internal quotation marks and citation omitted). This Court has identified three factors to assess in deciding whether a case is constitutionally ripe: (1) whether plaintiffs have articulated a concrete plan to violate the statute in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement of the challenged statute. *Id.*

These factors allow for plaintiffs to bring pre-enforcement challenges to laws that they claim infringe their fundamental rights. *See id.* at 1137 n.1. Indeed, we have long recognized that "[o]ne does not have to await the consummation

of threatened injury to obtain preventive relief.... [p]articularly in the First Amendment-protected speech context[.]"*Cal. Pro–Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (citation omitted); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988).

Appellants' claims are constitutionally ripe. Before the district court and this Court, Appellants have explicitly stated that they will not comply with the Act, even if enforced. Appellants have made this pledge of disobedience although they are aware that violators of the Act are subject to civil penalties. Cal. Health & Safety Code §123473(a). The AG, moreover, has not stated that she will not enforce the Act. *See Am. Booksellers Ass'n*, 484 U.S. at 393, 108 S.Ct. 636 ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them."). A lack of enforcement history is not a compelling reason to find Appellants' claims unripe in this context.[4] The Act did not go into effect until January 1, 2016, approximately one month before the district court denied the motion for a preliminary injunction. Appellants, therefore, could not have demonstrated a significant history of

enforcement. *See Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (affording the factor of past prosecution "little weight" when the challenged law was new); *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("[E]nforcement history alone is not dispositive. Courts have found standing where no one had ever been prosecuted under the challenged provision.").

B. Appellants' Claims Are Prudentially Ripe.

Even if a case is constitutionally ripe, we have discretionary power to decline to exercise jurisdiction. *Thomas*, 220 F.3d at 1142. When assessing prudential ripeness, we consider: (1) the fitness of the issues for judicial decision and; (2) hardship to the parties if we were to withhold jurisdiction. *Id.* at 1141.

This Court has stated that "[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Wolfson*, 616 F.3d at 1060 (quoting *U.S. W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). When evaluating hardship "[w]e consider whether the 'regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance.' " *Stormans, Inc. v.*

Selecky, 586 F.3d 1109, 1126 (9th Cir. 2009) (quoting *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 783 (9th Cir. 2000)). "[A] litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Id.* (quoting *MFS Intelenet, Inc.*, 193 F.3d at 1118).

We conclude that both factors favor a finding of prudential ripeness.

This action turns on a question of law. Appellants seek to enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require no further factual development to address Appellants' challenge. The district court's order denying the motion for a preliminary injunction was also an appealable order. 28 U.S.C. § 1292(a)(1).

We also conclude that the parties would face immediate and significant hardships if we were to decline to exercise jurisdiction. Until we issue a decision, Appellants must routinely choose between holding fast to their firmly held beliefs about abortion, or complying with the Act. And although the San Diego County Counsel claims that he will suffer hardship if he is forced to defend the Act, we find more significant the definite and direct hardship that all parties will suffer if we were to decline to

find jurisdiction. As noted, without a decision, Appellants must continually choose between obeying the law or following their strongly held convictions about abortion, and the AG will have to choose whether or not to enforce a law without the benefit of a ruling on its constitutionality.

We therefore conclude that this action is justiciable and turn to the merits of the case.

II. The District Court Did Not Abuse Its Discretion in Denying the Preliminary Injunction.

When bringing a motion for a preliminary injunction, a plaintiff must demonstrate: (1) that he is likely to succeed on the merits of his claim; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. 365. A preliminary injunction can also be issued if "a plaintiff demonstrates ... that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as well as satisfaction of the other *Winter* factors. *All. for the Wild Rockies*, 632 F.3d at 1134–35 (citation omitted).

A. Appellants Cannot Demonstrate a Likelihood of Success on their First Amendment Free Speech Claims.

Appellants argue that the Act should be subject to strict scrutiny for two main reasons. First, they argue that because the Act compels content-based speech, strict scrutiny is appropriate. Second, they contend that the Act engages in viewpoint discrimination.

We disagree. Although the Act is a content-based regulation, it does not discriminate based on viewpoint. The fact that the Act regulates content, moreover, does not compel us to apply strict scrutiny. And because we agree with the Fourth Circuit that the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), did not announce a rule regarding the level of scrutiny to apply in abortion-related disclosure cases, we apply our precedent in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), and rule that the Licensed Notice regulates professional speech, subject to intermediate scrutiny.[5] The Licensed Notice survives intermediate scrutiny. We also conclude that the Unlicensed Notice survives any level of scrutiny. Thus, the district court did not err in finding that Appellants cannot

show a likelihood of success on the merits of their free speech claims.

1. Strict Scrutiny Is Inappropriate.

A regulation discriminates based on content when "on its face," the regulation "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, —— U.S. —— –, 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). A regulation discriminates based on viewpoint when it regulates speech "based on 'the specific motivating ideology or the opinion or perspective of the speaker.' " *Id.* at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). Thus, viewpoint discrimination is a kind of content discrimination. Indeed, viewpoint discrimination is a "'more blatant' and 'egregious form of content discrimination.'" *Id.* (quoting *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510).

Because viewpoint discrimination is a subset of content discrimination, a regulation can be content-based, but viewpoint neutral. Such is the case with the Act.

On its face, the Act compels Appellants to disseminate the Notices. *See id.* at 2228 (explaining that the "first step" in assessing

whether a law is content-based or content-neutral is to "determine[ ] whether the law is content neutral on its face"). The Act therefore requires Appellants engage in speech on a particular subject matter. In so doing, the Act "[m]andat[es] speech that a speaker would not otherwise make" which "necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). The Act, therefore, is a content-based regulation.[6]

The Act, however, does not discriminate based on viewpoint. It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker. Instead, the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services. The Act contains two narrow exceptions that do not disfavor any particular speakers. The first exemption is for clinics "directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies." Cal. Health & Safety Code §123471(c)(1). This exemption was created in order to avoid federal preemption. The Act's second exemption is for a clinic "enrolled as a Medi–Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program." *Id.* §123472(c)(2). This exemption was created because clinics that fall under §123472(c)(2) already provide all

of the publicly-funded health services outlined in the Licensed Notice.

Appellants argue that this case is similar to *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), in which the Supreme Court held that a law restricting the sale and use of pharmacy records discriminated based on viewpoint and was subject to more rigorous judicial scrutiny. There, the Court looked to the law's legislative findings and concluded that the law's "express purpose" was to burden specific speakers. *Id.* at 565, 131 S.Ct. 2653. Appellants assert that because the California legislature also had specific speakers in mind when enacting the Act, that is, CPCs and clinics opposed to abortion, the Act engages in viewpoint discrimination. Appellants emphasize, moreover, that California has no evidence that their clinics actually misinform women.

Sorrell, however, did not rely solely on legislative intent. The Court concluded that the law "on its face burden[ed] disfavored speech by disfavored speakers," allowing use of the pharmacy records by all "but a narrow class of disfavored speakers." *Id.* at 564, 573, 131 S.Ct. 2653. Thus, while "a statute's stated purpose may also be considered," *Sorrell* did not turn exclusively on the law's motivation or purpose. *Id.* at 565, 131 S.Ct. 2653. Importantly, the law

in *Sorrell* applied to the speakers that were the targets of the law, while it exempted others. In sharp contrast, as discussed, the Act applies to almost all licensed and unlicensed speakers. Other than the two narrow exceptions unrelated to viewpoint, the Act applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services.

Appellants' reliance on *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), is also misplaced. In *Conant*, we affirmed an injunction that prohibited the federal government from possibly revoking a doctor's license based on a federal policy that "not merely prohibit[ed] the discussion of marijuana," but also "condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Id.* at 637.

Conant is distinguishable. Again, other than the two exceptions, the Act applies to all clinics, regardless of their stance on abortion or contraception. Next, unlike in *Conant*, the Act does not favor or disfavor any particular viewpoint. Indeed, contrasting this case with the Fourth Circuit's recent decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), confirms that the Act does not engage in viewpoint discrimination. In *Stuart*, the Fourth Circuit held that a statute that required doctors to

perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions violated the physicians' First Amendment rights. 774 F.3d at 255–56. In so doing, the Fourth Circuit concluded that the law compelled speech that "convey[ed] a particular opinion," which was, "to convince women seeking abortions to change their minds or reassess their decisions." *Id.* at 246. Here, however, the Act does not convey any opinion. The Licensed Notice and the Unlicensed Notice do not imply or suggest any preference regarding family-planning services. Instead, the Licensed Notice merely states the existence of publicly-funded family-planning services, and the Unlicensed Notice only states that the particular clinic in which it is distributed is not licensed.

We conclude that the Act is content-based, but does not discriminate based on viewpoint.

i. Even Though the Act Engages in Content–Based Discrimination, Strict Scrutiny Is Inappropriate.

In arguing that content-based regulations are always subject to strict scrutiny, Appellants cite the Supreme Court's recent decision in *Reed*. In *Reed*, the Supreme Court held that a town's regulation of the manner in which outdoor signs were displayed was content-based

and unable to satisfy strict scrutiny. 135 S.Ct. at 2227, 2231. In reaching this conclusion, the Court expressly stated that "[c]ontent-based laws ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.

Reed, however, does not require us to apply strict scrutiny in this case. Since *Reed*, we have recognized that not all content-based regulations merit strict scrutiny. *See United States v. Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc) (discussing *Reed* and noting examples that illustrate that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny").

Further, the Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion. In *Casey*, the Supreme Court considered Pennsylvania's requirement that a physician provide abortion-related information to his or her patient, writing:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be

> sure, the physician's First Amendment rights not to speak are implicated ... but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State* ... We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

505 U.S. at 884, 112 S.Ct. 2791 (citations omitted) (emphasis added). Over a decade later, in *Gonzales v. Carhart*, the Court wrote that "the State has a significant role to play in regulating the medical profession." 550 U.S. 124, 157, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007).

In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based. *See Stuart*, 774 F.3d at 248–49 (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (applying a reasonableness test); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (applying a reasonableness test).

Thus, Appellants' argument that the Act, a content-based regulation, must be subject to strict scrutiny is unpersuasive. We have recognized that not all content-based regulations are subject to strict scrutiny, and courts have routinely applied a lower level of scrutiny when states have compelled speech concerning abortion-related disclosures.

ii. *Casey* Did Not Announce a Rule Regarding the Level of Scrutiny to Apply to Abortion-Related Disclosure Cases.

Although courts are in agreement that strict scrutiny is inappropriate in abortion-related disclosure cases, there is currently a circuit split regarding the appropriate level of scrutiny to apply. In interpreting *Casey* and *Gonzales*, and in particular the above quoted excerpt from *Casey*, the Fifth and Eighth Circuits have applied a "reasonableness" test when determining whether an abortion-related disclosure law violated physicians' First Amendment rights. In *Lakey*, the Fifth Circuit held that the appropriate level of scrutiny for abortion-related disclosures was "the antithesis of strict scrutiny," upholding a law requiring doctors to show pregnant women sonograms of their fetuses and make audible the fetuses' heartbeats. 667 F.3d at 575. The *Lakey* court interpreted *Casey* and *Gonzales* to mean that such laws were permissible as they "are part of

the state's reasonable regulation of medical practice." *Id.* at 576. Similarly, in construing *Casey* and *Gonzales*, the Eighth Circuit upheld a law regulating informed consent to abortion, concluding that a state "can use its regulatory authority to require a physician to provide truthful, non-misleading information" to patients in the context of abortion-related disclosures. *Rounds*, 530 F.3d at 734–35.

The Fourth Circuit, however, disagreed that *Casey* created an entirely new standard to apply in abortion-related disclosure cases. In *Stuart*, the Fourth Circuit concluded that "[t]he single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech[.]" 774 F.3d at 249. The court also noted that *Gonzales* did not shed light on the First Amendment standard post-*Casey*, since *Gonzales* was not a First Amendment case. *Id.* Thus, the court assessed a law requiring doctors to perform an ultrasound, sonogram, and describe the fetus to pregnant patients under a professional speech framework. *Id.* at 247–48, 252, 256. The court concluded that intermediate scrutiny was the appropriate standard and that the law failed this level of scrutiny. *Id*. Applying intermediate scrutiny, the court explained, was "consistent with

Supreme Court precedent and appropriately recognizes the intersection ... of regulation of speech and regulation of the medical profession in the context of an abortion procedure." *Id.* at 249.

We agree with the Fourth Circuit that *Casey* did not establish a level of scrutiny to apply in abortion-related disclosure cases. *Casey*'s short discussion of a physician's First Amendment rights in the context of abortion means only what it says—that there was no violation of the physicians' First Amendment rights given the particular facts of *Casey*. *See* 505 U.S. at 884, 112 S.Ct. 2791 ("We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*." (emphasis added)). We need not "read too much," *Stuart*, 774 F.3d at 249, into *Casey*'s statement that physicians are "subject to reasonable licensing and regulation by the State." 505 U.S. at 884, 112 S.Ct. 2791. *Casey* did not announce an entirely new rule with this limited statement. *See Stuart*, 774 F.3d at 249 ("That particularized finding [in *Casey*] hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion."). Nor did it render inapplicable other frameworks for assessing free speech claims when the speech at issue concerns abortion. Instead, what *Casey* did was merely confirm what we have always known,

which is that professionals are subject to reasonable licensing by the state. *See, e.g.*, *Dent v. W. Va.*, 129 U.S. 114, 122, 9 S.Ct. 231, 32 L.Ed. 623 (1889) (examining a law regulating the medical profession and writing that "[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud").

We also agree with the Fourth Circuit that *Gonzales* did not clearly speak to the level of scrutiny to apply to physician's First Amendment rights. *See Stuart*, 774 F.3d at 249 ("The fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment.").

We rule that strict scrutiny is inappropriate, and that *Casey* did not announce a level of scrutiny to apply in abortion-related disclosure cases.

2. The Licensed Notice Is Professional Speech Subject to Intermediate Scrutiny.

In *Pickup*, we assessed the level of scrutiny to apply to Senate Bill 1172, a California law that

banned mental health therapists from conducting on minor patients any practice that purported to change a patient's sexual orientation. 740 F.3d at 1221. We explained that the level of protection to apply to specific instances of professional speech or conduct is best understood as along a continuum. At one end is a professional's right to engage in a "public dialogue, [where] First Amendment protection is at its greatest." *Id.* at 1227. There, "[professionals] are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection [.]" *Id.* at 1227–28. On the other end lies professional conduct, where the speech at issue is, for example, a form of treatment. *Id.* at 1229. When regulating conduct, "the state's power is great, even though such regulation may have an incidental effect on speech." *Id.* Because the law in *Pickup* involved the regulation of a specific type of therapy, we held that it regulated professional conduct subject to rational basis review. *Id.* at 1231.

Pickup also delineated professional speech that falls in the middle of the continuum. At the midpoint, "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it" because "[w]hen professionals, by means of their state-issued licenses, form relationships with clients,

the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *Id.* at 1228. *Pickup*, however, never discussed the level of scrutiny appropriate for speech that fell at the midpoint.

We conclude that the Licensed Notice regulates speech that falls at the midpoint of the *Pickup* continuum, and that intermediate scrutiny should apply.

To begin, the Licensed Notice regulates professional speech. Underlying the *Pickup* opinion is the principle that professional speech is speech that occurs between professionals and their clients in the context of their professional relationship. In other words, speech can be appropriately characterized as professional when it occurs within the confines of a professional's practice. *See King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014) ("[W]e conclude that a licensed professional does not enjoy the full protection of the First Amendment when speaking as *part of the practice of her profession*." (emphasis added)). The idea that the speech that occurs between a professional and a client is distinct from other types of speech stems from the belief that professionals, "through their education and training, have access to a corpus of specialized knowledge that their clients usually do not"

and that clients put "their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity." *Id.*; *see also Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."). This is why states have the power to regulate professions, *see, e.g.*, *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 449, 74 S.Ct. 650, 98 L.Ed. 829 (1954) ("The state's discretion ... extends naturally to the regulation of all professions concerned with health."), as well as the power to regulate the speech that occurs within the practice of the profession.

Licensed clinics engage in speech that occurs squarely within the confines of their professional practice. For example, Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services such as peer counseling and education. Thus, a regular client of Pregnancy Care could easily use many of their services throughout the stages of her pregnancy, such as receiving educational information about best health practices when

pregnant, relying upon Pregnancy Care for regular check-ups, or using Pregnancy Care as a resource for counseling. In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family-planning services. There is no question that Pregnancy Care's clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill. Because licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech.

The professional nature of their speech does not change even if Appellants decide to have staff members disseminate the Licensed Notice in the clinics' waiting rooms, instead of by doctors or nurses in the examining room. Here, the professional nature of the licensed clinics' relationship with their clients extends beyond the examining room. All the speech related to the clinics' professional services that occurs within the clinics' walls, including within in the waiting room, is part of the clinics' professional practice. Furthermore, the Licensed Notice contains information regarding the professional services offered by the clinics, and thus would constitute professional speech regardless of where within the clinic it was disseminated.

We now turn to the correct level of scrutiny to apply to the Licensed Notice and conclude that under our precedent in *Pickup*, intermediate scrutiny applies. Licensed Clinics are not engaging in a public dialogue when treating their clients, and they are not "constitutionally equivalent to soapbox orators and pamphleteers." *Pickup*, 740 F.3d at 1227. Thus, it would be inappropriate to apply strict scrutiny. And, unlike in *Pickup*, the Licensed Notice does not regulate therapy, treatment, medication, or any other type of conduct. Instead, the Licensed Notice regulates the clinics' speech in the context of medical treatment, counseling, or advertising.[7]

Because the speech here falls at the midpoint of the *Pickup* continuum, it is not afforded the "greatest" First Amendment protection, nor the least. *Id.* It follows, therefore, that speech in the middle of the *Pickup* continuum should be subject to intermediate scrutiny. *See Stuart*, 774 F.3d at 249 (applying intermediate scrutiny when physicians challenged an abortion-related disclosure law they claimed violated their First Amendment rights); *King*, 767 F.3d at 237 (applying intermediate scrutiny when therapists challenged a law prohibiting therapy that purported to change patients' sexual-orientation, which it had determined was professional "speech" rather

than "conduct"). Applying intermediate scrutiny is consistent with the principle that "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished," *Pickup*, 740 F.3d at 1228, but that professionals also do not "simply abandon their First Amendment rights when they commence practicing a profession." *Stuart*, 774 F.3d at 247.

Appellants cite *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), to argue that strict scrutiny should apply to professional speech when the professional services at issue are offered free of charge. We reject this argument.[8] In *In re Primus*, the Supreme Court addressed whether a lawyer's First Amendment rights were violated when a state bar punished her for writing a letter to a possible client about free legal services available at the American Civil Liberties Union, an organization with which she was affiliated, but offered her no compensation. 436 U.S. at 414–15, 98 S.Ct. 1893. The Supreme Court held that the lawyer's constitutional rights were violated, writing that "[i]n the context of political expression and association ... a State must regulate with significantly greater precision." *Id.* at 437–38, 98 S.Ct. 1893. Here, however, Appellants have positioned themselves in the marketplace as pregnancy

clinics. Their non-profit status does not change the fact that they offer medical services in a professional context. Nor does their non-profit status transform them into, for example, an organization that engages in "political expression and association." *Id.*

3. The Licensed Notice Survives Intermediate Scrutiny.

In order to survive intermediate scrutiny, "the State must show ... that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572, 131 S.Ct. 2653. Intermediate scrutiny is "demanding" but requires less than strict scrutiny. *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016). "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.' " *Id.* at 649 (quoting *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

We conclude that the Licensed Notice satisfies intermediate scrutiny. California has a substantial interest in the health of its citizens,

including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion. The California Legislature determined that a substantial number of California citizens may not be aware of, or have access to, medical services relevant to pregnancy. *See* Assem. Bill No. 775 § 1(b). This includes findings that in 2012, 2.6 million California women were in need of publicly-funded family-planning services, and that thousands of pregnant California women remain unaware of the state-funded programs that offer an array of services, such as health education and planning, prenatal care, and abortion. *Id.* As we have long recognized, "[s]tates have a compelling interest in the practice of professions within their boundaries, and ... as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards ***842** for ... regulating the practice of professions." *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1109 (9th Cir. 2004) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1994)).

We conclude that the Licensed Notice is narrowly drawn to achieve California's substantial interests. The Notice informs the reader only of the existence of publicly-funded

family-planning services. It does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services. The Licensed Notice is closely drawn to achieve California's interests in safeguarding public health and fully informing Californians of the existence of publicly-funded medical services. And given that many of the choices facing pregnant women are time-sensitive, such as a woman's right to have an abortion before viability, *Casey*, 505 U.S. at 846, 112 S.Ct. 2791, we find convincing the AG's argument that because the Licensed Notice is disseminated directly to patients whenever they enter a clinic, it is an effective means of informing women about publicly-funded pregnancy services.

Appellants argue that because California could find other ways to disseminate the information in the Licensed Notice to the public, such as in an advertising campaign, the Act cannot survive heightened scrutiny. The Second and Fourth Circuits used similar reasoning to strike down provisions of abortion-related regulations. *See Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 250 (2d Cir. 2014) (stating that "the City can communicate this message through an advertising campaign"); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (stating that

the government had "several options less restrictive than compelled speech" such as "launch[ing] a public awareness campaign" (internal quotation marks and citation omitted)).

But *Evergreen* and *Centro Tepeyac* applied strict scrutiny, which is much more stringent than the intermediate scrutiny we apply today. Unlike when evaluating a law under strict scrutiny, under intermediate scrutiny, a law need not be the least restrictive means possible. *See Appelsmith*, 810 F.3d at 649. Thus, even if it were true that the state could disseminate this information through other means, it need not prove that the Act is the least restrictive means possible.[9]

Further, unlike the portions of the regulations before the Second and Fourth Circuits, the Licensed Notice does not use the word "encourage," or other language that suggests the California Legislature's preferences regarding prenatal care. *See Evergreen*, 740 F.3d at 250 (striking down the portion of the regulation that required clinics to state that "the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider"); *Centro Tepeyac*, 722 F.3d at 191 (striking the portion of the regulation that mandated clinics to state that

"the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider").

4. The Unlicensed Notice Survives Any Level of Review.

We now address the speech regulated by the Unlicensed Notice. While we acknowledge that unlicensed clinics do not offer many of the medical services available at licensed clinics, they nonetheless offer some professional services. Fallbrook Pregnancy Center, for example, offers educational programs. They also give medical referrals for ultrasounds and sonographs, which are offered nearby. Indeed, the Act covers unlicensed clinics like Fallbrook precisely because their "primary purpose is [to provide] pregnancy-related services" and those services can include collecting health information, offering prenatal care, or pregnancy tests and diagnosis. Cal. Health & Safety Code §123471(b).

We need not resolve the question, however, of whether the Unlicensed Notice regulates professional speech because it is clear to us that the Unlicensed Notice will survive even strict scrutiny.

In order to survive strict scrutiny, a regulation

must be "narrowly tailored to serve a compelling interest." *Williams–Yulee v. Fla. Bar*, ——U.S. ——, 135 S.Ct. 1656, 1665, 191 L.Ed.2d 570 (2015).

California has a compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state. And given the Legislature's findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services, California's interest in presenting accurate information about the licensing status of individual clinics is particularly compelling.

We conclude that the Unlicensed Notice is narrowly tailored to this compelling interest. By stating that the clinic in which it is disseminated is not licensed by the State of California, the Unlicensed Notice helps ensure that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state. The Unlicensed Notice is also only one sentence long. It merely states that the facility in which it appears is not licensed by California and has

no state-licensed medical provider. It says nothing about the quality of service women may receive at these clinics, and in no way implies or suggests California's preferences regarding unlicensed clinics.

The Second and Fourth Circuits held that regulations with provisions similar to the Unlicensed Notice survived strict scrutiny. In *Evergreen*, the Second Circuit concluded that the portion of the regulation that required clinics to state if they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services" survived strict scrutiny because it was not overly broad, and was "the least restrictive means to ensure that a woman [was] aware of whether or not a *particular* pregnancy services center ha[d] a licensed medical provider." 740 F.3d at 246–47 (emphasis in original). Similarly, in *Centro Tepeyac*, the Fourth Circuit held that the portion of the regulation that stated "the Center does not have a licensed medical professional on staff," survived strict scrutiny because it "merely notifie[d] patients that a licensed medical professional [was] not on staff, d[id] not require any other specific message, and in neutral language state[d] the truth." 722 F.3d at 190 (internal quotation marks and citation omitted). The surviving portions of the regulations in *Evergreen* and *Centro Tepeyac* merely state whether or not the

clinics had licensed providers, which is exactly what the Unlicensed Notice does.

We therefore hold that the district court did not abuse its discretion in finding that Appellants cannot demonstrate a likelihood of success on their free speech claim. The Licensed Notice regulates professional speech, subject to intermediate scrutiny, which it survives. The Unlicensed Notice survives any level of review.[10]

B. Appellants Cannot Demonstrate a Likelihood of Success on their First Amendment Free Exercise Claim.

Courts have long recognized that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Empl't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (Stevens, J., concurring in judgment)). A neutral and generally applicable law is subject to only rational basis review. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075–76 (9th Cir. 2015).

The Act is facially neutral. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 1076 (citation omitted). The Act references no religious practice and is thus facially neutral.

The Act is also operationally neutral. It "prescribe[s] and proscribe[s] the same conduct for all, regardless of motivation." *Id.* at 1077. The Act applies to all covered facilities, and is indifferent to the basis for any objection. Thus, contrary to Appellants' assertion, this case is distinguishable from *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*. There, the Supreme Court found non-neutral a law that banned animal sacrifices for only a particular religion while sacrifices "that [were] no more necessary or humane in almost all other circumstances [went] unpunished." 508 U.S. 520, 536, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). But, unlike in *Lukumi*, the Act applies to all licensed and unlicensed facilities, regardless of any objection, religious or otherwise. The fact that Appellants' objections are grounded in their religious beliefs does not affect the Act's neutrality. *See Stormans*, 794 F.3d at 1077 ("The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct.").

The Act is generally applicable. "[I]f a law pursues the government's interest only against conduct motivated by religious belief but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable." *Id.* at 1079 (internal quotation marks and citation omitted). A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief[.]" *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217.

The Act has two exemptions, and neither renders the Act not generally applicable. As noted, the Act's first exemption exists to avoid federal preemption, and its second exemption is for clinics that already provide all of the publicly-funded services outlined in the Act. *See supra* section II.A.1. Because the Act's exemptions are "tied directly to limited, particularized, business-related, objective criteria," the Act is generally applicable. *Stormans*, 794 F.3d at 1082.

And finally, this action is not a "hybrid-rights" case in which a free exercise plaintiff has made out a "colorable claim that a companion right has been violated." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). Appellants have not shown a

likelihood of success on the merits of their free speech claim. Thus, there is no "colorable claim" for "a companion right." *Id.*

We conclude that the Act is a neutral law of general applicability, subject to only rational basis review. *See Stormans*, 794 F.3d at 1075–76. Because the Licensed Notice survives intermediate scrutiny, and the Unlicensed Notice survives any level of review, the Act necessarily also survives rational basis review.[11]

CONCLUSION

Appellants have failed to demonstrate that the first, most important, *Winter* factor favors granting their motion for a preliminary injunction. *Garcia*, 786 F.3d at 740. We reject Appellants' arguments that they are entitled to a preliminary injunction based on their free speech claims. The Act is a content-based regulation that does not discriminate based on viewpoint. And because *Casey* did not announce a new rule regarding the level of scrutiny to apply to abortion-related disclosure cases, we apply this Court's professional speech framework and conclude that the Licensed Notice is subject to intermediate scrutiny, which it survives. The Unlicensed Notice survives any level of review.

We also reject Appellants' arguments that they are entitled to a preliminary injunction based on their free exercise claims. The Act is a neutral law of general applicability, which survives rational basis review.

Appellants, therefore, are unable to demonstrate likelihood of success on the merits of their First Amendment claims.

AFFIRMED.

All Citations

839 F.3d 823, 2016 Daily Journal D.A.R. 10,264

Footnotes

1 In addition to this appeal, this panel also heard argument in related cases *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 15–7517, —— Fed.Appx. ——, 2016 WL 5956744 (9th Cir. 2016), and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15–17497, —— Fed.Appx. ——, 2016 WL 5956743 (9th Cir. 2016).

2 The district court's finding that the City Attorney of El Cajon is not a proper defendant was harmless error. The Act grants the City

Attorney the power to enforce the Act. *See* Cal. Health & Safety Code § 123473. The City Attorney, therefore, is a proper defendant.

[3] Appellants' claims for relief are (1) Violation of the free speech clause of the First Amendment of the United States Constitution; (2) Violation of the due process clause of the Fourteenth Amendment of the United States Constitution (alleged by unlicensed clinics); (3) Violation of the free exercise clause of the First Amendment of the United States Constitution; (4) Violation of the Coats–Snowe Amendment, 42 U.S.C. § 238N (alleged by licensed clinics); and (5) Violation of the free speech clause of the California Constitution. Because Appellants brought their motion for preliminary injunction only under their federal First Amendment claims, we address only those issues in this opinion.

[4] Moreover, we note that NIFLA filed a 28(j) letter informing the Court that, on August 16, 2016, Los Angeles City Attorney Michael Feuer sent an enforcement letter to co-counsel for NIFLA. In the letter, the City Attorney provided notice that The People of the State of California planned to make an *ex parte* application for an order to show cause why a preliminary injunction should not issue and a temporary restraining order enjoining the Pregnancy Counseling Center, a member of NIFLA, from violating the FACT Act. The City indicated it also would file a complaint containing a single

cause of action—violation of California Business & Professions Code § 17200, *et seq.*—and seeking equitable relief and civil penalties. NIFLA states this chilled the speech of the Pregnancy Counseling Center.

[5] We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). Commercial speech "does no more than propose a commercial transaction." *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010) (citation omitted). The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech.

[6] We disagree with the district court's conclusion that the Act is content-neutral. This error, however, was harmless as it appropriately denied the motion for a preliminary injunction.

[7] We disagree with the district court's conclusion that the Act regulates conduct. The district court's error, however, was harmless as it appropriately denied the motion for a preliminary injunction.

[8] We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech. *But see Moore–King v. Cty. of Chesterfield*,

708 F.3d 560, 569 (4th Cir. 2013) ("[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a *paying* client or instead engages in public discussion and commentary." (emphasis added)).

[9] We note that, given the preliminary stage of this case, it is unclear whether California actually could have disseminated this information as effectively in an advertising campaign, as Appellants argue. At oral argument, the AG noted that California has advertised its publicly-funded programs, but many women were still unaware of their existence given the expansion of certain health programs. Oral Argument at 28:44, *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 15–17517, http://www.ca9.uscourts.gov/media /view_video.php?pk _vid=0000009827.

[10] To be clear, we do not conclude that strict scrutiny is the correct level of scrutiny to apply to the Unlicensed Notice. We only conclude that it can survive strict scrutiny.

[11] We also find that Appellants have not raised "serious questions" going to the merits of their claims; thus, the alternate test set forth in

Alliance for the Wild Rockies does not apply. The district court's conclusion that there were serious questions going to the merits was harmless error because the district court appropriately denied the motion for a preliminary injunction. Because Appellants cannot show a likelihood of success on the merits or "serious questions" going to the merits of their First Amendment claims, we need not discuss the remaining *Winter* factors.

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

AB 775, 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.

Date of Hearing: April 14, 2015

ASSEMBLY COMMITTEE ON HEALTH

Rob Bonta, Chair

AB 775 (Chiu) - As Amended April 8, 2015

SUBJECT: Reproductive FACT Act.

SUMMARY: Requires licensed clinics that provide family planning or pregnancy-related services to provide a notice to consumers regarding their reproductive rights. Requires unlicensed facilities that provide pregnancy-related services to disseminate and post a notice informing consumers that they are not a licensed medical facility. Specifically, this bill:

1) Enacts the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act).

2) Defines, for purposes of the FACT Act, a licensed covered facility as a licensed, or intermittent, clinic whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

a) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility provides, or offers counseling about contraception, or contraceptive methods;

c) The facility offers pregnancy testing or pregnancy diagnosis;

d) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

e) The facility has staff or volunteers who collect health information from clients.

3) Clarifies that the following types of clinics are not considered covered facilities for the purposes of this bill:

a) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies; and,

b) 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.

4) Defines, for purposes of the FACT Act, 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, whose primary purpose is providing pregnancy-related services and that satisfies two or more of the following:

a) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility offers pregnancy testing or pregnancy diagnosis;

c) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

d) The facility has staff or volunteers who collect health information from clients.

5) Requires licensed covered facilities to disseminate the following notice in English and in minority languages pursuant to the federal Voting Rights Act, that states the following:

"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]. "

6) Requires the notice to be posted in a conspicuous place in the licensed clinic, specifies the size of the type on the notice, and requires a printed copy be given directly to

the client, either in written or digital form. Allows the notice to be combined with other mandated disclosures.

7) Requires an unlicensed facility to disseminate a notice to clients in English and in minority languages pursuant to the federal Voting Rights Act that states the following:

"This facility is not licensed as a medical facility by the

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State of California and has no licensed medical provider who provides or directly supervises the provision of services."

8) Specifies the size of the notice, the size type the notice is printed in, and that the notice is to be posted conspicuously in the entrance to the unlicensed facility and in at least one other area where clients wait to receive services. Requires that the notice shall be given to clients onsite, and included in any print and digital advertising materials.

9) Establishes civil penalties for failure to comply with these provisions, enforceable by the Attorney General (AG), a city attorney, or county counsel if they have provided the facility with reasonable notice of noncompliance and verified that the

violation was not corrected within 30 days from the date of the notice.

10) Specifies that any civil penalties be deposited into the General Fund if an action is brought by the AG, paid to the treasurer of the city if an action is brought by a city attorney, and paid to the county treasurer if an action is brought by a county counsel.

11) Requires the AG to post and maintain of the Department of Justice's (DOJ) Internet Web site a list of the covered facilities upon which a penalty has been imposed.

12) Provides that if any provisions of this bill or its application is held invalid, that invalidity will not affect other provisions or applications that can be given effect without the invalid provision or application.
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13) Makes various findings and declarations regarding Californian residents' rights to privacy and access to reproductive health services.

EXISTING LAW:

1) Licenses and regulates clinics, including primary care clinics and specialty

clinics such as surgical clinics, by the Department of Public Health (DPH).

2) Provides for exemptions from licensing requirements for certain types of clinics, including federally operated clinics, local government primary care clinics, clinics affiliated with an institution of higher learning, clinics conducted as outpatient departments of hospitals, and community or free clinics. Also provides for exemptions for community or free clinics that are operated on separate premises from the licensed clinic and are only open for limited services of no more than 20 hours a week (also known as intermittent clinics).

3) Authorizes DPH to take various types of enforcement actions against a primary care clinic that has violated state law or regulation, including imposing fines, sanctions, civil or criminal penalties, and suspension or revocation of the clinic's license.

4) Grants a specific right of privacy under the California

Constitution and provides that the right to have an abortion may not be infringed upon without a compelling state interest.

5) Requires, under the federal Voting Rights Act, voting materials be translated in localities where there are more than 10,000 or over 5% of the total voting age citizens in a single political subdivision (usually a county, but a township or municipality in some states) who are members of a single minority language group, have depressed literacy rates, and do not speak English very well. The Census Bureau identifies specific language groups for specific jurisdictions.

FISCAL EFFECT: This bill has not been analyzed by a fiscal committee

COMMENTS:

1) PURPOSE OF THIS BILL. According to the author, California has a proud legacy of respecting reproductive freedom and funding forward thinking programs to provide reproductive health assistance to low income women. The author notes that according to the Department of Health Care Services, the Patient Protection and Affordable Care Act expansion has made millions of Californians, 53% of them women, newly eligible for Medi-cal. The author states because pregnancy decisions are time sensitive, California women should receive information about their rights

and available services at the sites where they obtain care.

The author contends that, unfortunately, 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

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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.

2) BACKGROUND.

a) Crisis Pregnancy Centers. 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. A 2015 NARAL Pro-Choice America report on CPCs notes that the National Institute of Family and Life Advocates (an organization with over 1,300 CPC affiliates)

states on its website that it is on the front line of the cultural battle over abortion, and its vision is to provide [CPCs] with legal resources and counsel, with the aim of developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America. The NARAL report also sent several researchers into CPCs to receive the counseling offered, and they widely reported that they were provided with inaccurate information, including only being given information regarding the risks of abortion, being told that many women commit suicide after having an abortion, and being told abortions can cause breast cancer.

b) University of California, Hastings College of Law research report. In 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. Completed in December of 2010, "Pregnancy Resource Centers: Ensuring Access and

Accuracy of Information," discusses several options for regulation CPCs, ranging from creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute. Because approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the report concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.

c) Legal challenges to CPC regulation. In November 2014, the Supreme Court rejected an appeal from several CPCs over a 2011 New York City law that requires CPCs to inform clients whether or not they have medical personnel on site. New York City officials argued that the law is meant to protect consumers from false advertising.

In February of this year, a federal judge upheld the City of San Francisco's regulation of CPCs, which prohibits clinics from engaging in false or misleading advertising. The law allows a judge to order clinics to post notices saying whether they offer abortions or abortion referrals. The ordinance was challenged by First Resort, a nonprofit clinic owner, as a violation of free speech. First Resort's print and online advertisements stated that the clinic

offers "abortion information, resources and compassionate support for women facing the crucial decisions that surround unintended pregnancies and are considering abortion." In First Resort, Inc., v. Board of Supervisors of the City and County of San Francisco, the judges' ruling said the San Francisco law "only restricts

false and misleading commercial speech, which is not protected by the First Amendment."

3) SUPPORT. Black Women for Wellness and NARAL Pro-Choice, California the co-sponsors of this bill as well as numerous other organizations, including, California Council of Churches IMPACT, California Latinas for Reproductive Justice, Maternal and Child Health Access, and Planned Parenthood, California, support this bill because it requires unlicensed facilities that provide pregnancy-related care to inform clients that they are not a licensed medical facility and do not have a licensed provider on staff, enabling women to seek the care they wish to obtain and providing context for counseling given at these unlicensed facilities. They also state that distributing a notice of reproductive health services would ensure that women in any reproductive health or pregnancy counseling facility know that

California respects their rights and provides assistance.

The California Primary Care Association (CPCA) states this bill will protect patients by allowing them to fully understand their rights when it comes to their reproductive freedom and to not be deceived by organizations whose sole purpose is to provide them with a biased view that does not allow them to make their own informed choice. CPCA notes that many of their community clinics and health centers grew out of the women's movement and their members believe a women's right to choose is a fundamental health right that must be protected.

The American Nurses Association, California (ANA\C) writes that all California residents should have access to reproductive health services, and more than 700,000 California women become pregnant every year, approximately half of them unintentionally. ANA\C states thousands of women do not know the legal options they have, or the funding resources available to them, and this bill will help ensure that pregnant women receive the information they need to make an informed decision.

Forward Together supports this bill, opining; women in California face a threat from manipulative crisis pregnancy centers which pose as comprehensive reproductive health centers, but are, in fact, anti-choice organizations that target women with the goal of blocking them from considering abortion as an option and using proven contraceptive methods.

Forward Together contends that CPCs use false and misleading advertising to appeal to women, who think they may be pregnant and are looking for comprehensive reproductive health care, and then manipulate and shame these women by peddling medically inaccurate information about abortion and contraception.

4) OPPOSITION. The California Catholic Conference (CCC) opposes this bill stating, on its surface, the bill proposes to regulate the state's pregnancy centers, but in actuality is aimed at discriminating against those pregnancy centers that hold a pro-life viewpoint. CCC contents that such unfair legislation may discourage women from getting the assistance that they need and deserve as well as expose many of these pregnancy centers to needless criminal or civil sanctions for failure to comply. CCC concludes that because they believe all life is sacred, they support programs which offer medical, economic and emotional support for pregnant women and

children, so that they can make life-affirming choices.

The California Right to Life Committee, Inc. (CRLC) opposes this bill and states that, if enacted, it could set a precedent for many other businesses that are not like or appreciated by one group in society which could bring a law suit against another business, company, or agency. CRLC asks us to consider car dealerships: what if they were to be seen as anti-environmental with misleading advertising, selling too many cars, and making citizens not anxious to take high speed rail? CRLC asks; would it not be possible that the California High Speed Rail Authority require that car dealerships advertise High Speed Rail locations, schedules, and fees?
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CRLC argues the provisions of this bill would not be best practice for the car industry any more that it would be for pro-life pregnancy centers to have to promote services which they consider morally reprehensible.

5) DOUBLE REFERRAL. This bill is double referred; upon passage in this committee, this bill will be referred to the Assembly Judiciary Committee.

6) SUGGESTED AMENDMENT. As noted in existing law above, the federal Voting Act applies to political subdivisions (usually a county, but sometimes a township or municipality) and refers to populations that, "don't speak English very well." Because the covered facilities subject to the provisions of this bill are not likely to be familiar with federal Voting Act requirements, and state law already contains language that provides more specific guidance on which languages health related information should be translated into in each county, the Committee may wish to amend the bill to strike the references to federal law and instead require covered facilities to translate the notices required by this bill into the primary threshold languages for Medi-Cal beneficiaries as determined by the Department of Health Care Services for the county in which the covered facility is located.

7) POLICY COMMENT. This bill requires the AG to post and maintain on the DOJ Internet Web site a list of the covered facilities upon which a penalty has been imposed for noncompliance. Because an action against a covered facility may be brought by a city attorney or county counsel, as well as the AG, should this bill pass this committee, the author may wish to consider working with the Judiciary Committee to clarify how the AG will know a covered facility was cited when

the action was brought by an agency other than the DOJ.

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REGISTERED SUPPORT / OPPOSITION:

Support:

Black Women for Wellness (cosponsor)NARAL Pro-Choice California (cosponsor) Act for Women and Girls American Congress of Obstetricians and Gynecologists California Association for Nurse Practitioners California Council of Churches IMPACT California Latinas for Reproductive Justice California Primary Care Association California Women's Law Center California Women Lawyers Forward Together League of Women Voters of California Maternal And Child Health Access National Abortion Federation Planned Parenthood Affiliates of California Religious Coalition for Reproductive Choice, California Western Methodist Justice Movement Women's Community Clinic Women's Health Specialists

Opposition

Sacramento Life Center The California Catholic Conference The California Right to Life Committee, Inc.

Analysis Prepared by: Lara Flynn / HEALTH / (916) 319-2097.

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Date of Hearing: April 28, 2015

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 775 (Chiu) - As Amended April 16, 2015

SUBJECT: REPRODUCTIVE FACT ACT

KEY ISSUES:

1) SHOULD LICENSED PRIMARY CARE CLINICS THAT PROVIDE FAMILY PLANNING OR PREGNANCY-RELATED SERVICES BE REQUIRED TO PROVIDE A SPECIFIED NOTICE INFORMING CONSUMERS ABOUT THE EXISTENCE OF A CONTINUUM OF FREE OR LOW-COST HEALTH CARE SERVICES?

2) SHOULD AN UNLICENSED FACILITY THAT PROVIDES PREGNANCY-RELATED SERVICES BE REQUIRED TO PROVIDE A SPECIFIED NOTICE INFORMING CONSUMERS THAT IT IS NOT A LICENSED MEDICAL FACILITY?

SYNOPSIS

This bill, co-sponsored by NARAL Pro-Choice

America and Black Women for Wellness, seeks to that ensure that women who are pregnant are fully notified about the continuum of health care services available in the state. With respect to licensed health care facilities, the bill requires each client at the time of her visit to be advised of the various publicly funded

family planning and pregnancy-related resources available in California, and how to directly access these resources.

Proponents of the bill contend that this notice is needed to ensure that women in California are fully informed of their options and are able to make their own healthcare and pregnancy-related decisions. Opponents of the bill, representing operators of pregnancy clinics impacted by this bill and other concerned citizens holding pro-life views, strongly object to this requirement and assert that it unfairly targets pro-life pregnancy clinics because of their anti-abortion viewpoint, forcing them to disseminate a message with which they do not agree, in violation of free speech protections. The Committee's analysis of the free speech issues indicates that the licensed facility notice is content-based and would likely be considered viewpoint-neutral commercial speech. As such, it would be subject to intermediate scrutiny.

Furthermore, even if the licensed facility notice were subjected to strict scrutiny, it would likely be found to be constitutional if the court agreed with the proponents' argument that the most effective way to ensure that women timely obtain the information and services they need during pregnancy is to require licensed health facilities to provide the notice.

With respect to unlicensed facilities, the bill simply requires each client to be advised at the time of her visit that the facility is not licensed as a medical facility. Proponents of the bill contend that this notice is needed to ensure that pregnant women in California know when they are (and are not) getting medical care from licensed professionals. Opponents generally do not allege this notice violates free speech protections, but some contend that this provision requires unlicensed clinics to post language that is untrue. They contend that many of the non-licensed clinics do have licensed medical staff on site as the clinics seek to become licensed.

The Committee's analysis of the unlicensed facility notice concludes that it is content-based and would most likely be considered viewpoint-neutral commercial speech. As such, the required notice would be subject to rational basis scrutiny and

would likely be found permissible under that

standard. Even if the notice were to be subject to strict scrutiny, it would likely withstand strict scrutiny, especially in light of two recent court decisions from other states which have upheld, after applying strict scrutiny, requirements for unlicensed facilities to provide similar notices.

Finally, the bill authorizes modest civil penalties to be imposed if, after having been given notice of non-compliance and 30 days in which to correct a violation, the facility still fails to comply with these provisions. This bill previously passed the Health Committee by a 12-5 vote, and will be referred to Appropriations should it be approved in this Committee.

SUMMARY: Requires licensed facilities and unlicensed facilities whose purpose is to provide pregnancy-related services to provide specified notices to clients. Specifically, this bill:

1) Defines a licensed covered facility to mean a licensed, or intermittent, clinic whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

a) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility provides, or offers

counseling about contraception, or contraceptive methods;

c) The facility offers pregnancy testing or pregnancy diagnosis;

d) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

e) The facility has staff or volunteers who collect health information from clients.

2) Clarifies that the following types of clinics are not considered covered facilities for the purposes of this bill:

a) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies; and,

b) 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.

3) Defines an unlicensed covered facility to mean a facility that is not licensed by the State of California and does not have a licensed medical provider on staff, whose primary purpose is providing pregnancy-related services and that satisfies two or more of the following:

a) The facility offers obstetric

ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility offers pregnancy testing or pregnancy diagnosis;

c) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

d) The facility has staff or volunteers who collect health information from clients.

4) Requires licensed covered facilities to disseminate the following notice in English and in minority languages pursuant to the federal Voting Rights Act, that states the following: "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]. "

5) Requires the notice to be posted in a conspicuous place in the licensed clinic, specifies the size of the type on the notice, and requires a printed copy be given directly to the client, either in written or digital form. Allows the notice to be combined with other mandated

disclosures.

6) Requires an unlicensed facility to disseminate a notice to clients in English and in minority languages pursuant to the federal Voting Rights Act that states the following:

"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."

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7) Specifies the size of the notice, the size type the notice is printed in, and that the notice is to be posted conspicuously in the entrance to the unlicensed facility and in at least one other area where clients wait to receive services. Requires that the notice shall be given to clients onsite, and included in any print and digital advertising materials.

8) Establishes civil penalties for failure to comply with these provisions, enforceable by the Attorney General (AG), a city attorney, or county counsel if they have provided the facility with reasonable notice of noncompliance and verified that the violation was not corrected within 30 days from the date of the notice.

9) Specifies that any civil penalties be

deposited into the General Fund if an action is brought by the AG, paid to the treasurer of the city if an action is brought by a city attorney, and paid to the county treasurer if an action is brought by a county counsel.

10) Requires the AG to post and maintain on the Department of Justice's (DOJ) Internet Web site a list of the covered facilities upon which a penalty for violation of these requirements has been imposed.

11) Provides that if any provisions of this bill or its application is held invalid, that invalidity will not affect other provisions or applications that can be given effect without the invalid provision or application.

12) Makes various findings and declarations, including, among other things:

a) 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.

b) 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 ensure

licensed health care facilities that are unable to immediately enroll patients into the Family PACT and Medi-Cal programs advise each patient at the time of her visit 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.

c) The purpose of the Act is to ensure that California residents make their personal reproductive health care decisions by knowing their rights and health care services available to them.

EXISTING LAW:

1) Licenses and regulates clinics, including primary care clinics and specialty clinics such as surgical clinics, by the Department of Public Health (DPH). (Health and Safety Code Section 1200 et seq.)

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2) Provides for exemptions from licensing requirements for certain types of clinics, including federally operated clinics, local government primary care clinics, clinics affiliated with an institution of higher learning, clinics conducted as outpatient departments of hospitals, and community or free clinics. (Health and Safety Code

Section 1206.)

3) Prohibits any government body from making any law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (U.S. Constitution, Amendment I, made applicable to the states by Amendment XIV.)

4) Provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right, and that no law shall restrain or abridge liberty of speech or press. (Cal. Const., Art. I, Section 2.)

5) Holds that the government is "free to prevent the dissemination to commercial speech that is false, deceptive, or misleading" without violating the First Amendment. (Zauderer v. Office of Disciplinary Counsel of the Supreme Ct. (1985) 471 U.S. 638.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill, co-sponsored by NARAL Pro-Choice America

and Black Women for Wellness, seeks to ensure that women who are pregnant are fully notified about the continuum of health care services available in the state. With respect to licensed health care facilities, the bill requires each client at the time of her visit to be advised of the various publicly funded family planning and pregnancy-related resources available in California, and how to directly access these resources. With respect to unlicensed facilities, the bill simply requires each client to be advised at the time of her visit that the facility is not licensed to provide medical care. The bill authorizes modest civil penalties to be imposed if, after having been given notice of noncompliance and 30 days in which to correct a violation, the facility still fails to comply with these provisions.

Author's Statement. According to the author:

California has a proud legacy of respecting reproductive freedom and funding forward-thinking programs to provide reproductive health assistance to low income women. The power of the law is only fully

realized when California's women are fully informed of the rights and services available to them. Because family planning and pregnancy decisions are time sensitive, California women should receive information about their rights and available services at the sites where they obtain care.

Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. Yet, at the moment they learn they are pregnant, thousands of women remain unaware of the public programs available to them, including contraception, health education and counseling, family planning, prenatal care,

abortion or delivery.

It is in the best interest of the state, patients and providers that women are aware of available assistance to them - whether it is for preventing, continuing, or terminating a pregnancy. AB 775 ensures that women in California are fully informed of their options and are able to make their own healthcare and pregnancy-related

decisions.

Background on Community Clinics.

Community clinics and health centers are nonprofit, tax-exempt clinics that are licensed as community or free clinics, and provide services to patients on a sliding fee scale basis or, in the case of free clinics, at no charge to the patients. These include federally designated community health centers, migrant health centers, rural health centers, and frontier health centers. California is home to nearly 1,000 community clinics serving more than 5.6 million patients (or one in seven Californians) annually through over 17 million patient encounters. More than 50% of these patients are Hispanic and 43% speak a primary language other than English.

The non-statutory term "crisis pregnancy center" (CPC) refers to a subset of facilities that offer pregnancy-related services and are commonly affiliated with or operated by organizations whose stated goal is to prevent women from accessing abortions.

Depending on factors like the personnel who are employed and the types of clinical or medical services offered, a CPC may operate as a licensed facility or, if exempted under Health and Safety Code Section 1206, an unlicensed facility. For the purpose of

analyzing the free speech issues raised by this bill, however, the only distinction that matters is whether a facility is considered a licensed covered facility or an unlicensed covered
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facility because the bill regulates all members within each category equally and each category contains both CPCs and non-CPCs.

I. FIRST AMENDMENT DOCTRINE: COMPELLED SPEECH.

It is well-established that the First Amendment generally prohibits the government from compelling speech. "[T]he right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all." (Wooley v. Maynard, 430 U.S. 705, 714; see R.J. Reynolds Tobacco Co. v. Shewry (9th Cir. 2005) 423 F.3d 906, 915.)

However, the First Amendment's protections-including the right to not be compelled to speak-are not absolute. See Schenck v. United States (1919) 249 U.S. 47, 52, "The most stringent protection of free speech would not protect a man [from] falsely shouting fire in a theatre and causing panic.")

In a compelled speech analysis, a court will uphold a law that compels speech if the law is tailored and the government's reasoning behind the law survives the

applicable level of scrutiny. A court applies different levels of scrutiny depending on how the speech is classified. The higher the scrutiny, the more tailored the law must be, and the more compelling the government's interest must be. (See Riley v. National Federation of the Blind of North Carolina (1988) 487 U.S. 781, 796, "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.")
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A. Content-Based or Content-Neutral. The first classification of any regulation of speech is whether the regulation is "content-based" or "content-neutral." However, the Supreme Court has stated that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." (Riley v. National Federation of the Blind of North Carolina, Inc. (1988) 487 U.S. 781, 795.) Accordingly, any compelled speech is viewed as a content-based regulation (i.e. a law proscribing certain content). (Ibid.)
Subject-Matter Discrimination vs. Viewpoint Discrimination. If the speech is a "content-based" regulation, a court will distinguish whether the law is "subject-matter discrimination" or "viewpoint discrimination." For example, a regulation prohibiting

discussion of abortion in general would be "subject-matter discrimination," whereas a regulation prohibiting someone from speaking out against abortion would be "viewpoint discrimination." While both forms of discrimination are content-based, the courts have held that "viewpoint discrimination" is an especially suspect and "egregious form of content discrimination [and]. . . the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (Rosenberger v. Rector and Visitors of the Univ. of Va. (1995) 515 U.S. 819, 829.)

B. Commercial Speech (including Professional Speech) or Noncommercial Speech. The second level of analysis for a speech

regulation is whether the speech being regulated is commercial or noncommercial speech. If the regulation is content-based and the speech is noncommercial, a court will likely apply the strict scrutiny. Conversely, a similar regulation that is content-based but where the speech is commercial, a court will apply a more lenient standard. (See Dex Media West, Inc. v. City of Seattle (9th Cir. 2012) 696 F.3d 952, 956-957. Indeed, regulations targeting misleading commercial speech need only

survive rational basis scrutiny. (See Zauderer v. Office of Disciplinary Counsel of the Supreme Ct. (1985) 471 U.S. 626.) Sometimes, the line between commercial speech and noncommercial speech is not clear. For example, in Bolger v. Youngs Drug Products Corp., the Court struck down a federal law that prohibited unsolicited advertisements on contraception. There, a manufacturer and distributor of contraceptives-who challenged the law-distributed pamphlets which advertised its contraceptives and discussed in its pamphlets issues like venereal disease and family planning. Although the Court ultimately struck down the law, the Court held that the pamphlet was commercial speech. (Bolger v. Youngs Drug Prods. Corp. (1983) 463 U.S. 60, 75.)

Courts have established a test to help identify whether speech is more like commercial or noncommercial speech. In a close case where the regulation involves both commercial and noncommercial speech, a reviewing court looks at (i) the advertising format of the speech, (ii) the speech's reference to a specific product, and (iii) the underlying economic motive of the speaker (collectively known as the "Bolger" factors).
(Ass'n of Nat. Advertisers, Inc. v. Lungren (9th Cir. 1994) 44

F.3d 726, 728.)

(1) Commercial Speech. It is well-settled law that the government is "free to prevent the dissemination to commercial speech that is false, deceptive, or misleading" without violating the First Amendment. (Zauderer v. Office of Disciplinary Counsel of the Supreme Ct. (1985) 471 U.S. 638.)

Specifically, "disclosure requirements trench much more narrowly on an advertiser's interests [because] warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception." (Id. at 651 internal quotations omitted]). Accordingly, misleading commercial speech only needs to survive rational basis scrutiny. (Ibid.)

Indeed, "laws requiring a commercial speaker to make purely factual disclosures relating to its business affairs, whether to prevent deception or simply to promote informational transparency, have a purpose consistent with the reasons for according constitutional protection to commercial speech." (Beeman v. Anthem Prescription Management, LLC (2013) 58 Cal.4th 329, 356[citations omitted].) Similarly, "[m]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or

protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" (National Electric Manufacturers Assn. v. Sorrell (2d Cir. 2001) 272 F.3d 104, 113-114.)

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(2) Professional Speech. Courts have established a doctrine, like the commercial speech doctrine, that applies when government regulates professional speech. Justice Jackson provided the following explanation for why a professional speech doctrine exists:

The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. (Thomas v. Collins (1945) 323 U.S. 516, 545 (Jackson, J., concurring).)

In other words, a state or federal government may regulate professional speech because "[i]t is the State's imprimatur (and the regulatory oversight that accompanies it) that provide clients with the confidence to put their health or their livelihood in the hands of those [professionals] who utilize knowledge and methods with which the clients ordinarily have little or no familiarity. (King v. Governor of the State of New

Jersey (3d Cir. 2014) 767 F.3d 216, 232.)

Professional speech, similar to commercial speech, is subject to lower level of scrutiny. The Ninth Circuit Court of Appeals, in Pickup v. Brown, explains this principle:

The First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate. (Pickup v. Brown (9th Cir. 2014) 740 F.3d 1208, 1228.)

To determine whether speech is professional speech, the inquiry is whether the "speaker takes the affairs of a client personally in hand

and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." (Moore-King v. County of Chesterfield, Va. (4th Cir. 2013) 708 F.3d 560, 569 [citations omitted].)

APPLYING FREE SPEECH ANALYSIS TO THE REQUIRED NOTICE FOR

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LICENSED HEALTH CARE FACILITIES. This bill requires a licensed covered facility, as defined, to disseminate to all clients on site the following notice ("licensed facility notice"):

"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]."

Proponents of the bill contend that this notice is needed to ensure that women in California are fully informed of their options and are able to make their own healthcare and pregnancy-related decisions. Opponents of the bill, however, strongly object to this requirement and assert that it unfairly targets operators of CPCs because of their anti-abortion viewpoint, forcing them to disseminate a message with which they do not agree, in

violation of free speech protections.

As detailed below, the Committee's analysis of the free speech issues indicates that the licensed facility notice is content-based, and would likely be considered viewpoint-neutral commercial speech that would be subject to intermediate scrutiny. Even if the notice were subjected to strict scrutiny, the notice may very well be held constitutional if a court
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accepted proponents' argument that the most effective way to ensure that women timely obtain the information about services they need during pregnancy is to require licensed health facilities to provide the notice on site.

A. The Licensed Facility Notice will Likely be Construed as a Content-Based Regulation. Because the licensed facility notice relates to pregnancy-related services, the speech regulated will likely be considered content-based, and not content-neutral.

Moreover, any compelled speech regulation is generally analyzed as a content-based restriction. (*See Riley, supra*, at p. 795.)

Accordingly, the level of scrutiny a court would apply depends on whether the notice triggers viewpoint discrimination, or is commercial speech.

B. The Licensed Facility Notice Does Not

Create Viewpoint Discrimination, and is Viewpoint Neutral.

Viewpoint discrimination occurs when the government not only targets a certain subject matter, but also targets a particular point of view on that specific subject matter. (See Rosenberger, supra, at p. 829.) Here, the government's compelling interest is consistent with the licensed facility notice, which does not convey a particular viewpoint about the services it mentions.

The stated purpose of the bill is to ensure that women who are pregnant are fully notified about the full spectrum of health care services available in the state. The notice in this bill is likely to be construed as viewpoint-neutral because the notice speaks to the entire continuum of pregnancy-related health care services, like family planning services, contraception, prenatal care, and abortion. Moreover, the regulation applies to all primary care clinics whose primary

purpose is providing family planning or pregnancy-related services, and provides at least two of the following: ultrasounds, contraceptives, pregnancy testing, advertising, or data collection. This means that the notice requirement will apply to different types of health care facilities represented on the

spectrum (as described in the notice).

C. Exemption of Certain Facilities Under this Bill Does Not Create Viewpoint Discrimination.

Similar to the disputed exemption in McCullen, discussed above, the exemption provided under this bill does not demonstrate viewpoint discrimination.

The first exemption is provided to clinics operated by the federal government, which is aimed at addressing preemption concerns. The second exemption is provided to a licensed primary care clinic that is enrolled as a Medi-Cal provider and enrolled as a provider in the Family Planning, Access, Care, and Treatment Program (Family PACT).

According to the author, a licensed primary care clinic that is both a Medi-Cal provider and a Family PACT provider offers the full continuum of health care services as described in the Notice above (i.e. comprehensive family planning services, contraception, prenatal care, and abortion). Under Medi-Cal, a patient is covered for pregnancy-related services, maternity and new born care, prenatal care, and emergency and abortion services. Under Family PACT, a patient is covered for comprehensive clinical family planning services, including but not limited to methods

and services to limit or enhance fertility (including contraceptives); natural family planning; abstinence methods; limited fertility management; preconception counseling; maternal and fetal health counseling; general
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reproductive health care (including diagnosis and treatment of infections and conditions, including cancer, that threaten reproductive capability); medical family planning treatment; and family planning procedures.

Thus, the entire spectrum of services, as specified in the notice, will be provided by a Medi-Cal and Family PACT provider. Accordingly, there is appropriate justification for those clinics to be exempted from the requirement to provide the licensed facility notice.

D. The Licensed Facility Notice Will Likely be Construed as Commercial or Professional Speech.

As previously stated, the speech being regulated is professional speech if "the speaker takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." (Moore-King v. County of Chesterfield, Va. (4th Cir. 2013) 708

F.3d 560, 569 [citations omitted].)

Under this bill, a licensed 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 of the Health and Safety Code. This class of primary care clinics generally includes a community clinic, a free clinic, a surgical clinic, a chronic dialysis clinic, a rehabilitation clinic, and an alternative birth center (collectively "primary

care clinics").

In order to be licensed as a primary care clinic, an applicant must apply to the California Department of Public Health and comply with a series of licensing requirements to provide care.

A clinic must provide "diagnostic, therapeutic, radiological, laboratory and other services for the care and treatment of patients for whom the clinic accepts responsibility." (22 Cal. Code Regs. Section 75026.) Moreover, "[e]very medical clinic shall have a licensed physician designated as the professional director" and "[a] physician, physician's assistant, or a registered nurse shall be present whenever medical services are provided." (22 Cal. Code Regs. Section 75027.)

Given that a primary care clinic accepts to provide treatment for patients whom the clinic accepts responsibility, and provides medically-supervised care, a notice requirement for primary care clinic is likely to be construed a professional speech. (See Moore-King, supra, at p. 569.) Accordingly, a court would likely apply intermediate scrutiny.

E. The Licensed Facility Notice Will Likely Survive Intermediate Scrutiny.

Because the licensed family notice will likely be construed as professional speech, a reviewing court will probably subject the notice to intermediate scrutiny. To survive intermediate scrutiny, the law must directly advance a substantial governmental interest. (See Association of National

Advertisers, Inc. v. Lungren (9th Cir. 1994) 44 F.3d 726, 729.)

Here, the interest is to ensure that women who are pregnant are fully notified about the continuum of health care options available in the state. (Indeed, public health has always been viewed as a compelling governmental interest.) The government's interest here in ensuring that pregnant women are informed

about their health care options is directly advanced by a notice provided by primary care facilities, especially if the facility does not provide the full spectrum of health care services.

Thus, the licensed facility notice will survive intermediate scrutiny.

F. Even if a Court were to Apply Strict Scrutiny, the Licensed Facility Notice Will Likely Pass Constitutional Muster.

To survive strict scrutiny, the law must be narrowly tailored to satisfy a compelling government interest. As previously stated, the interest is to ensure that women who are pregnant are fully notified about the continuum of health care options available in the state. The interest is compelling and narrowly tailored because the time-sensitive nature of any pregnancy affects the policy options that this Legislature can enact. As this author has stated, the most effective way to ensure that women obtain information and services they need during pregnancy in a timely way is to require a licensed health care facility to provide the notice.

An alternative, like a statewide campaign, would not achieve the compelling interest because it would not sufficiently provide

information to the consumer about the services provided available at a particular primary care facility, especially if that facility does not provide the full spectrum of medical options. (See Evergreen Ass'n, Inc., supra, at p. 247.) Thus, the licensed facility notice will likely pass constitutional muster, whether a court reviews the law under intermediate or strict scrutiny.

III. APPLYING FREE SPEECH ANALYSIS TO THE REQUIRED NOTICE FOR UNLICENSED FACILITIES.

The bill requires an unlicensed covered facility, as defined, to disseminate to clients on site the following notice ("unlicensed facility notice"):

"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."

Proponents of the bill contend that this notice is needed to ensure that pregnant women in California know when they are getting medical care from licensed professionals. According to the author, the bill is intended to ensure that 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.

Most of the opposition letters received by the Committee object to the licensed facility notice as violation of free speech rights, but the letters make no allegation that the unlicensed facility notice is in similar violation of those rights. Some opponents, however, object that this provision requires non-licensed clinics to post language that is untrue because, they contend, many of the non-licensed clinics have licensed medical staff on site as the clinics prepare to obtain their licenses.

As detailed below, the Committee's analysis of the free speech issues indicates that the unlicensed facility notice is content-based and would likely be considered viewpoint-neutral commercial speech. As such, the required notice would be subject to rational basis scrutiny and would likely be found to be permissible under that standard. Even if the notice were subjected to strict scrutiny, the notice may very well be held constitutional in light of two recent court decisions, described below, that upheld similar notices required for unlicensed facilities after applying strict scrutiny.

A. The Unlicensed Facility Notice will be Construed a Content-Based Regulation.

Since the unlicensed facility notice relates to a specific subject matter, the notice will be construed as a content-based regulation. Moreover, any

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compelled speech regulation is generally analyzed as a content-based restriction. (See Riley, supra, at p. 795.)

Accordingly, the level of scrutiny a court applied would depend on whether this bill were found to trigger viewpoint discrimination, or to be targeting commercial speech.

B. The Unlicensed Facility Notice is Viewpoint Neutral.

As stated above, viewpoint discrimination occurs when the government not only targets a certain subject matter, but also targets a particular point of view taken by speakers on that a specific subject matter. (See Rosenberger, supra, at p. 829.)

Here, the notice required of an unlicensed facility does not take a particular point of view. The notice simply requires an unlicensed

facility to state uncontrovertibly that it is not a medical facility (if it is not licensed). Accordingly, the notice is viewpoint neutral.

C. The Unlicensed Facility Notice Will be Likely be Construed as Commercial Speech.

As previously mentioned, the line between commercial and noncommercial speech is not always clear. To determine whether the speech that is being regulated is commercial or noncommercial, a reviewing court looks at the Bolger factors: (i) the advertising format of the speech, (ii) the speech's reference to a specific product, and (iii) the underlying economic motive of the speaker. (Lungren, supra, at p. 728.)

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Here, the speech and notice likely meets the Bolger factors.

First, the format of the notice is required to be in advertising materials, and onsite in areas where there is an initial contact between the client and the facility. (See American Academy of Pain Management v. Joseph (9th Cir. 2004) 353 F.3d 1099, 1106, finding that "advertising" was sufficient for the first Bolger "format" factor.) Second, the speech here is related to a pregnancy-related health service, which is

considered a product. (See Joseph, supra, at p. 1106, finding that "medical services" was a specific product for the second Bolger factor.)

While the third Bolger factor for the unlicensed facilities notice may be a closer question, a court would likely find that the unlicensed facility has an economic motive. If the facility charges a fee, that is generally sufficient to establish an economic motive. However, a facility that does not charge a fee may still be construed as having an economic motive because it attracts clients and patients in order to perform health services, rather than to exchange ideas. (See Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore (4th Cir. 2013) 721 F.3d 264, 286, citing Fargo Women's Health Organization, Inc. v. Larson (1986) 381 N.W.2d 176, 180-81, "the degree, if any, that monies are received by the [nonprofit] from its clients is not dispositive of the commercial speech issue" [internal citations omitted].)

Accordingly, it seems likely that the speech required under this bill would be construed as commercial speech, and a reviewing court would likely apply rational basis scrutiny. (Zauderer,

supra, at p. 638.)

D. The Unlicensed Facility Notice Will Likely Survive Rational Basis Scrutiny.

As previously stated, the author has stated that the government's compelling interest is to ensure that women who are pregnant are fully notified about the continuum of health care services available in the state.

Given that the notice required of unlicensed facilities is about promoting transparency and avoiding consumer confusion, a court is likely to apply rational basis scrutiny. Here, the notice required of unlicensed facilities is reasonably related to the state's interest in ensuring that pregnant women are fully notified about the continuum of health care services available in the state. The notice is a fact-specific, incontrovertible statement aimed at informing a patient about the kinds of services a facility provides. (See Sorrell, supra, at pp. 113-114.)

Additionally, because the state wants to ensure that a woman knows about all of her health care options, a notice informing the woman about the lack of a health care professional informs her that certain health care services are unavailable.

Understanding that certain health care services are not available assists a consumer of

health-related services to avoid confusion or deception about the kind of care that an unlicensed facility may provide. (See Zauderer, supra, at p. 638.) Thus,
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the unlicensed facility notice will likely survive rational basis scrutiny.

E. Even If A Court Were to Apply Strict Scrutiny, The Unlicensed Facility Notice Will Likely Pass Constitutional Muster.

Similar notices-like the notice that is required of an unlicensed facility under this bill-were upheld in two Circuit Courts of Appeals that applied strict scrutiny.

In Centro Tepayac v. Montgomery County, the Fourth Circuit reviewed a 2010 resolution passed by the Montgomery County Council that regulated pregnancy service centers. (Centro Tepayac v. Montgomery County. (4th Cir. 2013) 722 F.3d 184,189.) The Montgomery Resolution required a pregnancy service center that did not have a licensed medical professional on staff to post a sign stating that "the Center does not have a licensed medical professional on staff." (Id. at p. 189.) The Centro Tepayac, a nonprofit organization that operated a limited pregnancy resource center, challenged the law. The Fourth Circuit upheld the law and the lower court's application of

strict scrutiny. The court found that the government had a compelling interest to ensure that women were able to obtain needed medical care, and that women did not forgo medical treatment. The notice was narrowly tailored because it notified patients "in neutral language [stating] the truth that a licensed medical professional is not on staff, [and the notice] does not require any other specific message." (Id. at p. 190 [internal quotations omitted.) Accordingly, the Resolution was constitutional.

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In Evergreen Ass'n, Inc. v. City of New York, the Second Circuit reviewed a 2011 City of New York ordinance that regulated pregnancy service centers. (Evergreen Ass'n, Inc. v. City of New York (2nd Cir. 2014) 740 F.3d 233, 238.) Among other things, the New York Ordinance required a pregnancy service center to disclose whether the center had "a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center." (Ibid.)

Evergreen Association, Inc. challenged the law on several arguments, including on First Amendment grounds. Similar to the Fourth Circuit, the Second Circuit applied strict scrutiny to the notice and upheld the law. The court held that "striking down the [disclosure] would deprive the City of its ability to protect the health of its citizens and combat

consumer deception in even the most minimal way." (Id, at p. 247.)

Specifically, the Evergreen court stated that the government had a compelling interest "to ensure that women have prompt access to the type of care they seek" and "to prevent [women] from mistakenly concluding that pregnancy services centers, which look like medical facilities, are medical facilities, whether or not the centers engage in deception." (Evergreen Ass'n, Inc., supra, at p. 247.) The law was narrowly tailored because alternatives like city-sponsored advertisements and prosecuting fraud, false advertising, or the unauthorized practice of medicine would not achieve the City's interest. (Ibid.)

Specifically, the alternatives would not alert consumers "as to whether a particular pregnancy services center employs a licensed medical provider, because, among other things, this is discrete factual information known only to the particular center." (Ibid [original emphasis].) Moreover, "[e]nforcement of fraud or other laws occurs only after the fact, at which

point the reproductive service sought may be ineffectual or unobtainable." (Ibid.) Thus, the notice required of unlicensed facilities will likely pass constitutional muster, whether a

court reviews the law under rational basis or strict scrutiny.

ENFORCEMENT PROVISIONS. The bill authorizes modest civil penalties to be imposed if, after having been given notice of noncompliance and 30 days in which to correct a violation, the facility still fails to comply with these provisions. This bill also requires the Attorney General (AG) to post and maintain on the DOJ Internet Web site a list of the covered facilities upon which a penalty has been imposed for noncompliance. Because the bill allows an enforcement action against a covered facility to be brought by a city attorney or county counsel, in addition to the AG, the author may wish to consider clarifying how the list of previous violators will be maintained and kept current to reflect actions brought by an entity other than the AG.

ARGUMENTS IN SUPPORT:

In support of the bill, NARAL Pro-Choice California writes: As a national leader for reproductive freedom, the state of California has numerous laws on the books supporting women and providing assistance for low-income residents. However, many women are unaware of the truly comprehensive support the state has to offer. This legislation ensures California women receive the information they need to

access affordable health care and make the best decisions regarding family planning. Distributing a notice of reproductive health services would ensure that women in any reproductive health or

pregnancy counseling facility know that California respects their rights and provides assistance.

Disclosing the unlicensed status of a facility allows women to make fully informed decisions. AB 775, the Reproductive FACT Act, will help ensure that the intent of California's strong laws that protect reproductive freedom is fully realized.

In support of the bill, the League of Women Voters of California writes: AB 775 requires licensed and unlicensed facilities to provide their parents information they need to understand their rights and the full range of medical care available to them so as to make the best decisions regarding family planning. It also ensures that women are informed that the facility they use is a licensed medical facility that provides actual medical services or is an unlicensed facility that cannot provide the full range of services?

[A] woman's constitutional right of privacy to make reproductive choices and to have access to a basic level of health care includes all

aspects of family planning. The right to make reproductive choices is empty of content if a woman lacks the ability to obtain the services she chooses because she lacks information about her rights, the services available, and the ability of the facility she is in to provide them.

ARGUMENTS IN OPPOSITION:

The California Catholic Conference (CCC) opposes this bill, stating:

The bill proposes to regulate the state's pregnancy centers, but in actuality is aimed at discriminating

against those pregnancy centers that hold a pro-life viewpoint. Such unfair legislation may discourage women from getting the assistance that they need and deserve as well as expose many of these pregnancy centers to needless criminal or civil sanctions for failure to comply. Because we believe all life is sacred, we support programs which offer medical, economic and emotional support for pregnant women and children, so that they can make life-affirming choices.

The Committee has received hundreds of letters expressing opposition to the bill from operators of pregnancy centers and their

supporters. For example, Pregnancy Counseling Center writes:

Women are smart and they know that they have options regarding their pregnancy. Not all pregnant women want a referral to a government agency that funds abortions.

Pregnant women seek out abortion-alternative organizations because they do not want to go to an abortion-provider to discuss their options.

The National Institute of Family & Life Advocates writes in opposition: AB 775 basically requires non-profit organizations that lawfully promote a woman's right to make a fully informed decision about her pregnancy to announce what services they do not provide and force them to refer in violation of their conscience. A law such as this, while targeted at pro-women groups, would set a terrible precedent and its rational could be used against many other forms of speech. There are alternative methods to spread the word about public healthcare programs other than to force one type of organization, targeted for their religious and

philosophical beliefs, to advertise them. There are other laws that are in effect, such as laws against fraud and deceptive practices, which are available to remedy a situation where

deceptive practices are in fact occurring. Forcing speech is not the solution.

REGISTERED SUPPORT/OPPOSITION:
Support

Black Women for Wellness (co-sponsor)
NARAL Pro Choice California (co-sponsor)
ACT for Women and Girls
American Congress of Obstetricians and Gynecologists
American Nurses Association, California
California Association for Nurse Practitioners
California Council of Churches IMPACT
California Latinas for Reproductive Justice
California Pan-Ethnic Health Network
California Primary Care Association
California Women's Law Center
California Women Lawyers
The Center on Reproductive Rights and Justice

Forward Together
Fresno Barrios Unidos
League of Women Voters of California
Maternal And Child Health Access
National Abortion Federation
National Council of Jewish Women, California
Planned Parenthood Affiliates of California
Religious Coalition for Reproductive Choice, California
Western Methodist Justice Movement

Women's Community Clinic
Women's Health Specialists

Opposition

Alliance Defending Freedom
Birth Choice
California Catholic Conference
California Right to Life Committees, Inc.
Caring for Women Pregnancy Resource Center
Conejo Pregnancy Center
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Fallbrook Pregnancy Resource Center
Horizon Pregnancy Clinic
Life Choices
Network Medical Women's Center
Pacific Justice Institute Center for Public Policy
Pregnancy Care Center
Pregnancy Care Clinic
Pregnancy Counseling Center
Whittier Life Centers, Inc.
Women's Pregnancy Care Clinic
Hundreds of Individuals
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

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

Plaintiffs

Case No.:_____

v.

KAMALA HARRIS, Attorney General of the State
of California, *in her official capacity;*
KAREN SMITH, M.D., Director of California Department of Public Health, *in her official capacity*,

Defendants.

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, DAMAGES AND ATTORNEYS' FEES

Come now Plaintiffs, MOUNTAIN RIGHT TO LIFE, INC., dba PREGNANCY & FAMILY RESOURCE CENTER, BIRTH CHOICE OF THE DESERT, and HIS NESTING PLACE by and through their undersigned counsel, and file this civil action, respectfully requesting this Court to issue Injunctive and Declaratory Relief and award nominal damages, attorneys' fees and costs for the constitutional violations described below.

INTRODUCTION

1. This is a civil rights action brought pursuant to 42 U.S.C. §1983 challenging the constitutionality of California's AB 775, the

"Reproductive FACT Act" (hereafter "the Act" or "AB 775"), Article 2.7 of Chapter 2 of Part 2 of Division 106 of the California Health and Safety Code. The Act violates Plaintiffs' federal and state constitutional guarantees of Freedom of Speech and Free Exercise of Religion by requiring Plaintiffs to post government-dictated messages which are antithetical to their beliefs and which they do not wish to communicate. Plaintiffs assert that the Act is unconstitutional as written and in its application to Plaintiffs.

2. Plaintiffs seek Preliminary and Permanent Injunctive Relief enjoining Defendants from enforcing AB 775 because it violates: (1) Plaintiffs' rights to freedom of speech and free exercise of religion, guaranteed by the First Amendment to the United States Constitution and (2) Plaintiffs' rights to liberty of speech and free exercise and enjoyment of religion, guaranteed by article I, §§2(a), 4 of the California Constitution.

3. Plaintiffs also seek declaratory relief from this Court declaring that the Act is unconstitutional on its face and as applied. An actual controversy exists between the parties involving substantial constitutional issues, in that Plaintiffs assert that the challenged statute violates the Free Speech and Free Exercise of Religion rights of Plaintiffs guaranteed under the First and Fourteenth Amendments to the United States Constitution

and by Article I, §§2(a), 4 of the California Constitution, while Defendants assert the Act comports with the United States and California constitutions.

JURISDICTION AND VENUE

4. This action arises under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §1983, and Article I, §§2(a), 4 of the California Constitution.

5. This Court has jurisdiction of this action under 28 U.S.C. §§1331, 1343, 1367, and 2201-02.

6. This Court is authorized to grant the Plaintiffs' prayer for relief regarding costs, including reasonable attorney's fees, under 42 U.S.C. §1988.

7. This Court is authorized to grant Declaratory Judgment under the Declaratory Judgment Act, 28 U.S.C. §§2201-02, implemented through Federal Rule of Civil Procedure 57, and to issue the Preliminary and Permanent Injunctive Relief under Federal Rule of Civil Procedure 65.

8. Venue is proper in this judicial district under 28 U.S.C. §1391(b). Each and all of the acts alleged herein were done and are to be done by Defendants, and each of them, not as individuals, but under the color and pretense of statutes, ordinances, regulations, customs, and uses of the United States of America and of

the State of California. A substantial part of the actions giving rise to this case occurred within the District and Plaintiffs' offices are located in this District.

PARTIES

Plaintiffs

9. Plaintiff His Nesting Place is a nonprofit corporation organized and operating under the laws of the State of California, and is located in Long Beach, California.

10. Plaintiff Mountain Right to Life, Inc., doing business as Pregnancy & Family Resource Center, is a nonprofit corporation organized and operating under the laws of the State of California, and is located in San Bernardino, California.

11. Plaintiff Birth Choice of the Desert is a nonprofit corporation organized and operating under the laws of the State of California, and is located in La Quinta, California.

Defendants

12. Defendant, Kamala Harris, is Attorney General of California, charged with enforcement of the Act. She is sued in her official capacity.

13. Defendant, Karen Smith, M.D., is Director of Public Health for the State of California. The California Department of Public Health is responsible for the enforcement of public health laws and regulations such as the Act. She is sued in her official capacity.

GENERAL FACTUAL ALLEGATIONS
AB 775

14. Governor Edmund G. Brown, Jr. signed AB 775 into law on October 9, 2015 as California Health and Safety Code §§123470-123473, which went into effect on January 1, 2016. An authenticated copy of AB 775 as enacted is attached to this Complaint as Exhibit A and is incorporated herein by reference as if set forth in full.

15. The Legislature describes the purpose of AB 775 as: "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." AB 775, Section 2 (Exhibit A).

16. More particularly, the Legislature claims that

> Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery.…
>
> 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.

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….

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.

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. AB 775, Section 1 (Exhibit A).

17. In order to help the state with its purported need to make women aware of low cost and no-cost abortion services, AB 775 requires that facilities which counsel pregnant women, under penalty of civil fines, post a government-prescribed message. The compelled message differs, depending upon whether a facility is defined as "a licensed covered facility," or "an unlicensed covered facility." AB 775, Section 3, to be codified as Health and Safety Code §123471(a) (Exhibit A).

18. AB 775 defines "licensed covered facility" as:

> [A] facility licensed under [Health and Safety Code] 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

AB 775, Section 3, to be codified as Health and Safety Code §123471(a) (Exhibit A).

19. AB 775 defines "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.

AB 775, Section 3, to be codified as Health and Safety Code §123471(b) (Exhibit A).

20. Clinics that are directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies, and licensed primary care clinics that are enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program are exempt from the compelled speech requirements of AB775. AB 775, Section 3, to be codified as Health and Safety Code §123471(c). (Exhibit A).

21. Plaintiffs are all faith-based organizations that offer information on the subject matter of abortion but will not express the viewpoint that abortion is a viable option

for women facing unplanned pregnancies, because that viewpoint deeply violates Plaintiffs' sincerely held religious beliefs.

22. Facilities that meet the definition of licensed covered facility are required to disseminate 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].

AB 775, Section 3, to be codified as Health and Safety Code §123472(a). (Exhibit A).

23. Licensed covered facilities must disclose the information by either posting it in a conspicuous place in the facilities' waiting rooms in no less than 22-point type on a sign that is at least 8.5 inches by 11 inches, or by

distributing the information to all clients in no less than 14-point type or by 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 must be available for all clients who cannot or do not wish to receive the information in a digital format. AB 775, Section 3, to be codified as Health and Safety Code §123472(a). (Exhibit A).

24. Facilities that meet the definition of unlicensed covered facilities must 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:"

> 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.

AB 775, Section 3, to be codified as Health and Safety Code §123472(b). (Exhibit A).

25. Unlicensed covered facilities must post a notice in at least 48-point type on a sign

that measures at least 8.5 inches by 11 inches conspicuously in the entrance of the facility, and at least one additional area where clients wait to receive services. AB 775, Section 3, to be codified as Health and Safety Code §123472(b) (Exhibit A).

26. Unlicensed covered facilities must also post the notice "clearly and conspicuously" in "any print and digital advertising materials including Internet Web sites." AB 775, Section 3, to be codified as Health and Safety Code §123472(b). (Exhibit A).

27. AB 775 does not define "any print and digital advertising materials" other than to say that it includes Web sites. Therefore, unlicensed facilities do not know and must guess at whether the multi-language disclaimer must be present on materials such as business cards for which the disclaimer will take up all of the available space, thus effectively stifling Plaintiffs' message.

28. AB 775 defines "clear and conspicuous" as "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." AB 775, Section 3, to be codified as Health and Safety Code §123472(b). (Exhibit A).

29. Facilities that fail to post the required government notices will be subject to

civil penalties of $500 for the first violation and $1,000 for each subsequent violation. AB 775, Section 3, to be codified as Health and Safety Code §123473. (Exhibit A).

30. AB 775 empowers the Attorney General, city attorneys or county counsel to bring an action to impose the penalties after providing facilities with 30 days' notice of non-compliance. AB 775, Section 3, to be codified as Health and Safety Code §123473. (Exhibit A).

Pregnancy & Family Resource Center

31. Plaintiff Mountain Right to Life, Inc., doing business as Pregnancy & Family Resource Center ("PRC") is a faith-based nonprofit center that is licensed to provide ultrasound services. 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. The sanctity of human life and provision of care to both mother and her unborn child is a core tenet of Plaintiff's sincerely held religious beliefs and is integral to its mission of serving women facing unplanned pregnancies and their unborn children.

32. PRC provides limited, non-diagnostic ultrasound five days a week, accurate information regarding a woman's

choices when facing an unplanned pregnancy, abstinence counseling, an abortion recovery Bible study, Sexual Integrity classes for teens, adoption information and referrals to community resources as well as other free services to women and families in the community.

33. PRC has a group of Client Advocates who assist clients in setting goals and making decisions that will create positive consequences for the mothers and their families.

34. PRC offers free pregnancy tests, relationship consulting, medical care referrals, information regarding maternity homes, and counseling regarding employment and education options. Its services are free and confidential.

35. PRC talks to clients about the subject of abortion and alternatives available if a client does not want to parent her child, but does not communicate the viewpoint that abortion is a viable option for clients, as said viewpoint deeply violates the sincerely held religious beliefs upon which PRC's services are based. PRC does not, and will not, refer for, recommend, encourage, or facilitate clients to obtain abortions.

36. PRC receives no state or federal funds, but relies entirely upon donations from churches, other non-profit organizations and individuals who are committed to ensuring that

PRC continues to provide Christian-based care, training and education to women facing unplanned pregnancies.

37. PRC is informed and believes and based thereon alleges that it would be categorized as a "licensed covered facility" under AB 775. As such, PRC will be required to post, in multiple languages under threat of crippling penalties, the government prescribed message:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

38. PRC cannot comply with the Act's requirement to post the information which PRC views as an endorsement and/or facilitation of abortion, which is antithetical to PRC's sincerely held religious beliefs that proscribe abortion as the murder of an unborn child.

39. PRC cannot communicate a viewpoint that contradicts its sincerely held

religious beliefs and undermines the fundamental purpose upon which it was founded.

40. As a result of the Act's compelled speech requirement, PRC is faced with an unconstitutional Hobson's choice of 1) complying with the Act and violating its sincerely held religious beliefs and infringing its freedom of speech; 2) continuing to engage in its free speech activities and exercise its sincerely held religious beliefs and face crippling penalties that will tax its limited resources and effectively diminish its ability to serve clients; or 3) ceasing its expressive activities and leaving its clients without the much needed free services that preserve and protect the life of women and their babies.

41. PRC's services are quintessential expressive activities, offering clients messages regarding 1) options available for caring for themselves and their children, 2) information on educational and training opportunities, 3) results of diagnostic ultrasounds and 4) counseling on child care, personal and financial issues and Christian principles and values that provide clients with a foundation for building a life for themselves and their children.

42. AB775 places a substantial burden on PRC's exercise of religion by prescribing that it utter a government message antithetical to its religious viewpoint and its sincerely held religious beliefs in the sanctity of

human life, the devastating consequences of abortion and the Biblical mandate to care for both the pregnant mother and the unborn child. AB 775 is an impermissible government intrusion into and excessive entanglement in the religious exercise and mission of PRC.

43. AB 775 substantially burdens PRC's First Amendment rights of free speech by compelling PRC to either disseminate a government-prescribed message with which it deeply disagrees and which contradicts its foundational religious tenets, or face crippling fines for its failure to do so.

44. AB 775 is an impermissible prior restraint on speech in that it compels PRC to disseminate a government-prescribed viewpoint or pay a fine for refusing to do so.

Birth Choice of the Desert

45. Birth Choice of the Desert ("BCD") is a nonprofit corporation that provides pregnancy testing, and, if the test is positive, referrals to a licensed medical provider for ultrasound services.

46. BCD also provides counseling for women facing unplanned pregnancies. BCD provides counseling on the subject of abortion, adoption and parenting choices for the client, but does not communicate the viewpoint that abortion is an acceptable option for the pregnant women, because that viewpoint

deeply violates BCD's core religious principles and beliefs.

47. BCD is not licensed by the State of California to provide ultrasound and other medical services, but is seeking funding for a mobile ultrasound unit and seeking licensing to become a medical clinic qualified to perform ultrasounds. BCD's Board of Directors has approved the plan to expand its services to include licensure for ultrasound testing. BCD has a concrete plan to attain ultrasound capabilities and licensing in the immediate future, but the requirements of AB 775 are interfering with and deterring that plan.

48. BCD is informed and believes and based thereon alleges that unless and until it acquires an ultrasound unit and licensure from the state, it would be regarded as an unlicensed covered facility under the Act. As such, it will be subject to oppressive fines if it fails to 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."

49. BCD is a 501(c)(3) faith-based organization that is based upon Christian principles that permeate all aspects of its care for pregnant women. BCD's belief and mission as a pregnancy center is to protect life and protect the dignity of babies and their parents.

Abortion is directly contrary to BCD's beliefs and mission.

50. Central to BCD's mission is 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. The sanctity of human life and provision of care to both mother and her unborn child is a core tenet of BCD's sincerely held religious beliefs and is integral to its mission of serving women facing unplanned pregnancies.

51. BCD provides its services free of charge to its clients and does not seek donations from those who use its services.

52. BCD's services are quintessential expressive activities offering clients faith-based, life-affirming messages regarding non-abortion options for caring for themselves and their babies, including counseling on Christian principles and values to aid the mothers in choosing life and making healthy choices for themselves and their babies.

53. BCD offers medical referrals, but does not and will not, refer for, recommend, encourage, or facilitate clients to obtain abortions.

54. BCD receives no state or federal funds, but relies entirely upon donations from churches, other non-profit organizations and individuals who are committed to ensuring that BCD continues to provide Christian-based care

and education to women facing unplanned pregnancies.

55. BCD intends to acquire in the immediate future a mobile ultrasound unit that will enable it to better serve its clients and better exercise its sincerely held religious beliefs in the sanctity of human life by giving women additional information to enable them to turn away from abortion and its deleterious consequences and choose life for their unborn babies.

56. When BCD acquires a mobile ultrasound unit and becomes licensed as a medical facility, then it will become subject to the requirements for "licensed facilities" under AB 775 and therefore be required to post, in multiple languages under threat of crippling penalties, the government prescribed message:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

57. The requirement that BCD post the above-described language as a "licensed facility" adversely affects and impedes its efforts to provide women with ultrasound services, and thereby prevents BCD from disseminating its message that human life is sacred and should be preserved. Donors seeking to further that message by donating to BCD will cease to do so if BCD is forced to facilitate abortions by posting the government-required message regarding the free availability of abortion services, because that message is antithetical to the donors' and BCD's sincerely held religious beliefs.

58. AB 775 unconstitutionally abridges and burdens BCD's free speech rights by compelling it to speak messages that it does not choose to speak, that BCD is opposed to speaking, and that distract and detract from the messages that BCD chooses to speak.

59. AB 775 substantially burdens BCD's free exercise of religion now, by impeding and preventing BCD from obtaining ultrasound capabilities and medical licensing, which BCD intends to obtain to further its religious beliefs regarding the sanctity of human life.

60. Moreover, AB 775 will substantially burden BCD's exercise of religion when BCD becomes licensed in that it will require that BCD compromise its sincerely held religious beliefs that all life is sacred and that

murder is a sin by posting the government-prescribed message which facilitates abortion by advertising its availability. Alternatively, BCD will face crippling fines if it refuses to compromise its beliefs, which will result in BCD having to discontinue its operations.

61. AB 775 also substantially burdens BCD's exercise of religion as an "unlicensed facility" in that it requires that BCD either diminish the pro-life messages it can place in print and digital media in order to provide the required multi-language disclaimer, or to spend additional resources to increase the advertising resources it can purchase, leaving it fewer funds for services, or face fines that will quickly diminish its resources and cripple its ability to engage in its expressive activities.

62. Because AB 775 does not define "any print or digital advertising" and imposes crippling fines for non-compliance, BCD is compelled to define the term to include all manner of communication with its clients, including business cards, for which the multi-language disclaimer will become the only message that can be placed in the limited amount of space, This will completely foreclose the messages that BCD needs to communicate in order to exercise its free speech rights and its sincerely held religious beliefs. Even as to larger media formats, BCD will be forced to either forgo substantial content of its religious speech in order to accommodate the state's

required multi-language disclaimer, expend more of its limited resources on media purchases or face crippling fines for failure to comply with AB 775.

63. AB 775 is an impermissible government intrusion into and excessive entanglement in the religious exercise and mission of BCD.

64. AB 775 substantially burdens BCD's First Amendment rights of free speech by compelling BCD to disseminate a government-prescribed message or face crippling fines for its failure to do so.

65. AB 775 impermissibly chills BCD's free speech rights by compelling it to forgo or significantly curtail other expressive activities in order to finance and otherwise accommodate the government's prescribed message in multiple languages and across multiple media platforms.

His Nesting Place

66. Plaintiff His Nesting Place ("HNP") is a nonprofit organization that is not licensed by the State of California to provide ultrasound or other medical services.

67. 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.

68. The emphasis of HNP is the restoration, personal growth and education of the mother, which prepares her to be responsible for her own future.

69. HNP is a 501(c)(3) faith-based organization that is based upon Christian principles that permeate all aspects of its care for pregnant women. Central tenets of the organization'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. Provision of care to both the mother and her unborn child is a core tenet of Plaintiff's sincerely held religious beliefs and is integral to its mission of serving women facing unplanned pregnancies.

70. HNP provides its services free of charge to its clients and does not seek donations from those who use its services.

71. In keeping with its mission to empower women and help them care for their unborn children, HNP offers job training, financial management, pastoral counseling and parenting classes as well as housing for the mother and her children during the course of her pregnancy.

72. HNP's services are quintessential expressive activities, offering clients messages about the options available for caring for themselves and their children, information on educational and training opportunities to

enable the mother to provide for herself and her children, counseling on how to care for children, counseling on how to address personal and financial issues affecting the mothers and their children, and counseling on Christian principles and values to aid the mothers in forging a life for themselves and their children.

73. HNP offers medical referrals, but does not offer medical services on site. HNP does not, and will not, refer for, recommend, encourage, or facilitate clients to obtain abortions.

74. HNP is informed and believes and based thereon alleges that it would be regarded as an unlicensed covered facility under the Act. As such, it will be subject to oppressive fines if it fails to 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."

75. HNP receives no state or federal funds, but relies entirely upon donations from churches, other non-profit organizations and individuals who are committed to ensuring that HNP continues to provide Christian-based care, training and education to women facing unplanned pregnancies.

76. AB 775 will substantially burden HNP's exercise of religion by compelling it to either diminish the pro-life messages it can

place in print and digital media in order to provide the required notice, or to spend additional resources to increase the advertising resources it can purchase, leaving it less money for services. Failing to provide the required notice would subject HNP to crippling fines that will quickly diminish its resources. Either of these options will significantly burden HNP's ability to exercise its sincerely held religious beliefs by providing care, counseling, training and housing for pregnant women and their children.

77. Because AB 775 does not define "any print or digital advertising," other than saying that it includes print and digital media, HNP does not know whether it must include the multi-language disclaimer on materials such as business cards, for which the disclaimer would represent the entire content of the card and thereby preclude HNP from providing critical contact information and other messages that are integral to Plaintiff's free speech and free exercise rights under the United States and California constitutions.

78. AB775 places a substantial burden on HNP's exercise of religion by prescribing that it disseminate a government message as part of the services HNP provides in exercising its sincerely held religious beliefs in the sanctity of human life and the Biblical mandate to care for both the pregnant mother and the unborn child. AB 775 is an impermissible

government intrusion into and excessive entanglement in the religious exercise and mission of HNP.

79. AB 775 unconstitutionally abridges and burdens HNP's free speech rights by compelling it to speak messages that it does not choose to speak, that it is opposed to speaking, and that distract and detract from the messages that it chooses to speak.

80. AB 775 impermissibly chills HNP's free speech rights by compelling it to forgo or significantly curtail other expressive activities in order to finance and otherwise accommodate the government's prescribed message in multiple languages and across multiple media platforms.

COUNT I—AB 775 VIOLATES PLAINTIFFS' RIGHT TO FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT.

81. Plaintiffs reiterate and adopt each and every allegation in the preceding paragraphs numbered 1 through 80.

82. The Free Speech Clause of the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, prohibits Defendants from abridging Plaintiffs' freedom of speech.

83. AB 775, on its face and as applied, is an unconstitutional prior restraint on Plaintiffs' speech.

84. AB 775, on its face and as applied, unconstitutionally compels Plaintiffs to speak messages they have not chosen for themselves, with which they disagree, that are antithetical to their mission and sincerely held religious beliefs, and that detract from, undermine, and interfere with messages that comport with their mission and purpose.

85. AB 775, on its face and as applied, discriminates against Plaintiffs' speech on the basis of the content or viewpoint of their message.

86. AB 775, on its fact and as applied, is not the least restrictive means to accomplish any permissible government purpose sought to be served by the law.

87. AB 775, on its face and as applied, unconstitutionally chills and abridges the right of Plaintiffs to freely communicate information pertaining to the morally upright options available to women facing unplanned pregnancy from a faith-based perspective.

88. AB 775, on its face and as applied, is impermissibly vague and overbroad as it requires organizations to guess at the extent of the requirement for placing multi-language disclaimers on advertising materials, and to restrain their expressive activity from fear of being charged with failing to comply with the poorly defined provisions.

89. On its face and as applied, AB 775 vests unbridled discretion in Defendants.

90. On its face and as applied, AB 775's violation of Plaintiffs' rights of free speech has caused and will continue to cause Plaintiffs to suffer undue and actual hardship and irreparable injury. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their most cherished constitutional liberties.

COUNT II—AB 775 VIOLATES PLAINTIFFS' RIGHT TO LIBERTY OF SPEECH UNDER ARTICLE I, § 2(a) OF THE CALIFORNIA CONSTITUTION.

91. Plaintiffs re-allege every allegation in the preceding paragraphs numbered 1 through 80.

92. Article I, § 2(a) of the Constitution of the State of California states, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

93. Article I, §2 of the California Constitution provides greater protection to liberty of speech than does the First Amendment to the United States Constitution.

94. AB 775, on its face and as applied, violates Plaintiff's rights under article I, §2 of the California Constitution by impermissibly compelling Plaintiffs, under threat of crippling fines, to utter state-prescribed messages which

they have not chosen for themselves, with which they disagree, which are antithetical to their mission and sincerely held religious beliefs, and which detract from, undermine, and interfere with messages they have chosen to speak as part of their core mission to minister to women facing unplanned pregnancies.

95. On its face and as applied, AB 775's violation of Plaintiffs' rights to liberty of speech has caused and will continue to cause Plaintiffs to suffer undue and actual hardship and irreparable injury.

96. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their most cherished constitutional liberties.

COUNT III—AB 775 VIOLATES PLAINTIFFS' RIGHT TO FREE EXERCISE OF RELIGION UNDER THE FIRST AMENDMENT.

97. Plaintiffs re-allege every allegation in the preceding paragraphs numbered 1 through 80.

98. The Free Exercise Clause of the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, prohibits Defendants from abridging Plaintiffs' right to free exercise of religion.

99. Plaintiffs have sincerely-held religious beliefs that abortion is the wrongful killing of an unborn child and harmful to women, and they put their beliefs into action by providing counseling, resources, food, shelter and other services to provide women facing unplanned pregnancies alternatives to abortion and encourage them to choose life for their child.

100. AB 775, on its face and as applied, targets Plaintiffs' beliefs which are informed by the Bible and constitute central components of Plaintiffs' sincerely held religious beliefs. AB 775 causes Plaintiffs a direct and immediate conflict with their religious beliefs by compelling them, under threat of oppressive fines, to utter government speech that advertises for and thus facilitates abortion in violation of their sincerely held religious beliefs.

101. AB 775, on its face and as applied, impermissibly burdens Plaintiffs' sincerely-held religious beliefs and compels them to choose between changing those religious beliefs, acting contrary to them or closing their centers and leaving pregnant women with no recourse for free and confidential information regarding alternatives to abortion.

102. AB 775's imposition, on its face and as applied, on Plaintiffs is neither neutral nor generally applicable but rather specifically targets their religious speech and beliefs, and is

viewpoint-based, and is therefore expressly discriminatory to sincerely-held religious beliefs that are contrary to the state-approved viewpoint on abortion.

103. AB 775, on its face and as applied, unconstitutionally burdens Plaintiffs' ministries by requiring them to yield their clearly established right to free exercise of religion and belief under threat of crippling fines that would undermine, diminish and/or effectively end Plaintiffs' ministries.

104. The State of California's alleged interest in broadening the transmission of information about low cost and no cost abortions to pregnant women does not constitute a compelling interest to justify compelling faith-based organizations to participate in the transmission of that message against their religious beliefs.

105. No compelling state interest justifies the burdens Defendants impose upon Plaintiffs' rights to the free exercise of religion.

106. Even if AB 775's provisions were supported by a compelling state interest, they are not the least restrictive means to accomplish any permissible government purpose AB 775 seeks to serve.

107. On its face and as applied, AB 775's violation of Plaintiffs' rights to free exercise of religion has caused and will continue to cause Plaintiffs to suffer undue and actual hardship and irreparable injury.

108. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their most cherished constitutional liberties.

COUNT IV—AB 775 VIOLATES PLAINTIFFS' RIGHT TO FREE EXERCISE AND ENJOYMENT OF RELIGION UNDER ARTICLE I, § 4 OF THE CALIFORNIA CONSTITUTION.

109. Plaintiffs re-allege every allegation in the preceding paragraphs numbered 1 through 80.

110. Article I, §4 of the California Constitution states, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Plaintiffs have sincerely-held religious beliefs that abortion is the wrongful killing of an unborn child and that it is harmful to women and cannot be presented as a viable option for women facing an unplanned pregnancy.

111. On its face and as applied, AB 775 serves no compelling state interest and, even if it did, it does not employ the least restrictive means to accomplish such interest. AB 775 therefore violates Plaintiffs' rights under article I, §4 of the California Constitution.

112. AB 775's violation of Plaintiffs' rights to free exercise and enjoyment of religion has caused and will continue to cause Plaintiffs

to suffer undue and actual hardship and irreparable injury.

113. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their most cherished constitutional liberties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

A. That this Court issue a Preliminary Injunction enjoining Defendants, Defendants' officers, agents, employees and all other persons acting in active concert with them, from enforcing in any way California Health and Safety Code §§123470-123473 ("AB 775") against Plaintiffs.

B. That this Court issue a Permanent Injunction enjoining Defendants, Defendants' officers, agents, employees and all other persons acting in active concert with them, from enforcing in any way California Health and Safety Code §§123470-123473 ("AB 775") against Plaintiffs.

C. That this Court render a Declaratory Judgment declaring California Health and Safety Code §§123470-123473 ("AB 775") unconstitutional under the United States Constitution and the California Constitution.

D. That this Court adjudge, decree, and declare the rights and other legal relations with the subject matter here in controversy so

that such declaration shall have the force and effect of final judgment;

E. That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's order;

F. That this Court award Plaintiffs the reasonable costs and expenses of this action, including attorney's fees, in accordance with 42 U.S.C. §1988 and

G. That this Court grant such other and further relief as this Court deems equitable and just under the circumstances.

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*Motions for admission pro hac vice pending

VERIFICATION

I, Al Howard, am the Executive Director of His Nesting Place which is a Plaintiff in the above-captioned matter. I have read the VERIFIED COMPLAINT and am familiar with same. The contents are true and accurate and known to me by personal knowledge except for those matters asserted on information and belief. As to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the United States and the State of California, that the foregoing is true and correct.

Executed this day of January, 2016 in the County of Los Angeles, City of Long Beach, State of California.

_____

Al Howard

VERIFICATION

I, Lisa Stiefken, am the Executive Director of Pregnancy & Family Resource Center, which is a Plaintiff in the above-captioned matter. I have read the VERIFIED

COMPLAINT and am familiar with same. The contents are true and accurate and known to me by personal knowledge except for those matters asserted on information and belief. As to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the United States and the State of California, that the foregoing is true and correct.

Executed this day of January, 2016, in the County of San Bernardino, City of San Bernardino, State of California.

_____

Lisa Stiefken

VERIFICATION

I, John Jimenez, am the Chairman of the Board of Birth Choice of the Desert, which is a Plaintiff in the above-captioned matter. I have read the VERIFIED COMPLAINT and am familiar with same. The contents are true and accurate and known to me by personal knowledge except for those matters asserted on information and belief. As to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the United States and the State of

California, that the foregoing is true and correct.

Executed this day of January, 2016, in the County of Riverside, City of La Quinta, State of California.

_____

John Jimenez