NO. 16-1140

IN THE

Supreme Court of the United States

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

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

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

BRIEF FOR PETITIONERS

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

MICHAEL P. FARRIS
KRISTEN K. WAGGONER
DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
DENISE M. HARLE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW
AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are National Institute of Family and Life Advocates, d/b/a NIFLA, a Virginia corporation; Pregnancy Care Center, d/b/a Pregnancy Care Clinic, a California corporation; and Fallbrook Pregnancy Resource Center, a California corporation.

Respondents are Xavier Becerra, in his 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, California; and Edmund D. Brown, Jr., in his official capacity as Governor of the State of California.

CORPORATE DISCLOSURE STATEMENT

National Institute of Family and Life Advocates, Pregnancy Care Clinic, and Fallbrook Pregnancy Resource Center are nonprofit corporations with no parent corporations. None of these entities have any stock; accordingly, no public corporation owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Forcing a pro-life group to advertise for abortion has to be unconstitutional, yet that is what California's Reproductive FACT Act does. Compelled speech strikes at the heart of constitutional liberties. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Free speech is at its greatest peril when the government targets speakers because officials disagree with the speakers' thoughts and ideas. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011) (striking down a law with the "express purpose" of targeting speakers). The Act violates both of these cardinal First Amendment principles: it targets disfavored speakers and compels them to deliver the State's message. And it does so in the context of speech on a subject where there is profound moral and ideological disagreement.

Petitioners are nonprofit pregnancy centers, licensed and unlicensed, with the sole mission of encouraging expectant mothers to give their children the opportunity for life. They do so by providing women with free information and resources like prenatal vitamins, diapers, and baby clothes; the licensed centers also provide limited medical services such as ultrasounds. All of their speech is designed to encourage childbirth.

The Act purposely hampers this advocacy at the very beginning of a pregnancy center's interaction with expectant mothers. While the centers exist to support childbirth, the Act forces them to point the

way to ending unborn babies' lives. It requires licensed centers to display a message to all women entering the facility, directing them to a government agency where they can obtain information about "free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception) … and abortion." Pet.App.80a. It also requires unlicensed centers to begin their conversation with women by saying what they are *not* and do not claim to be—medical facilities—and to do so in up to 13 different languages, which could result in hundreds of words, in every advertisement. This not only is cost prohibitive but drowns out Petitioners' message.

The legislative record demonstrates that the State chose to mandate these compelled messages precisely because of the pregnancy centers' pro-life views. The legislative committee report described the centers' messages as "unfortunate[ ]" because they "aim to discourage and prevent women from seeking abortions." JA84–85. The Legislature created exceptions within the Act, seeking to ensure that it applies only to centers that express this disfavored view. Such government targeting of viewpoints runs afoul of this Court's cases "establish[ing] that the State cannot advance some points of view by burdening the expression of others." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (plurality opinion).

The Ninth Circuit upheld the Act's directive that licensed centers must speak pro-abortion messages, without applying strict scrutiny. Instead, it applied intermediate scrutiny under a so-called "professional

speech doctrine." But that doctrine has never been adopted by this Court. Even among the few lower courts that have adopted it, the doctrine applies only to the speech of professionals within an established professional-client relationship, and to speech concerning the client's particular circumstances in the context of the professional's specific services. Neither is present here. And even lower courts using that doctrine hold that regulations of professional speech cannot target speakers based on their viewpoint. The Ninth Circuit also upheld the Act's provision compelling speech by unlicensed centers, purporting to apply strict scrutiny, but failing to account for the Act's lack of narrow tailoring or the State's failure to meet its burden to show a compelling interest.

This Court has long held that compelled speech is highly disfavored because it imperils freedom by giving government control of the voices of private actors—and that laws targeting particular speakers because of their views are especially dangerous. The government "may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). This Court should continue its steadfast defense of this fundamental freedom against governmental attempts to compel speech, and reverse the judgment of the Ninth Circuit.

DECISIONS BELOW

The Ninth Circuit's opinion is reported at 839 F.3d 823 (2016), and reproduced in the Petition for Writ of Certiorari Appendix ("Pet.App.") at 1a–43a. The order of the Ninth Circuit denying rehearing and rehearing en banc is unreported. Pet.App.72a–73a. The District Court's opinion denying the motion for preliminary injunction is unreported, but is available at 2016 WL 3627327 (S.D. Cal. Feb. 9, 2016). Pet.App.44a–71a.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on October 14, 2016, Pet.App.1a–43a, and denied a timely petition for rehearing en banc on December 20, 2016, Pet.App.72a–73a. Petitioners timely filed their petition for writ of certiorari with this Court on March 20, 2017. This Court granted review on November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution is set forth at Pet.App.74a.

The text of California's Reproductive FACT Act, CAL. HEALTH & SAFETY CODE § 123470, is set forth at Pet.App.75a.

STATEMENT OF THE CASE

A. Statement of the Facts

1. *Petitioners' Activity*. Petitioners are the National Institute of Family and Life Advocates (NIFLA), an organization with over 130 nonprofit pro-life pregnancy center members in California, and two such centers in San Diego County: Pregnancy Care Clinic and Fallbrook Pregnancy Resource Center. Pet.App.89a–90a.[1] Because of Petitioners' pro-life views, they seek to provide help and information to women in unplanned pregnancies so they will be supported in choosing to give birth. Pet.App.91a–93a. Petitioners, licensed and unlicensed centers, provide all of their services and resources free of charge. *Id*. Petitioners are all incorporated as religious organizations, and they pursue their activities based on their pro-life religious beliefs. *Id*.

Petitioner Pregnancy Care Clinic and many of NIFLA's California member centers are licensed medical facilities that provide pro-life information, non-medical services, and certain limited medical services. Pregnancy Care Clinic is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory. Pet.App.91a. Non-medical services provided by Pregnancy Care Clinic include childbirth education, maternity clothing, baby blankets, layettes, diapers, baby wipes, emotional support groups, Bible studies,

---

[1] When the verified complaint was filed in 2015, NIFLA had 111 California members; its California membership has since increased to over 130. *See also Find a NIFLA Member Center Near You*, NIFLA, http://bit.ly/2ABSkdG (last visited Jan. 5, 2018) (current member list).

adoption resources, parenting classes, information on sexually transmitted diseases and natural family planning, and healthy family support. *Id.* at 92a.[2] Pregnancy Care Clinic also provides the following medical services: pregnancy testing, prenatal vitamins, ultrasound examinations, medical referrals, STD testing, health provider consultation, and other clinical services. Pet.App.91a–92a. Pregnancy Care Clinic provides all of these services free of charge to advance its pro-life mission. *Id.* Currently, at least 90 of NIFLA's California member centers are similar to Pregnancy Care Clinic as licensed medical clinics providing a comparable array of medical and non-medical support services. *Id.* at 93a.[3]

Petitioner Fallbrook Pregnancy Resource Center, like many of NIFLA's other California members, is an unlicensed center that offers non-medical pregnancy-related information and services for free in furtherance of its pro-life views. Pet.App.92a. Fallbrook Pregnancy Resource Center provides pregnancy test kits that women administer and diagnose themselves, maternity clothing, baby clothes, baby food and formula, baby bottles, diapers, strollers, high chairs, baby toys, nursery furniture, play yards, educational programs, resources on maternal and prenatal health, emotional support, spiritual resources, preparation for parenting, and

---

[2] *See also Services*, Pregnancy Care Clinic, http://bit.ly/2Fb8iik (last visited Jan. 5, 2018) (describing services); *Our Story,* Pregnancy Care Clinic, http://bit.ly/2BxBuOy (last visited Jan. 5, 2018) (same).

[3] *See Find a NIFLA Member Center Near You*, *supra* note 1.

community referrals. *Id.*[4] There are currently more than 40 NIFLA member centers in California that are similar to Fallbrook Pregnancy Resource Center, operating as unlicensed centers offering pregnant women a comparable variety of non-medical services. Pet.App.94a.[5] To reach the women they hope to support, Fallbrook Pregnancy Resource Center and similar NIFLA centers advertise on the internet and elsewhere their free information and services. Pet.App.102a.

2. *The California Reproductive FACT Act.* The legislative record expressly states that the impetus for the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, CAL. HEALTH & SAFETY CODE § 123470, was disagreement with pro-life centers' messages. Legislative committee reports with bill sponsor statements noted "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," which "aim to discourage and prevent women from seeking abortions." JA84–85. Although the bill sponsor claimed that these centers "often confuse [and] misinform" women, JA85, neither the legislative history nor the record contains any objective or impartial evidence that pregnancy centers like Petitioners actually "misinform" anyone about their medical status or services, *see infra* note 17. Nonetheless, the State imposed the Act's compelled speech provisions on all centers prophylactically.

---

[4] *See also Our Services,* Fallbrook Pregnancy Resource Center, http://bit.ly/2FdzFZi (last visited Jan. 5, 2018).

[5] *See Find a NIFLA Member Center Near You*, *supra* note 1.

The Act's express purpose was predicated on the view that "California women should receive information about their rights and available services at the sites where they obtain care." JA84. But rather than ensuring that all California women get this information at their chosen healthcare providers—which number in the thousands—the Act's requirements fall almost exclusively on about 200 nonprofit pro-life clinics whose existence was deemed "unfortunate[ ]" by the bill's sponsor. *See id*.

3. *Operation of the Act.* The Act imposes different messaging requirements based on whether a pregnancy center is a licensed medical facility or an unlicensed center.

Licensed Centers — Compelled Abortion Referral. The Act requires licensed medical facilities covered by the Act, such as Pregnancy Care Clinic and NIFLA's other licensed California members, to provide all clients with the following statement:

> 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 [phone number].

Pet.App.80a ("Compelled Abortion Referral"). Those calling the number listed will be referred to providers accepting state-funded forms of insurance, including

private abortion providers such as Planned Parenthood.[6]

Although the Act states that the Compelled Abortion Referral applies to all "licensed covered facilities" in California, it then contains numerous limitations and exemptions, discussed below, that substantially narrow its application both facially and in practice. A "licensed covered facility" is defined as:

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

---

[6] *See Health Centers In California,* Planned Parenthood, http://bit.ly/2F9OCLP (last visited Jan. 5, 2018) (listing numerous California Planned Parenthood locations that include Medi-Cal and Family PACT as accepted forms of insurance); *Provider Search,* Family PACT, http://bit.ly/2i0VBM1 (last updated May 3, 2016) (search tool listing Planned Parenthood clinics as Family PACT providers).

> (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.

Pet.App.78a–79a.

In other words, not all clinics licensed under the two specified sections are "covered" by the Act. Only clinics licensed under section 1204 or operating pursuant to 1206(h) that also have the "primary purpose [of] providing family planning or pregnancy-related services" must comply. Clinics offering a broader array of medical services are not covered, even though they may routinely see pregnant women.

From there, the Act's application narrows further. As explained more below, any licensed covered facility that participates in both Medi-Cal and California's Family PACT program is exempt from the Act's requirements. But participation in Family PACT requires a center to provide abortifacients and birth control. Therefore, pro-life centers cannot qualify for this exemption because of their pro-life views.

Licensed covered facilities must post the Compelled Abortion Referral in one of the following ways:

> (A) A "conspicuous" and "easily read" public notice in the waiting room, "in no less than 22-point type." Pet.App.80a.

(B) "A printed notice distributed to all clients in no less than 14-point type." *Id.* at 81a.

(C) "A digital notice distributed to all clients … at the time of check-in or arrival." *Id.*

In addition, the Compelled Abortion Referral must be published in numerous languages: "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." *Id.* at 80a. For San Diego County, where Pregnancy Care Clinic is located, "threshold" languages include English, Spanish, Arabic, Vietnamese, Tagalog, and Farsi. A center in Los Angeles County would have to publish the statement in English and 12 additional languages.[7]

Unlicensed Centers — Compelled Disclaimer. The Act compels unlicensed non-medical pregnancy centers, such as Fallbrook Pregnancy Resource Center, to begin any interactions with expectant women by informing them of what they are not. The centers must prominently post a notice ("Compelled Disclaimer") at their entrance and in any advertisement, in up to 13 different languages, stating that the "facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises

---

[7] *See* State of California, Department of Health Care Services, *Frequency of Threshold Language Speakers in the Medi-Cal Population by County for January 2015* (Sept. 2016) www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf.

the provision of services." Pet.App.81a. The Act 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 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. at 79a.

The Compelled Disclaimer must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." *Id.* at 81a. In each advertisement and notice, the Compelled Disclaimer must appear "in English and in the primary threshold languages," which could include as many as 13 distinct languages. *Id.* The Compelled Disclaimer must appear—in all of the required languages—"in no less than 48-point type"

and be "posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.* The Compelled Disclaimer contained in all advertising material must be "clear and conspicuous"—which "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"—in all of the required languages. *Id.* at 81a–82a.

4. *Exemptions from Compelled Statements.* The Act exempts any licensed covered facility that accepts Medi-Cal and participates in the Family PACT program. *Id.* at 80a (CAL. HEALTH & SAFETY CODE § 123471(c)(2)). Family PACT is California's program for family planning and "reproductive health care." *See* CAL. WELF. & INST. CODE § 14132. To participate, a clinic must "provide the full scope of family planning education, counseling, and medical services specified for the program, either directly or by referral …." CAL. WELF. & INST. CODE § 24005(c). The Family PACT program involves "family planning services" that includes abortifacients and intrauterine contraceptives. *What Does Family PACT Cover?*, Family PACT http://bit.ly/2lasupX (last updated Aug. 9, 2017); *see also* CAL. WELF. & INST. CODE § 24007(a)(2).[8]

Petitioners cannot in good conscience participate in the Family PACT program, because of their pro-life

[8] *See also Birth Control: Medicines to Help You,* U.S. Department of Health and Human Services, http://bit.ly/2CP5slE (last updated Sept. 8, 2016).

religious, moral, and philosophical beliefs. By tying the Act's exemption from the compelled-speech requirements to an agreement to dispense all contraceptives, abortifacients, and IUDs, the State effectively precludes pro-life centers like Petitioners from avoiding the Act's mandates to speak.

5. *Penalties Under the Act.* Covered facilities that violate the Act by failing to make the compelled statements "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." Pet.App.82a. A facility found to be in violation will receive a notice that "it is subject to a civil penalty if it does not correct the violation within 30 days." *Id.* The Act's requirements are enforceable by the Attorney General, city attorney, or county counsel. *Id.*

B. Proceedings Below

1. *District Court Proceedings*. Governor Edmund G. "Jerry" Brown Jr. signed the Reproductive FACT Act into law on October 9, 2015. Petitioners filed their complaint four days later, in the United States District Court for the Southern District of California, alleging violations of the Free Speech and Free Exercise Clauses of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and 42 U.S.C. § 238n (Coats–Snowe Amendment). Petitioners then filed their motion for preliminary injunction, asking that the Act be enjoined before its effective date of January 1, 2016.

The District Court denied the motion on February 9, 2016. Pet.App.44a–71a. The court held that the Act did not implicate speech but regulated only conduct,

and applied rational basis review. *Id.* at 61a–62a. Although the Act compels propagation of a government-crafted message, the District Court concluded that the Act was neither content based nor viewpoint discriminatory. *Id.* In the alternative, the District Court held that even if speech were implicated, the Act at most compelled professional speech and was subject to intermediate scrutiny. *Id.* at 63a–64a. The District Court then found that the Act, with respect to licensed centers, survived such scrutiny, in part because it did "not preclude Plaintiff from providing all manner of beneficial advice, including alternatives to abortion," and did "not preclude Plaintiffs from openly expressing disagreement with the required disclosure." *Id.* at 64a–65a. Concerning the unlicensed centers, the District Court found that the Act survived any level of scrutiny. *Id.* at 66a–67a.

2. *Ninth Circuit Proceedings*. The Ninth Circuit panel upheld the District Court's ruling denying Petitioners' motion for a preliminary injunction. *Id.* at 1a–43a. On appeal, Petitioners continued to argue that the Act is content based. The Ninth Circuit conceded as much, *id.* at 22a, but it declined to apply strict scrutiny, despite this Court's recent holding in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In its analysis, the panel cited Ninth Circuit precedent, explaining that "[s]ince *Reed*, we have recognized that not all content-based regulations merit strict scrutiny." Pet.App.23a. The Ninth Circuit also rejected Petitioners' argument that by targeting centers that "discourage and prevent women from seeking abortions," *id.* at 7a, the Act is viewpoint discriminatory. According to the Ninth Circuit, the

Act is viewpoint neutral, because "[i]t does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker," *id*. at 20a, and because "the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services," *id.* The Ninth Circuit additionally concluded that the Act's exemptions were "narrow exceptions that do not disfavor any particular speakers." *Id.*

When analyzing the Act's Compelled Abortion Referral for licensed centers, the panel applied intermediate scrutiny, because it deemed the speech professional in nature. The Ninth Circuit reached this conclusion even though this Court held in *In Re Primus*, 436 U.S. 412 (1978), that advocacy entwined with free professional services is fully protected, and Petitioners provide their services pro bono. Pet.App.32a–33a, 60a, 62a. The panel then found that the Act survived intermediate scrutiny, stating that "even if it were true that the state could disseminate this information through other means," California had met its burden because it "has a substantial interest in … ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." *Id.* at 34a–35a. Finally, the panel agreed with the District Court that the compelled speech imposed on unlicensed centers satisfies any level of scrutiny. *Id.* at 36a–39a.

On December 20, 2016, the Ninth Circuit denied rehearing en banc. *Id.* at 72a. On November 13, 2017, this Court granted certiorari as to Petitioners' free speech claims.

SUMMARY OF THE ARGUMENT

Petitioners engage in issue advocacy on an important matter of public concern. The very reason they exist is to encourage and support women in choosing to give birth to their unborn children, and to advocate a broader social message affirming the sanctity of human life. Petitioners' ideological speech is protected at the highest level by the First Amendment. But the Act undermines this advocacy and forces Petitioners to speak a message not only detrimental to their cause, but in direct conflict with their purpose and core convictions. The Act deserves strict scrutiny for three independent reasons, and this Court should reverse the Ninth Circuit's judgment upholding the Act under erroneous legal standards.

First, the Act unquestionably compels speech. This is not in dispute. And under this Court's precedent, laws compelling speech are generally subject to strict scrutiny. Although the Ninth Circuit invoked a "professional speech" exception to strict scrutiny, this Court has never created a category of "professional speech" that merits less rigorous First Amendment protection. The only category of protected speech this Court has deemed worthy of receiving lower scrutiny in certain instances is commercial speech—but the speech here is plainly not commercial, as the Ninth Circuit recognized. *See* Pet.App.18a n.5. By definition, nonprofit organizations offering services pro bono are not proposing commercial transactions. The State simply cannot compel Petitioners to speak on matters relating to their issue advocacy—just as they could

not be prohibited from speaking—unless the Act survives strict scrutiny.

Second, the Act is undeniably content based, as the Ninth Circuit acknowledged. Pet.App.18a. The State has prescribed precise words that Petitioners must say. Content-based speech regulations normally are invalid unless they survive strict scrutiny. The limited historical exceptions mentioned by the Ninth Circuit—for unprotected speech such as fraud, true threats, defamation, and the like—are irrelevant to Petitioners' fully protected speech. And the fact that Petitioners' speech pertains to the political, religious, and ideological issue of abortion does not, under this Court's case law, lessen its protections. Quite the opposite: speech on matters of fundamental public debate like abortion lies at the core of the First Amendment's protections against content-based regulations.

Third, the Act is viewpoint discriminatory in both its stated purpose and actual effect. It targets speakers with a particular viewpoint and forces them to advance the State's viewpoint-biased message. This the government cannot do. This Court has stated that laws regulating speech to disfavor a particular viewpoint are subject to the most rigorous scrutiny. In practice, this Court has approached such laws as though they are per se unconstitutional.

With three separate roads leading to at least strict scrutiny, the Act's fate is nearly sealed. The Act then falls far short of meeting the strict scrutiny test. The interest the State offers to justify the Compelled Abortion Referral—a general interest in providing women with information regarding healthcare—does

not rise to the level of compelling. The State itself does not contend that it does, arguing instead that it need only satisfy intermediate scrutiny. For the Compelled Disclaimer, the State asserts an interest in preventing a conjectural harm—women being misled—without objective evidence that the problem actually exists. This is woefully inadequate for the State to meet its heavy burden of proving a compelling interest.

Nor is the Act narrowly tailored. Rife with limitations and exemptions, the Act effectively compels only pro-life pregnancy centers to convey the State's supposedly all-important message. Such underinclusiveness is not narrow tailoring; it is the mark of an ill-fitted law. Moreover, the Act imposes burdensome requirements that are plainly excessive to the State's purported goal. For example, the Act mandates that the message be expressed in very large font, in multiple languages, and in numerous places. Worse yet, the State does not employ any of the obvious primary measures of advancing its purported interests—for example, enforcing fraud laws to combat actual deception, or publishing the messages itself. A speech regulation cannot be narrowly tailored when less restrictive means are readily available.

Because the Ninth Circuit failed to properly apply strict scrutiny—and the State cannot meet this test—this Court should reverse the judgment below.

ARGUMENT

I. Compelling pro-life pregnancy centers to speak government-created messages violates the Free Speech Clause.

In resolving free speech claims, this Court generally assesses the nature of speech as "the first question." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation omitted).

A. Speech discussing the issue of abortion from a pro-life viewpoint receives full First Amendment protection.

California's Reproductive FACT Act compels speech by private, nonprofit organizations. These organizations, like Petitioners, are mission-oriented, formed primarily to advocate and implement their core pro-life values as well as to express these views publicly and privately. As this Court has recognized, such nonprofits often engage in "dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984). Indeed, the First Amendment protects an organization's ability to advocate for viewpoints in accordance with its mission, free from government interference with that expression. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013).

The speech of these pregnancy centers about the issue of abortion rests at the core of the First Amendment. Advocacy related to abortion is fully protected expression. *See e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014) (abortion-related leafletting and advocacy are protected); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (discussing the "constitutional right … to engage in abortion advocacy and counseling"); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing "Abortion is Murder" and "Right to Choose" as examples of protected speech).[9]

Although the State argues that the Act regulates commercial speech, the Ninth Circuit rightly dispensed with that argument in a footnote. Pet.App.18a n.5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech"). This Court has made clear that commercial speech is "speech which does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation and quotation marks omitted). Petitioners charge nothing for their services and never propose commercial transactions. Even when there is a commercial aspect to speech, that speech does not "retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech," *Riley*, 487 U.S. at 796. When protected speech is part of the speaker's message, this

---

[9] *Cf. Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (noting that discussion about political issues and matters of public debate is "an area of the most fundamental First Amendment" guarantees).

Court will "apply [its strict scrutiny] test for fully protected expression." *Id.* Thus, the Act's speech mandates intrude upon the purest sort of private, noncommercial, mission-oriented issue advocacy.

Nor can the State strip Petitioners' speech of protection by labeling it "professional speech," as the Ninth Circuit did. This Court has never treated "professional speech" as a separate category for First Amendment analysis. Certain forms of speech by professionals have been held to be "commercial speech," while other forms have been deemed noncommercial or political advocacy. *Compare Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (commercial speech by lawyers), *with NAACP v. Button*, 371 U.S. 415 (1963) (political advocacy by lawyers). As discussed above and *infra* section II, Petitioners' mission-oriented speech is in no way commercial and falls squarely within issue advocacy.

B. The Act compels Petitioners to speak the government's message.

Compelled speech is antithetical to the First Amendment. There is no dispute that the Act compels Petitioners to deliver a particular message crafted by the State. This government-mandated message is precisely the kind of compelled speech that the Constitution forbids. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not … compel the endorsement of ideas that it approves"). Such "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to … rigorous scrutiny"—"the most exacting scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

The First Amendment "presume[s] that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 791. Its protections "include[ ] both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. The First Amendment protects not only the right of a speaker to choose what to say, but also the right to decide "what not to say." *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quotation marks and citation omitted). Compelled speech is no more tolerable than compelled silence. *Riley*, 487 U.S. at 796.

And compelled disclosure of "fact" is no more acceptable than compelled disclosure of opinion—"either form of compulsion burdens protected speech." *Id.* at 797–98. The "general rule[ ] that the speaker has the right to tailor the speech[ ] applies … equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Thus, even laws that compel expression of facts receive strict scrutiny. *See Riley*, 487 U.S. at 791–92 (citing cases and applying strict scrutiny to compelled factual disclosures).

Applying these principles, this Court has held that the government cannot force objectors to pledge allegiance to the flag, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), force drivers to display license plates with a state-scripted slogan, *Wooley*, 430 U.S. at 717, force newspapers to print political columns, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), or force companies to include third-party newsletters in their billing envelopes, *Pac. Gas & Elec. Co.*, 475 U.S. at 20–21 (plurality opinion). Nor may a state force professional

fundraisers to announce to potential donors the percentage of funds raised that have been given to charities. *Riley*, 487 U.S. at 799–800. Such compulsions of speech against the speaker's will are just as egregious as prohibiting speech based on disagreement with the speaker's message. *Cf. Sorrell*, 564 U.S. at 574 (rejecting as "impermissible" a speech regulation where "the State's goal [is] burdening disfavored speech by disfavored speakers").

Underlying the constitutional prohibition on compelled speech is the fundamental value of freedom of thought and mind. This includes both the "dissemination and propagation of views and ideas," *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), and private internal thought. "The right to think is the beginning of freedom." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002). Therefore, the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637); *see also Schneiderman v. United States*, 320 U.S. 118, 137 (1943) (the First Amendment "guarantee[s] freedom of thought").

By compelling speech, the Act offends freedom of mind in more ways than one. First, it intrudes upon private thought by mandating that Petitioners mouth ideas that contradict their own convictions. The Compelled Abortion Referral requires Petitioners to facilitate the spread of pro-abortion information and, in the process, to encourage the very act they exist to help women avoid. As the Superior Court of California ruled in *Scharpen Foundation, Inc. v. Harris,* "[i]t

forces the [pro-life] clinic to point the way to the abortion clinic and can leave patients with the belief they were referred to an abortion provider by that clinic." Addendum at 13a–14a[10] (addressing a challenge to the Act's provisions for licensed facilities); *cf. Hurley*, 515 U.S. at 577 (impermissible compelled expression would be "perceived by spectators as part of the whole" message by the unwilling speaker). The State is "us[ing] the wall of the [center] as a billboard to advertise the availability of low cost abortions." Addendum at 14. This creates duplicity of thought and mental conflict for Petitioners—requiring them "to affirm in one breath that which they deny in the next"—that this Court has noted would make freedom of speech "empty." *Hurley*, 515 U.S. at 576 (citation omitted). Such an intrusion is forbidden, because "[t]he First Amendment protects the right of individuals to … refuse to foster … an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Second, the Act presumes that certain private ideas about encouraging childbirth are wrong and should be overridden. But the First Amendment protects ideas and opinions, even when the government finds them distasteful. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). It is not

---

[10] As Petitioners advised the Court on November 2, 2017, the Superior Court of California, County of Riverside ruled that the Act violates the free speech protections of the California Constitution. *Scharpen Foundation, Inc. v. Harris*, No. RIC1514022 (Cal. Super. Ct. Oct. 30, 2017). A copy of the court's order permanently enjoining the Act, which has now been appealed by the State and is stayed, is attached here as an Addendum.

for California to assume its citizens cannot sort out ideas and information but must be assisted by state-ordered speech mandates. To the contrary, the spheres of political, social, and cultural life are to be places "where ideas and information flourish"—and where "the speaker and the audience, not the government, assess the value of the information presented." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503–04 (1996).[11] California's biased and paternalistic law interferes with this free exchange of ideas.

More specifically, the Compelled Abortion Referral presupposes that the idea of supporting women in continuing their pregnancies is misguided and should be undermined by a forced contrary message suggesting abortion. But this Court has made clear that the Constitution protects a pro-life viewpoint and all the associated liberties of living out one's pro-life conscience. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (recognizing "these virtually irreconcilable points of view [on abortion], aware that constitutional law must govern a society whose different members sincerely hold directly opposing views … in light of the Constitution's guarantees of fundamental individual liberty"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("[W]here reasonable people disagree [over abortion,] the government can adopt one position or the other," but only when it "does not intrude upon a protected liberty").

---

[11] If this is true in the commercial context, it has all the more force in the realm of fully protected noncommercial, ideological speech.

Similarly, the Compelled Disclaimer for unlicensed centers seeks to discredit certain pregnancy centers by forcing them to first announce (in large font) what they are *not*—even in public advertisements, before there is any relationship with an expectant mother. The Compelled Disclaimer is mandatory even when there is no basis to conclude that the disclosure is needed to clarify anything at all, because the centers are not purporting to provide medical services and do not operate for that purpose, and because women are already freely able to inquire about the centers' services and qualifications. This Court rejected such a law in *Riley*, holding that compelling charities' agents to speak prophylactic adverse disclosures is unconstitutional, where donors are already "free to inquire" about the details disclosed and "are also undoubtedly aware" of the underlying subject matter. 487 U.S. at 799.[12]

As in *Riley*, strict scrutiny is necessary because compelling these negative disclaimers up front—including in all advertisements seen by the public—"will almost certainly hamper the legitimate efforts" of the centers, in part because they "will not likely be given a chance to explain." *Id.* at 799–800. But precisely because the First Amendment protects ideas the government disapproves of, this Court has

[12] To be sure, an unchallenged portion of the statute in *Riley* did require fundraisers to convey their "professional status" by disclosing their employer's name and address, and this Court suggested the provision would survive First Amendment scrutiny. 487 U.S. at 799 n.11. But a name and address is a far cry from the Act's Compelled Disclaimer requiring a message in large font, and in multiple languages, potentially amounting to hundreds of words, that effectively obscures any other message.

vigilantly confirmed that "governmental bodies may not prescribe the form or content of individual expression," which is precisely what the Act does. *Cohen v. California*, 403 U.S. 15, 24 (1971).

C. The Act impermissibly regulates speech based on content and therefore deserves strict scrutiny.

Besides compelling speech, the Act also regulates speech based on content. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Such content-based speech regulations are presumptively unconstitutional. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). This Court has repeatedly held that "[a] law that is content based on its face," such as the Act, "is subject to strict scrutiny." *Reed*, 135 S. Ct. at 2228; *see also McCullen*, 134 S. Ct. at 2530; *Sorrell*, 564 U.S. at 565. This is true even when a law "singles out specific subject matter for differential treatment, [but] does not target viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2230.

But despite this Court's clear pronouncement just two years ago in *Reed* that content-based speech laws must be subjected to strict scrutiny, *id.* at 2227, the Ninth Circuit declined to apply *Reed* or strict scrutiny, and announced a different standard:

> *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).

Pet.App.23a.

A closer look at the Ninth Circuit's post-*Reed* case law reveals a misunderstanding of *Reed*—and a failure to apprehend this Court's distinctions between constitutionally proscribable expression and fully protected speech. When the Ninth Circuit in *Swisher* held that some content-based regulations did not trigger strict scrutiny, it cited only to *unprotected* speech: (i) this Court's reference in *R.A.V.*, 505 U.S. at 382–83, to obscenity, defamation, and fighting words; (ii) the plurality's reference in *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (citations omitted), to "incite[ment] …, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent"; and (iii) Justice Breyer's concurrence in *Alvarez*, 567 U.S. at 734–35, noting that "certain kinds of false statements [are] unlawful," such as "false claims of terrorist attacks or other lies about the commission of crimes or catastrophes, impersonation of an officer, and trademark infringement." *Swisher*, 811 F.3d at 313–14.

But the existence of some categories of unprotected speech does not justify applying lower scrutiny to a content-based regulation on *fully protected speech*. This Court has already rejected attempts to justify content-based laws affecting fully protected speech when the government employs an "ad hoc balancing of relative social costs and benefits."

United States v. Stevens, 559 U.S. 460, 470 (2010). Here, the Act does not regulate any of the rare "historic and traditional categories" of expression recognized as criminal or dangerous, where content-based regulations may sometimes be permitted. *Alvarez*, 567 U.S. at 717. Rather, it seeks to interfere with speech on a deeply divisive ideological matter, which receives the utmost First Amendment protection.

In other words, the Ninth Circuit's primary reason for refusing to apply strict scrutiny here contradicts this Court's precedent. Indeed, *Reed* reiterated *R.A.V.*'s holding that content-based laws are presumptively unconstitutional. Likewise, *Alvarez* held that "the Constitution 'demands that content-based restrictions on speech be presumed invalid … and that the Government bear the burden of showing their constitutionality." 567 U.S. at 716–17 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)). In short, the "exceptions" the Ninth Circuit cites to spare the Act from strict scrutiny existed long before *Reed*, do not weaken *Reed*'s holding, and are irrelevant to analyzing the Act.[13] *Reed* states the "clear and firm rule" for content-based laws that regulate protected speech: when a law "imposes content-based restrictions on speech, those provisions

---

[13] The Ninth Circuit also defined a new category of speech—"physicians' speech concerning abortion"—which it determined is regulated by the Act. Pet.App.23a–24a. The Ninth Circuit held that this new category of speech regulations demands lesser constitutional scrutiny, "[e]ven [t]hough the Act [e]ngages in [c]ontent-[b]ased [d]iscrimination." *Id.* at 23a. This reasoning is without any basis in this Court's precedent, and it is plainly incorrect. *See infra* § II.C.

can stand only if they survive strict scrutiny." 135 S. Ct. at 2231. Whatever the Ninth Circuit's view of its own precedent, this Court has not receded from that constitutional norm, and the Act therefore deserves strict scrutiny as a content-based regulation of speech.

D. The Act regulates speech based on viewpoint, the most egregious form of speech regulation.

Viewpoint discrimination is the most egregious form of speech regulation. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (citation omitted). While content-based regulations are presumptively unconstitutional, "[w]hen the government targets … particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This Court has recently reiterated that its cases "use the term 'viewpoint' discrimination in a broad sense" and that, outside the context of government speech, inapplicable here, "viewpoint discrimination is forbidden." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion).

1. The Act targets speakers with a viewpoint the State disfavors.

The Act's viewpoint-based purpose is both clear and constitutionally significant. It can be seen in two ways: (i) its operational effect and exemptions, and (ii) its stated purpose in the legislative record.

As to the former, the Compelled Abortion Referral is uniquely applicable to pro-life pregnancy centers, as the following examples illustrate:

Doctors in private practice. Because only *clinics* licensed under Section 1204 or operating pursuant to Section 1206(h) are subject to the Act, no doctor in private practice in California is subject to the Act.[14] This means the Act excludes, for example, all primary care physicians and obstetrician-gynecologists in private practice.

General practice clinics operating under Section 1204 or 1206(h). Any licensed clinic that provides a full range of medical services is not covered under the Act because its practice does not have pregnancy-related services as its "primary purpose." Pet.App.79a. This means the Act exempts, for example, all primary care clinics.

Clinics licensed under other provisions. Any clinic, whatever its primary purpose, is exempt if not licensed under Section 1204 or operating pursuant to Section 1206(h). This means the Act does not cover, for example, clinics exempted under Section 1206's other subsections—a long list of medical facilities, including student health centers, clinics operating as outpatient divisions of a hospital, clinics operated by an Indian tribe on tribal lands, community mental health centers, clinics affiliated with an institution of higher education that teaches any healing art, or clinics operated by employers for their employees.

---

[14] An individual doctor could be subject to the Act, but only indirectly and only if he practices at a Section 1204 or 1206(h) clinic.

Abortion clinics. Planned Parenthood or other clinics that provide abortion-related services are eligible for an exemption, by participation in both Medi-Cal and Family PACT. As long as an abortion clinic enrolls in Medi-Cal and Family PACT and "provide[s] the full scope of family planning education, counseling, and medical services specified for the program, either directly or by referral …," it is exempt from the Act. *See* CAL. WELF. & INST. CODE § 24005(c). The term "full scope" is a term of art meaning clinics that provide or refer patients for services including emergency contraception, abortifacients, and all FDA-approved forms of birth control.[15] There is no dispute that California's abortion clinics satisfy the Act's criteria for exemption.

In contrast to the above examples, nonprofit pro-life clinics, which are licensed under Section 1204, are subject to the requirements of the Act because:

- pregnancy-related services are their primary purpose,
- they perform two or more of the listed services, and
- they cannot qualify for the Medi-Cal / Family PACT exemption because, as a matter of conscience and religious belief, they will not offer or refer for abortion-causing drugs.

Thus, pro-life licensed nonprofit pregnancy centers are effectively the only type of medical facility

---

[15] Clinics operated by the federal government are also expressly exempt. *See* CAL. HEALTH & SAFETY CODE § 123471(c)(1).

in California that must comply with the Act's Compelled Abortion Referral.

By applying the Compelled Abortion Referral only to licensed pregnancy centers that are pro-life, the Act singles out particular speakers with a particular viewpoint. The Compelled Disclaimer is also targeted at unlicensed facilities that are pro-life in their mission because it covers only facilities "whose primary purpose is providing pregnancy-related services." Pet.App.79a.

This speaker-based targeting alone triggers strict scrutiny because "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

As in *Sorrell*, the Act also has the "express purpose" of burdening particular speakers. *See Sorrell*, 564 U.S. at 565 (considering the "statute's stated purposes" and noting that the regulation was aimed at certain speakers). The legislative hostility is clear.[16] The bill sponsor explained "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California." JA84. These pro-life centers, the sponsor complained, "pose as full-service women's

---

[16] *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (Kennedy, J., concurring) ("Relevant evidence [of legislative purpose] includes … the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history ….").

health clinics but aim to discourage and prevent women from seeking abortions." JA85. The express legislative purpose criticizes Petitioners' goal of, as the bill sponsor viewed it, "interfer[ing] with a woman's ability to be fully informed and exercise their reproductive rights." JA84–85. The State thus openly sought to mandate speech that will undermine the centers' ability to further their pro-life mission and advocate their pro-life views. This sort of viewpoint targeting is "forbidden." *Matal*, 137 S. Ct. at 1763 (plurality opinion); *see also Rosenberger*, 515 U.S. at 829 (prohibiting viewpoint discrimination); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785–86 (1978) ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended").

The Ninth Circuit again excused the Act from the appropriate constitutional scrutiny by shrugging off this important factor after concluding that "*Sorrell* did not turn exclusively on the law's motivation or purpose" but also on the fact that the law was facially discriminatory. Pet.App.21a. The Ninth Circuit then proceeded as though the law's viewpoint-discriminatory purpose were irrelevant:

> [T]he 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.

Id.

This analysis is wrong in at least three ways, and *Sorrell* is squarely on point. First, the Ninth Circuit read the statutory scheme incorrectly. As demonstrated above, the Act does *not* "appl[y] to almost all licensed and unlicensed speakers." *Id.* It facially excludes a vast array of licensed medical facilities where pregnant women may reasonably be expected to seek care. The Family PACT exemption further limits the Act's application so that hardly any speakers, aside from centers like Petitioners, are forced to speak the government's message.

Second, the exemptions in the Act are not "unrelated to viewpoint," as the Ninth Circuit concluded, *id.,* but plainly operate based on viewpoint. By requiring participation in Family PACT to avoid the speech mandates, the Act exempts all facilities willing to provide contraceptives and abortifacients, leaving only pro-life centers subject to the law. *See Sorrell*, 564 U.S. at 565 ("In its practical operation," the law "goes even beyond mere content discrimination, to actual viewpoint discrimination").

Finally, the viewpoint animus motivating the law *does* matter, as it did in *Sorrell*, and the Ninth Circuit should have considered it. "Any doubt that [the law] imposes an aimed, content-based burden on [certain speakers] is dispelled by the record and by formal legislative findings." *Id.* at 564. In *Sorrell*, the Vermont Legislature explained that certain speakers "convey messages that 'are often in conflict with the

goals of the state.'" *Id.* at 565 (citation omitted). It then "designed [the law] to target those speakers and their messages for disfavored treatment." *Id.* That sounds remarkably like the California Legislature's explanation that "unfortunately," JA84, centers like Petitioners "aim to discourage and prevent women from seeking abortions," JA85—something apparently in conflict with the State's goals. The State thus designed the Act to "impose[ ] a burden based on the content of speech and the identity of the speaker," which this Court found impermissible in *Sorrell*, 564 U.S. at 567.

Thus, in both express purpose and practical effect, the Act targets pro-life pregnancy centers to stifle their particular viewpoint. *See id.* at 565. At a minimum, such a law animated by the government's disagreement with a particular pro-life message "requires heightened scrutiny." *Id.* at 566.

2. The Act promotes the government's viewpoint while suppressing Petitioners' opposing viewpoint.

In addition to compelling Petitioners to promote messages that fundamentally contradict their beliefs and undermine their purpose, the Act chills their speech. Specifically, the Act's compelled speech provisions are so burdensome that they threaten to stifle Petitioners' pro-life viewpoint.

The Compelled Abortion Referral provision surely does that. Those walking into Petitioners' licensed facilities would see signs referring for free and low-cost abortions before even getting to the front desk or speaking with Petitioners' staff. Pet.App.80a–81a. The Act requires the signage *for* abortion to be in

several different languages—a dozen or more in some centers—and in large font, "conspicuous" and "easily read," attracting the attention of clients in the waiting room, who Petitioners hope to encourage in the very opposite way. *Id.* The Act's only alternative to posting the sign is for Petitioners to give each client a written or electronic notice with the same words. *Id.* Petitioners' effectiveness as advocates who encourage childbirth over abortion is undoubtedly undermined by a conspicuous sign informing expectant mothers how to obtain free or low-cost abortions.

The Compelled Disclaimer required in unlicensed facilities has a similar effect. It must be posted in large (48-point) font, "conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." Pet.App.81a. It must also appear in large font in multiple languages in all of Petitioners' print and digital advertisements. It crowds out or entirely eliminates space for Petitioners to speak their own messages *against* abortion or to communicate about the free services they offer. The Act's multiple-language and font requirements can add up to hundreds of words and many inches of text. With no space left for Petitioners' own messages, the only alternative left is for Petitioners to purchase additional space to speak their own words. But that is no alternative at all, given the cost.

As this Court noted in *Tornillo*, "it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate [the government's compelled speech]." 418 U.S. at 257. And if a government cannot force a for-profit newspaper to bear the cost of creating

additional space to counteract a government-mandated message, neither can it force a nonprofit, religious-based pregnancy center. That conclusion applies even more forcefully today, when many ads come through social media, where ads must be short to be effective and where any added words substantially increase the cost.

Burdensome costs aside, the Act requires Petitioners to speak unwanted messages instead of their desired views. That by itself renders the law unconstitutional. *See id.* at 258 ("Even if a newspaper would face no additional costs …, the … statute fails to clear the barriers of the First Amendment because of its intrusion into the function of [the speakers]").

And by forcing only pro-life clinics to use their speech to promote the government's message, the State has disfavored certain speakers with particular messages. But the First Amendment guarantees that "[t]he government may not prohibit the dissemination of ideas it disfavors, nor compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2282. Thus, the State "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*, 515 U.S. at 829.

II. No Standard Less Than Strict Scrutiny Applies to This Content-Based and Viewpoint-Targeted Compelled Speech.

Rather than apply this Court's typical rules for analyzing compelled speech or content- and viewpoint-based regulations, the State below offered three arguments why strict scrutiny does not apply to the Act: (i) it regulates commercial speech, (ii) it

regulates professional speech, or (iii) it regulates speech in the abortion context. None of these arguments is grounded in principle or in this Court's precedents.

A. The Act does not regulate commercial speech.

The Ninth Circuit correctly rejected the State's argument that the Act regulates commercial speech. Pet.App.18a n.5. Petitioners are nonprofits and do not speak for any commercial purpose. They do not solicit any commercial transactions or sell any services, nor do they operate out of economic interest.

This Court "ha[s] always been careful to distinguish commercial speech from speech at the First Amendment's core." *Went For It, Inc.*, 515 U.S. at 623. The Act does not target commercial speech, which is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). Commercial speech is "'linked inextricably' with the commercial arrangement that it proposes," *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citation omitted), and "does no more than propose a commercial transaction," *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986) (quotation omitted). In contrast, Petitioners' ideological advocacy lies at the core of First Amendment protection, which guarantees "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). That, of course, is the essence of Petitioners' mission in operating centers

for compassionate, informative, and persuasive pro-life advocacy and assistance.

Petitioners' speech is akin to an ACLU-affiliated lawyer's offer of "free assistance by attorneys," which this Court did not analyze as commercial speech, since it was "not an offer predicated on entitlement to a share of any monetary recovery [or] … to derive financial gain." *In re Primus*, 436 U.S. at 422; *see also Button*, 371 U.S. at 443 (declining to analyze lawyers' speech as commercial "because no monetary stakes [were] involved"). This Court has already held that the commercial speech doctrine does not apply to a speech regulation targeted at speakers who "do not solicit contributions or orders for the sale of merchandise or services." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002).

The intermediate scrutiny standard that governs restrictions on commercial speech does not apply for another reason. The Act regulates the pregnancy centers' speech for reasons unrelated to its alleged commercial character. By burdening speech out of ideological dislike and not for commercial concerns, the Act must be subjected to strict scrutiny. *Cf. R.A.V.*, 505 U.S. at 389 (noting that "the power to proscribe [speech] on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements"). Indeed, this Court's decision in *Sorrell* teaches that the First Amendment demands strict scrutiny "whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" 564 U.S.

at 566 (citation omitted). To this rule, "[c]ommercial speech is no exception." *Id.*

The same logic applies to viewpoint-based regulations in the commercial context. As this Court has explained, viewpoint-based regulations of commercial speech receive strict scrutiny. *See, e.g.*, *R.A.V.*, 505 U.S. at 389 (holding that the government "may not prohibit only that commercial advertising that depicts men in a demeaning fashion"); *Matal*, 137 S. Ct. at 1767–69 (five justices concluding in two concurrences that the commercial speech doctrine does not justify viewpoint-based restrictions on speech, which always receive strict scrutiny).

B. The Act does not regulate "professional speech."

This Court has never recognized "professional speech" as a unique category for First Amendment analysis. While certain instances of speech by professionals have been deemed "commercial speech" when they met the narrow criteria described above, the default rule is that speech by professionals receives full First Amendment protections. *See, e.g.*, *Sorrell*, 564 U.S. at 563 (law restricting speech among professional pharmacists, physicians, and pharmaceutical representatives subject to heightened scrutiny); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (regulation of lawyers' professional advice to clients affects "private speech" that is "constitutionally protected expression"); *Riley*, 487 U.S. at 789–90 (speech by professional fundraisers to potential donors is fully protected); *Button*, 371 U.S. at 437 (lawyers' communications soliciting clients involved "advocacy" and "freedom[ ] of expression"

protected under the First Amendment). This Court has never inquired whether professionals have "positioned themselves in the marketplace" or "in a professional context," Pet.App.33a, in free speech cases. Nor does this Court need to create a new speech category now. *See* Rodney A. Smolla, *Professional Speech and the First Amendment,* 119 W. VA. L. REV. 67, 69 (2016) (concluding that "recognition of a new professional speech doctrine is unnecessary and inappropriate").

Nevertheless, the Ninth Circuit has manufactured a special category of "professional speech" that it characterizes as "a continuum," ranging from a professional's public advocacy on one end to professional conduct on the other. Pet.App.28a. The Ninth Circuit rejected, without explanation, the Fourth Circuit's conclusion that professional speech necessarily requires payment for services. *Id.* at 32a & n.8. Applying this dubious reasoning to the Act, the Ninth Circuit determined that the Compelled Abortion Referral "falls at the midpoint of the [speech–conduct] continuum" and—under the Ninth Circuit's new rule—is subject to "intermediate scrutiny." *Id.* at 29a. This is because, in the Ninth Circuit's view, "[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 28a–29a (quoting *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014)); *but see Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) ("There are serious doubts about whether *Pickup* was correctly decided").

How the status of a professional-client relationship could transform speech into conduct is unclear. But even if professional speech as conduct were a constitutionally meaningful concept, it would not turn on the fact that the Act compels speech "within the clinics' walls," as the Ninth Circuit concluded. Pet.App.31a. In fact, the speech mandated by the Act occurs at the same point in the relationship as the communications from the lawyers for the NAACP in *Button*, 371 U.S. 415, and the lawyer for the ACLU in *In re Primus*, 436 U.S. 412, both cases where this Court applied strict scrutiny. Likewise, Petitioners here are seeking to provide pregnant women with free information, to offer them pro bono services, and to advocate pro-life causes. Yet the Compelled Abortion Referral requires licensed pregnancy centers to inform women entering the clinic of government-endorsed alternatives—before any professional relationship has begun. The Compelled Disclaimer is even further removed from a professional relationship of any sort, compelling speech not only to women first entering the centers but also to women anywhere who happen to see a print or digital advertisement. As a result, the Act does not ensure exchange of truthful information on a particular topic within an ongoing professional relationship; the Act deters women from ever seeking *any* information from pro-life pregnancy centers in the first place.

Even the few lower courts that have employed a separate "professional speech" analysis do not suggest that the doctrine applies at this early stage of a medical professional's interaction with a potential patient. *See*, *e.g.*, *Wollschlaeger*, 848 F.3d at 1308

(reduced protection for professional speech only applies when speaking with a "particular client"); *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014) (professional speech protection limited only when providing "personalized services to a client based on the professional's expert knowledge and judgment"). Rather, this doctrine has been invoked only upon a showing that "the speaker is providing personalized advice in a private setting to a paying client." *Moore-King v. Cty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013).

But the Act interferes with speech at the First Amendment's core: advocacy for a cause. As Petitioners seek to speak public messages about an ideological cause, their invitation "is characteristically intertwined with informative and … persuasive speech." *Riley*, 487 U.S. at 796. Because the Act compels speech at the origin of this invitation, it interferes with the free exchange of ideas—for "without solicitation the flow of such information and advocacy would likely cease." *Id.* This, of course, is the State's goal in mandating messages in super-sized font to divert Petitioners' potential audience and inhibit Petitioners' opportunity to advocate for their pro-life perspective. The "professional" complexion of Petitioners' speech thus matters not; this Court's "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." *Id.* Even if the speech of these nonprofit clinics were deemed to have some "professional" aspect, such speech "is inextricably intertwined with otherwise

fully protected speech," and the First Amendment permits nothing less than strict scrutiny. *Id.*

C. There is no "abortion exception" to the First Amendment.

There is neither a basis in case law nor a principled reason to apply lesser scrutiny simply because the government's content-based regulation of speech relates to abortion. This Court has never recognized an abortion exception to the First Amendment. To the contrary, Petitioners' pro-life messaging is just the sort of advocacy on matters of public concern that this Court has recognized lie "at the core of the First Amendment's protective ambit." *In re Primus*, 436 U.S. at 424.

When the Ninth Circuit said "courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based," it overlooked a critical distinction: those cases all involved medical professionals obtaining informed consent to perform an abortion. Pet.App.23a–24a. Just because a physician performing an abortion, a medical procedure, must obtain a patient's informed consent does not mean that pro-life advocates must provide information related to abortion, a procedure they do not perform.

Obtaining informed consent for abortion, as with any medical procedure, requires a discussion of the risks, consequences, and alternatives of the procedure. *See Casey*, 505 U.S. at 881. In *Casey*, this Court reviewed a multifaceted law regulating abortion procedures. The law challenged there required a doctor performing an abortion to inform a patient, in the doctor's own words, of "the nature of

the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'" *Id.* In addition, the doctor was required to inform the patient about a variety of materials from the State offering alternatives to abortion, and to furnish those materials if a woman expressed interest. This Court dispatched the free speech claims in one paragraph, holding that the requirement was reasonable in the context of regulating the practice of medicine. *Id.* at 882–83. "As with any medical procedure," this Court explained, "the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id.* at 878. It is implied but nonetheless clear that this Court viewed informed consent for abortion akin to informed consent for other medical procedures. *See id.* at 883 (analogizing to a kidney transplant operation). In contrast, the Act's compelled speech provisions have no connection to informed consent to any medical procedure performed by Petitioners.

This Court has elsewhere made plain that there is a significant difference between the government's ability to regulate a doctor's particular advice to a patient regarding a medical procedure and the government's inability to regulate speech by, for example, "mak[ing] it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring). Patients talking to their doctors about a particular medical procedure need and expect certain information before they can consent to undergoing that procedure. That is not true for persons receiving information from pro bono

advocacy groups that is unrelated to surgeries or any medical services those centers perform.

The Ninth Circuit relied on a case from the Fourth Circuit to buttress its claim that courts routinely employ a lesser standard for evaluating abortion-related disclosures. But while the Fourth Circuit invalidated on free speech grounds a law mandating that a physician asked to perform an abortion must first describe the unborn baby to the expectant mother during an ultrasound, the Fourth Circuit did not—contrary to the assertion of the Ninth Circuit, Pet.App.26a—decide which level of scrutiny applied. *See Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) ("Thus, we need not conclusively determine whether strict scrutiny ever applies in similar situations, because in this case the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied" (citation and quotation marks omitted)).

The two other cases cited by the Ninth Circuit also involved informed consent laws. One case recognized that "such laws are part of the state's reasonable regulation of medical practice" and do not compel or otherwise interfere with "ideological speech." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012). The other case held that "a physician is required to disclose truthful and non-misleading information as part of obtaining informed consent to a procedure." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 737 (8th Cir. 2008).

Casey and these decisions from the Fifth and Eighth Circuits, each of which addresses informed

consent to medical procedures are worlds apart from the present case. None of those cases support the Ninth Circuit's view of the Act. It is simply not true that, outside of that context, there is a wide exception to First Amendment principles if the requirement has any remote connection to abortion. This Court's decision in *Bigelow v. Virginia*, 421 U.S. 809 (1975), clearly illustrates that general First Amendment principles apply when the State regulates advertising about abortions.

Moreover, the *Casey* plurality recognized that issue advocacy surrounding the persistent public debate over abortion is deeply ideological. 505 U.S. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage"). Compulsory transmission of government-selected words in this issue-advocacy context cannot be defended by reference to informed-consent laws because the Act is unrelated to a medical procedure that is being offered by Petitioners and creating risk for the patient.

III. The Act Cannot Survive Constitutional Review.

The State cannot meet the exacting standard the First Amendment demands. As discussed above, "[b]ecause the Act imposes a restriction on the content of protected speech"—and, worse yet, targets a particular viewpoint—"it is invalid unless California can demonstrate that it passes strict scrutiny." *Brown*, 564 U.S. at 799. Given the heavy burden on the government to sustain such a law, "[i]t is rare that

a regulation [of] speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). The Act is no exception to that general rule. Here, at a minimum, the State has not shown that the Act is the least restrictive means of advancing a compelling state interest—much less has it justified its discrimination against organizations holding a pro-life point of view.

Alternatively, instead of applying strict scrutiny, this Court could hold that a speech regulation is never permissible when the government targets an ideological viewpoint for disfavored treatment. *Rosenberger*, 515 U.S. at 829 ("The State may not … discriminate against speech on the basis of its viewpoint"). Ultimately, though, it does not matter what level of scrutiny applies because the Act fails even under more deferential standards.

A. No compelling state interest justifies the Act.

Only interests of the "highest order" are sufficiently compelling to satisfy strict scrutiny. *City of Hialeah*, 508 U.S. at 546. Moreover, the State must show that a compelling governmental interest is actually furthered by burdening the particular party. *Brown*, 564 U.S. at 799; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

Neither the Compelled Abortion Referral for licensed centers nor the Compelled Disclaimer for unlicensed centers can clear this high bar. In support of the Compelled Abortion Referral, the State asserts a general interest in ensuring that women are informed of their rights and the healthcare services

available to them. The State itself does not assert that this interest is compelling, and for good reason. This interest does not suffice for strict scrutiny because it is far too general to satisfy the particularity that strict scrutiny demands.

Moreover, the State's purported purpose of propagating information is called into question by the Act's striking underinclusiveness. The Compelled Abortion Referral is not required in all the ordinary places where expectant mothers may seek care during their pregnancy, such as physicians' offices or obstetrician-gynecologist practices. Such "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. "[A] law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 135 S. Ct. at 2232 (citation omitted).

The State's claim that the Compelled Disclaimer for unlicensed centers furthers its interest in informing women that certain pro-life pregnancy centers are not licensed medical facilities fares no better. This could not possibly be a compelling interest because there is no evidence of any confusion about what these centers do and do not provide. When the government justifies a speech regulation as preventing anticipated harms, "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S.

at 799 (citations omitted). "[A]mbiguous proof" or a mere "predictive judgment" "will not suffice"; the State must demonstrate a "direct causal link." *Id.* at 799–800. But here, California has put forth no specific, objective evidence supporting the existence or risk of fraud by pro-life centers—not in the legislative record or at any point during this litigation.[17] Mere assertion, in the absence of evidence, cannot establish a compelling interest. *See Bellotti*, 435 U.S. at 786 ("[T]he burden is on the Government to show the existence of such an interest" (citation omitted)).

Nor is a general interest in distinguishing medical from non-medical centers sufficient. "[I]t is no answer" to First Amendment claims "to say … that

---

[17] As stated in the Petition, Pet. at 34, the only "evidence" underlying the legislative purpose of combatting misinformation by pregnancy centers were summary descriptions of anecdotal "reports"—one by a partisan organization, NARAL Pro-Choice California, and one released by the University of California, Hastings College of Law, on strategies to restrict pro-life pregnancy centers. *See* JA40–41. Neither report was even included in the legislative record or the record in this case. There is no indication that the NARAL report relied on objective sources for its accusations—primarily accusations faulting the centers for not promoting abortion. *See id.* Neither is there any indication that the UC Hastings report pointed to any harms caused by pregnancy centers. In short, neither of these reports (i) has been demonstrated to be objective or reliable, (ii) proves any harm caused by pro-life pregnancy centers, or (iii) shows that the compelled speech would prevent any harm, real or imagined. The reports were driven by ideological advocacy and underscore the viewpoint hostility that drove the Act. The State's general reference to these reports is merely ambiguous "proof" that fails to show a direct causal link between the state-mandated compelled speech and a specific harm to be remedied.

the purpose of [the law] was merely to insure high professional standards and not to curtail free expression." *Button*, 371 U.S. at 438–39. "[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439.

B. The Act is not narrowly tailored to achieve any asserted interest.

In addition, the Act is not narrowly tailored to achieve any interest that the State has identified. The First Amendment demands that the "government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley*, 487 U.S. at 800. Even where a compelling interest has been shown—and the State has not done so here—"the 'danger of censorship' presented by a facially content-based statute … requires that that weapon be employed only where it is '*necessary* to serve the asserted [compelling] interest.'" *R.A.V.*, 505 U.S. at 395 (citations omitted).

The State claims that the Compelled Disclaimer is a means to prevent fraud and deception. But a law addressing fraud—if it targets the content of private speech—must be narrowly tailored to regulate only what is necessary for fraud prevention. *See Watchtower*, 536 U.S. at 168 (an "interest in preventing fraud … provides no support for [the law's] application to [ideological, political, and advocacy] causes"). This Court has made the "distinction … between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process." *Joseph H. Munson Co.*, 467 U.S. at 969–70. The latter, which is what the State has done here, fails because it does not

aim precisely—free speech rights may not be collateral damage in a preventive assault on fraud. *See id.* at 970.

To satisfy narrow tailoring, the State "must demonstrate that … the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664. A speech regulation cannot stand if reason "suggest[s] the availability of less intrusive and more effective measures" for accomplishing the asserted goal. *Schaumburg*, 444 U.S. at 639; *see also Playboy Entm't Grp.*, 529 U.S. at 824 (instructing courts not to "assume a plausible, less restrictive alternative would be ineffective"). For example, "[f]rauds may be denounced as offenses and punished by law." *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939). Even if that "is not the most efficient means of preventing fraud," this Court has already "emphatically" affirmed "that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. This Court has therefore stricken speech laws justified by the asserted purpose of fraud prevention when the laws appeared intended to target certain speakers, *e.g.*, *Watchtower*, 536 U.S. at 158, or the means chosen unduly interfered with free speech, *e.g.*, *Riley*, 487 U.S. at 798.

Riley illustrates why the Act fails narrow tailoring. There, this Court held that the compelled disclosure imposed on professional fundraisers was not narrowly tailored to the asserted governmental interest because the challenged law "necessarily discriminate[d] against" certain small and underfunded nonprofits and tainted the fundraisers'

ability to communicate those groups' charitable messages. *Riley*, 487 U.S. at 799–800. The compelled preemptive "unfavorable disclosures [had] the predictable result that [the speaker's message] will prove unsuccessful." *Id.* at 799. Assessing this burden, this Court explained that "[i]n contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available." *Id.* at 800. The State could, this Court observed, "publish the … disclosure[s]" itself or "vigorously enforce its antifraud laws to prohibit [speakers from eliciting public trust based] on false pretenses or by making false statements." *Id.*; *see also Sorrell*, 564 U.S. at 573 (noting that the speech regulation could have been more precisely tailored had the State limited its application to "only a few narrow and well-justified circumstances").

The Compelled Abortion Referral, if designed to promote the spread of information on how to obtain an abortion, is not properly tailored by any measure. *See infra* § III.D. Most obviously, as in *Riley*, the State could itself publish information about where women may obtain free and low-cost abortions in California. The State could make the abortion-provider contact information publicly available—without forcing private citizens like Petitioners to be the messengers. It could "purchase television advertisements as it does to encourage [other state programs]" or "purchase billboard space" near pregnancy centers. Addendum at 19a (discussing ways in which the FACT Act could be more narrowly tailored). It could "require counties or other political entities to make … significant efforts to inform women of the

availability of family planning services." *Id.* at 8a–9a. It could require county health departments to prominently post (in large font, perhaps) the referral information on their website home pages. *See id.* at 8a. It could require medical facilities receiving government funding for certain programs, such as Family PACT, to say certain things. *Cf. Rust*, 500 U.S. at 197–98. These would certainly be less restrictive means of disseminating the government's desired message, but the State employs none of them.

The de minimis advertising the State has done rarely mentions the word "abortion," instead describing services euphemistically as "family planning." Addendum at 8a; *see also id.* at 7a ("those few [state] entities making an effort to inform women of the availability of services appear nearly as loathe as [pro-life pregnancy centers] to specifically use or post the word 'abortion'"). Ironically, not talking about abortion is one of the primary criticisms the Act's sponsors launch against pro-life pregnancy centers like Petitioners. *See supra* note 17. If spreading information about abortion to women is the State's crucial objective, it could start by first speaking the word itself.

The Compelled Disclaimer, if intended to prevent deception, is likewise far more restrictive than necessary. As this Court has reiterated in free-speech cases, states must enforce their fraud laws rather than decide that it is a "less efficient and convenient" means and thus "abridge freedom of speech" instead. *Schneider*, 308 U.S. at 164. Beyond that, the State has not even attempted to explain why the Compelled Disclaimer could not be more narrowly tailored than

intruding upon all of the centers' advertisements in print or digital media. The State has made no effort to justify the necessity of the large font requirements or the numerous language requirements. The State could instead, for example, maintain a public registry of unlicensed pregnancy centers, noting that they are not medical facilities. This would serve to inform every person seeking the information, even before entering the center, without encroaching upon Petitioners' channels of mission-oriented private speech and issue advocacy.

Because in speech regulations, the government may act only through "narrowly drawn regulations … without unnecessarily interfering with First Amendment freedoms," *Schaumburg*, 444 U.S. at 637, laws that gratuitously compel or stifle speech cannot stand. Where "[p]recision of [the] regulation must be the touchstone," *Button*, 371 U.S. at 438, the Act is too blunt an instrument to pass constitutional muster.

C. The Court should adopt a per se rule that viewpoint discrimination against private speech is unconstitutional.

The Act's egregious targeting of a particular viewpoint presents a prime vehicle for the Court to hold that the government can never mandate or suppress speech based on an ideological disagreement. A per se rule has been a long time coming.

No violation of the First Amendment is more clear than when the government regulates a private speaker because of his viewpoint. "[T]he First Amendment forbids the government to regulate

speech in ways that favor some viewpoints or ideas at the expense of others." *Matal*, 137 S. Ct. at 1757 (plurality opinion) (citation omitted). This Court long ago suggested the rigor of this constitutional principle when West Virginia compelled school children to speak words they did not believe:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. at 642.

No government has ever succeeded in an attempt to justify viewpoint discrimination. In *Barnette*, the state argued that the requirement to pledge allegiance to the flag was justified because "[n]ational unity is the basis of national security" and "the authorities have the right to select appropriate means for its attainment." *Id.* at 640. This Court did not weigh the importance of this claimed interest in any sort of a balancing test. Rather, it declared that the use of compelled speech to achieve this particular viewpoint was beyond the power of government. *Id.* at 641.

Then, in *Rosenberger*, the Court invalidated, as impermissible viewpoint discrimination, a state-university policy prohibiting religious student organizations from equal participation in a student funding program. 515 U.S. 819. There, this Court rejected the university's proffered justification not

because it was insufficiently weighty, but because viewpoint discrimination is never legitimate: "nothing in our [prior] decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." *Id.* at 835.

Years later, this Court determined that a congressional restriction on using legal-services funding to challenge the constitutionality of welfare programs constituted unconstitutional viewpoint discrimination. *Legal Servs. Corp.*, 531 U.S. at 548–49. Although the Court did not employ the "viewpoint" terminology, its ruling was squarely rooted in the theory that "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* Again, this Court did not weigh the importance of the government's claimed interests, but simply declared the restriction per se illegitimate, holding that "[t]he Constitution does not permit the Government to confine litigants and their attorneys in this manner." *Id.* at 548.

This Court has repeatedly treated a finding of viewpoint bias as determinative.[18] Though the level of

---

[18] This Court also recently addressed viewpoint discrimination in *Matal*, 137 S. Ct. 1744. The plurality rejected the government's claim that its interest in preventing the issuance of trademarks disparaging any person or group could justify viewpoint discrimination. The Court held that the appropriate level of review "need not be resolved here because the disparagement clause cannot withstand even *Central Hudson* review." *Id.* at 1749. A four-justice concurrence advanced a more rigorous level of protection whenever viewpoint discrimination is found—even in the context of commercial speech: "It is telling

scrutiny has never been decided, it operates as the functional equivalent of a per se rule. Following this established practice, this Court should now declare that a per se violation of the First Amendment occurs when the government regulates speech based on a disagreement with the viewpoint of a private speaker.

D. The Act fails any level of scrutiny.

Even under the lesser scrutiny that the State urges, the Act fails because it is not narrowly drawn. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994) (intermediate scrutiny demands that the law be "narrowly tailored to serve a significant governmental interest"). The State's purported interest in ensuring that its citizens have access to health-related information can be advanced in any number of constitutionally sound ways. A content-based speech law compelling objectors to speak a particular viewpoint is not "narrowly drawn" to achieve such an interest. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 565 ("[T]he First Amendment mandates that speech restrictions be 'narrowly drawn'" (citation omitted)).

As detailed in section III.B., *supra*, there are obvious means by which the State could transmit health-related information without compelling speech. *See also Riley*, 487 U.S. at 800 (law not narrowly drawn when, "[f]or example, as a general rule, the State may itself publish the detailed

---

that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf." *Id.* at 1768 (Kennedy, J., concurring).

financial disclosure forms it requires professional fundraisers to file"); *Schaumburg*, 444 U.S. at 637 (because "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly," the State need not regulate speech in violation of the First Amendment). Yet California has not even attempted to show, much less convincingly demonstrated, that any of these measures would be inadequate. *See* Addendum at 8a, 17a (discussing State's "completely passive" and "very modest efforts at delivering information" through alternative means). On that basis alone, the Act cannot be, as the Ninth Circuit wrongly concluded, "*closely drawn* to achieve California's interests in safeguarding public health and fully informing Californians of the existence of publicly-funded medical services." Pet.App.35a (emphasis supplied). Even under a lesser standard than the strict scrutiny that correctly applies, "[i]n the absence of a showing that more limited speech regulation would be ineffective," the Act fails a First Amendment analysis. *Cent. Hudson Gas & Elec.*, 447 U.S. at 571.

In addition, no matter the level of scrutiny, "[t]he State cannot regulate speech that poses no danger to the asserted state interest." *Id.* at 565. Here, there is no evidence that the Act's compelled speech solves any real problem at all; the State has shown no "danger." In this way, the Act is overinclusive. The Compelled Disclaimer applies regardless of whether the pregnancy centers have engaged in any "misleading" speech that would threaten a governmental interest. It applies to all centers focused on assisting with pregnancy and options counseling. The Compelled Abortion Referral also

applies despite the absence of any evidence that women in California are without access to information about abortion. Thus, the Act's requirements are not even reasonably or rationally related to the State's asserted interest in preventing citizens' confusion.

CONCLUSION

Abortion remains a deeply divisive moral issue in this country. Nothing prohibits California from taking a side in that debate, too. It can subsidize a pro-abortion view and use many tools at its disposal to disseminate that perspective. But the State cannot single out and commandeer the speech of those devoted to pro-life advocacy to transmit that view. The marketplace of ideas can sort out which view is most persuasive. California need not, and under the First Amendment cannot, use coercion of private speech to advance the outcome it prefers. This Court should reverse the Ninth Circuit's refusal to enjoin the Act.

Respectfully submitted.

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

MICHAEL P. FARRIS
KRISTEN K. WAGGONER
DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
DENISE M. HARLE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

JANUARY 8, 2018

ADDENDUM

ADDENDUM TABLE OF CONTENTS

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
OCT 30 2017
J. Castillo

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT:	CASE NO.:
THE SCHARPEN FOUNDATION INC. vs. KAMALA HARRIS, et al.	October 30, 2017 Department 1	RIC1514022
COUNSEL: None present	REPORTER: None	

STATEMENT OF DECISION

STATEMENT OF DECISION

This action seeks a judicial declaration that the Reproductive FACT Act, Health and Safety Code Sections 123470 et seq., is unconstitutional and a permanent injunction prohibiting its enforcement. Trial was held on October 18, 2017.

Based on the law and evidence presented at trial, the Court finds that the notice requirement of the FACT Act is compelled speech violating Article I, Section 2, of the Constitution of the State of California.

Judgment is for Plaintiff Scharpen Foundation. The Court grants injunctive and declaratory relief.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

The Reproductive FACT Act, Health and Safety Code Sections 123470 et seq. requires Scharpen's licensed clinic to either post or individually provide the following specifically worded notice to patients:

> 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].

Failure to make the required notice is punishable by a civil penalty. The statute is enforced by the Attorney General, County Counsels, and City Attorneys.

For religious reasons Scharpen Foundation does not provide or make referrals for abortion services and refuses to post the required notice.

Scharpen Foundation filed this action alleging in its First Amended Complaint that the FACT Act violates the freedoms of speech, assembly, and free expression of religion guaranteed by Article I, Sections 2, 3 and 4 the Constitution of the State of

California. The Attorney General, County Counsel of Riverside County, and City Attorney of the City of Temecula all answered the First Amended Complaint. The County Counsel and City Attorney left the defense of the challenged legislation in the hands of the Attorney General and agreed to be bound by the results of this trial.

Plaintiff Scharpen Foundation moved for a preliminary injunction. That motion was denied on the grounds that Plaintiff was unlikely to succeed on the merits.

The Attorney General moved for Judgment on the Pleadings. That motion was denied on June 23, 2017. The Court granted the motion with respect to the Counts 2 and 3 of the First Amended Complaint related to freedom of assembly and free expression of religion. The resulting trial was thus limited solely to the issue of whether the Fact Act violates Plaintiff Scharpen Foundation's freedom of speech under Article I, Section 2. This Court's June 23, 2017, ruling on the Attorney General's motion for Judgment on the Pleadings is incorporated herein by reference.

THE EVIDENCE AND FACTUAL FINDINGS

There is little contradiction in the evidence presented by the parties. The dispute lies in the inferences the Court should draw from that evidence and what law governs the State's power to compel the speech at issue.

The parties stipulated to the admissibility of almost all exhibits, transcripts, declarations and of

matters subject to judicial notice. For reasons the Court will explain, the disputed evidence is of minimal relevance, and does not alter the outcome of the case. The Court overrules all objections and receives into evidence all exhibits, declarations, transcripts and matters to be judicially noticed offered by the parties.

The Court finds that Scharpen Foundation operates a clinic subject to the required notice provisions of the FACT Act. The clinic is mobile and operates out of a motor home in the County of Riverside and at times in the City of Temecula. For religious reasons, Scharpen Foundation does not comply with the posting and notice requirements of the statute.

The FACT Act compels speech, and regulates its content.

VIEWPOINT DISCRIMINATION

Sharpen Foundation asserts that the FACT Act discriminates based upon viewpoint. In support of that argument Scharpen produced a spreadsheet showing that only about 90 of the State's 1,200 or so clinics are subject to the FACT Act, and the vast majority of affected clinics are pro-life. This may be so. But for the reasons stated in the Court's ruling of June 23, 2017, finding no violation of Article I, Section 4 right to free expression, the Court finds no viewpoint discrimination. By its terms, FACT Act is a neutral statute of general applicability. It may affect mostly pro-life clinics, but laws requiring mandatory vaccinations burden persons who view vaccinations

as harmful more those that view them as beneficial. Such laws do not discriminate on viewpoint.

The Plaintiff Scharpen Foundation points to the legislative history suggesting that the statute was supported by pro-abortion groups and that a legislative author was concerned about pro-life Christian clinics misleading women who came to those clinics with false information regarding abortion. Some legislators may have had discriminatory intent. But the Legislature is a corporate body, and its intent is always a mix of the motives of its members, best understood by looking at the words they enact. This is especially true in a case such as this where there is no ambiguity in the statute and the Legislature has made specific legislative findings. Those findings state that thousands of California women are not knowledgeable regarding the availability of comprehensive family planning services, including abortion services. The statute was enacted to address that problem. The legislative findings make no mention of Christian pro-life clinics, or any misrepresentations by those clinics.

This Court is cognizant of the Legislature's role as the public policy making body of California government. Legislators are sworn to and have a duty to support the California Constitution no less ardently than members of the Judiciary. Constitutional protections for free speech serve to legitimize the Legislature's role in formulating public policy by ensuring the People, in whose name the Legislature acts, are informed on issues of public importance. Courts must be vigilant in protecting

constitutional free speech in order to preserve our republican democracy, but unless clearly acting outside its constitutional limitations, the Legislature's acts are entitled to great judicial deference.

Based upon the text of the legislation, the legislative findings, and the legislative history, the Court finds that there was no prohibited legislative discriminatory intent in the FACT Act's enactment. Similarly, even though the legislation may primarily affect Christian pro-life clinics, there is no prohibited discriminatory affect in its operation.

SCOTT SCHARPEN TESTIMONY

The deposition transcript of Scott Scharpen, the president and founder of the Scharpen Foundation, was also received into evidence. His testimony generally describes how the Scharpen organization is pro-life, that it does not advertise as pro-life, and that it attempts to have women who would otherwise obtain an abortion go to the clinic and subsequently choose to give birth. As a whole, the testimony establishes that Mr. Scharpen goes to great lengths to have women who may be contemplating abortion come to his clinic, and makes no effort to inform them beforehand of the clinic's pro-life position.

The legislative findings do not address potential abuses by Scharpen or any other pro-life clinic. The legislative findings could have targeted behaviors similar to those described in Mr. Scharpen's deposition testimony, but the legislative findings only discuss the need to provide women with information

regarding comprehensive family planning services without any mention of abuses by clinics of any description. The legislation is facially neutral and applies to all clinics that meet certain neutral criteria, regardless of whether they are religious or not, whether they are pro-life or not, and regardless of the content of their advertising, their motives, or their behavior.

Mr. Scharpen's activities are not relevant to the constitutionality of the statute.

THE STATE'S EFFORTS TO INFORM WOMEN OF THE AVAILABILITY OF SERVICES

The legislative findings state that many women remain uninformed of available services. That lack of information serves as the State's justification to compel clinics such as Scharpen Foundation's to "supplement" its own efforts to inform women of its reproductive health programs. The Attorney General offered a number of declarations and exhibits. They describe those steps the State has taken, and which Scharpen Foundation must now supplement, to educate women regarding the availability of low cost public contraceptive, prenatal, and abortion services.

While the educational steps taken by the State are described as "myriad' by the Attorney General, they are actually quite minimal. And while the evidence is voluminous, it describes very little. And even those few entities making an effort to inform women of the availability of services appear nearly as loathe as Scharpen Foundation to specifically use or post the word "abortion".

The evidence consists of declarations describing the contents of Health Department websites for 15 of the State's 58 counties, and a State website for the Office of Family Planning. After one navigates though each of these 16 websites to the Health Department and one can see the services offered. In most of these websites the services are merely described as "family planning" or by a similar euphemism. The word "abortion" appears on only 2 county websites.

These website based attempts at educating women are completely passive. A woman must decide, on her own initiative, to go to the website seeking services. Even if she can navigate through information concerning vaccinations, the importance of flossing, hazardous waste, and other topics, in all but 2 counties, she must then ascertain that "family planning" or "contraceptive" includes post-conception contraception and abortion.

The only evidence of an active effort to educate women was a 12-week project in Alameda County in 2015. Signs were posted on buses advertising a "Free Pregnancy Test" with a phone number. Wallet-sized cards with the same message were also distributed. The word "abortion" did not appear in the advertising, and no other services beyond free pregnancy testing were listed. If a woman knew she was pregnant and desired an abortion, or was not pregnant and only desired contraception, this advertising would not direct her to the desired services.

Based on the record at trial the Court finds the State does not require counties or other political entities to make any significant efforts to inform

women of the availability of family planning services. The Court finds that the State, which controls public education from K-12, community colleges, State Universities, the UC system, and which controls the funding of the services at issue, makes no other effort to inform women about the availability of those services.

FREEDOM OF SPEECH UNDER ARTICLE I, SECTION2

This action is brought under Article I, Section 2 of the California Constitution, a provision of California's Declaration of Rights. The civil liberties granted by the California Constitution are independent of rights guaranteed by the United States Constitution's Bill of Rights. See California Constitution Article I, Section 24. Absent cogent reasons, however, California courts do not depart from the construction placed by the United States Supreme Court on a similar provision of the federal constitution. *Gabrielli v. Knickerbocker*, (1938) 12 Cal.2d 85.

There is neither a California nor a federal case examining the Reproductive FACT Act under the California Constitution's provision protecting freedom of speech, Article I, Section 2. We look first to U.S. Supreme Court First Amendment precedent for guidance. In the abortion context, the seminal U.S. Supreme Court case addressing compelled speech is *Planned Parenthood of Southern Pennsylvania v. Casey* (1992) 505 U.S. 833. There, the Court's plurality found no First Amendment deficiency in a statute that compelled a physician to provide specific

information regarding abortion and childbirth to an abortion patient. *Id.*, 505 U.S. 833, 884.

The Court did not discuss whether strict scrutiny, intermediate scrutiny, or rational basis was the appropriate level of review.

STRICT SCRUTINY, INTERMEDIATE SCRUTINY, OR RATIONAL BASIS

There is no question that the FACT Act compels speech and the content of that speech. This Court must determine the appropriate level of scrutiny to apply, and whether the statute passes that level of scrutiny.

Five federal circuit courts have examined cases of state compelled speech by physicians in the abortion context. These federal circuit court cases are not binding precedent for this Court. They are secondary authorities this Court may consult for guidance. The cases are not in agreement on what level of scrutiny to apply.

California's Reproductive FACT Act was analyzed as a First Amendment case by the Ninth Circuit Court of Appeals in *National Institute of Family and Life Advocates (NIFLA) v. Harris* (2016) 839 F.3d 823. As this Court finds, the Ninth Circuit court held the FACT Act is content based, but does not discriminate based on viewpoint. The Ninth Circuit court found the statute passed intermediate scrutiny. *Id.*, 839 F.3d 823, 838. The Attorney General urges the Court to adopt the Ninth Circuit's opinion, except for the level of scrutiny it applied. The Attorney General urges

this Court to adopt the lowest level of scrutiny, rational basis.

The Fifth and the Eighth Circuits applied the lower rational basis standard urged by the Attorney General. Both cases involve statutes compelling physicians to describe fetal development to the patient. In one case the State compelled physicians to specifically inform the patient that abortion "... will terminate the life of a whole, unique, living human being." Using the rational basis analysis, both circuit courts found the statutes in question did not violate the First Amendment. *Texas Medical Providers v. Lakey* (5th Cir. 2012) 667 F.3d 570, 576; *Planned Parenthood of Minnesota v. Rounds*, (8th Cir. 2008) 530 F.3d 724, 734-735.

In *Stuart v. Camnitz* (4th Cir. 2014) 774 F.3d 238, 246-250 the Fourth Circuit used intermediate scrutiny to analyze a statute requiring physicians to perform ultrasounds and sonograms, and to then describe the fetus to patients. The statute was similar to the statutes found constitutional by the Fifth and Eighth Circuits. The Fourth Circuit found that the statute failed intermediate scrutiny. By necessary implication it failed strict scrutiny as well. The Court took a contextual approach, holding the statute regulated not professional conduct, but ideological speech. The burden on liberty was too great to justify interfering with the physician's "freedom of mind". The Court held the compelled speech unconstitutional.

In a case examining an ordinance similar to the California statute at issue, the Second Circuit held a

New York City ordinance compelling pregnancy centers to disclose whether they provided referrals for abortions was invalid. The Court held the ordinance failed both intermediate scrutiny and strict scrutiny. *Evergreen Association v. City of New York*, (2nd Cir. 2014) 740 F.3d 233. The court focused on the context of the speech in question to determine the appropriate level of scrutiny. See *Id.*, 740 F.3d 233, 249:

> When evaluating compelled speech, we consider the context in which the speech is made. [Citation.] Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated ... provide alternatives. 'Expression on public issues has always rested on the highest rung on the hierarchy of First Amendment values.' [Citation.] Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. [Citation.] A requirement that pregnancy 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.

In summary, the federal circuit courts are in disagreement, but lean toward intermediate or strict scrutiny. The Second and Fourth Circuits are consistent in that both find that compelled political or

ideological speech leads to heightened scrutiny, possibly strict scrutiny. The contextual approach of the Second and Fourth Circuits is most compatible with the California Supreme Court's approach to Article I, Section 2.

California's protection of freedom of speech sometimes differs from that required by the First Amendment. In those cases the California Supreme Court has necessarily looked to the context of the speech, either in its forum, its nature as commercial or political, and whether it is restricted or compelled. In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d 899, Article I, Section 2 was found to protect a level of free expression on the grounds of a privately owned shopping center not sanctioned by the First Amendment. In *Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 495 and 517, Justice Mosk explained the independent analysis afforded compelled commercial speech under Article I, Section 2, and the historical reasons for the that difference.

The speech required by the FACT Act is unquestionably compelled and content based. The Attorney General describes its context as commercial in nature, thus justifying a rational basis review. It is true that Scharpen provides services, without cost, in the market for pre-natal care. But this compelled speech is not politically neutral. This speech is not merely the transmittal of neutral information, such as the calorie count of a food product, or the octane of gasoline purchased at a pump. Here, the State commands clinics to post specific directions for whom to contact to obtain an abortion. It forces the clinic to point the way to the abortion clinic and can leave

patients with the belief they were referred to an abortion provider by that clinic.

The Attorney General argues forcefully that the FACT Act only requires an affected clinic to post true, factual information. That argument is accurate, but only to a point. The required posting directs the reader to a telephone number. And if that number is called, one can undoubtedly be referred to an abortion provider if one so desires. But the specific language of the required signage is also misleading, in that it can leave the reader with the belief that the referral is being made by the clinic in which it is posted. In Scharpen's case that would be inaccurate, profoundly inaccurate.

The dispute over the issue of abortion is contentious and raises issues that are religious, cultural, political, and legal. It has been a matter of continuous legal and political controversy for more than four decades. The dispute is essentially over how we define when human life begins, a purely moral and philosophical question that cannot lend itself to scientific resolution. This conflict goes to the heart of our debates regarding individual liberty, judicial power, feminism, federalism, and now, free speech. It is a subject of paramount importance when evaluating nominees to the U.S. Supreme Court, a political process. Political candidates for all manner of public office find it necessary to declare their positions on the issue. The issue of abortion is undoubtedly political in nature.

There is no question that the State has a legitimate regulatory interest in the practice of the

healing arts. In the midst of this contentious political dispute the State commands that specific State authored words be mouthed by the clinic at the very beginning of its relationship with those who come to it for guidance. In at least some cases the compelled speech alters that relationship. *Evergree*n (supra), at 249. The statute distorts the clinic's speech, which can confuse the patient. The statute interferes both with the right of the clinician to speak and with the right of the patient to hear what the clinician would say in the absence of State censorship.

The State is requiring more than informed consent. The statute requires the clinic to give information to a woman at the start of her relationship with the clinic. Women who come to the clinic and are found not to be pregnant must be told of the availability of abortion. Women who find out they are pregnant and are thrilled to be so must be told about abortion. Women with unplanned, but not unwanted pregnancies must also be told. The State inserts itself into the private and sensitive relationship between a woman and her physician.

It is entirely proper for the State to take its position supporting access to abortion, a right protected by both state and federal constitutions. It may enact laws that support abortion access and tax its citizens to make abortions available. It can require informed consent for all medical procedures. But its ability to impress free citizens into State service in this political dispute cannot be absolute; it must be limited.

RATIONAL BASIS

Article I, Section 2 offers little protection if a rational basis test is used to evaluate compelled political speech. The rational basis test could be used to subject women and their physicians to compelled descriptions of fetal development. The majority of the federal circuit court cases previously cited suggest that no less than intermediate scrutiny is required, with the Court in *Evergreen, supra*, 740 F.3d 233, specifically noting that freedom of expression on public issues enjoys the highest level of protection, and the Court in *Camnitz, supra*, 774 F.3d 238-246 noting that the compelled statements required of physicians interfered with a physician's 'freedom of mind".

INTERMEDIATE SCRUTINY

This statute fails even intermediate scrutiny.

In *McCullen v. Coakley*, 573 U.S.__,134 S.Ct 2518 (2014), the United States Supreme Court examined a Massachusetts statute creating a 35 foot buffer area around reproductive health care facilities, that excluded all but patrons and employees of the facilities. There were problems with protesters blocking public sidewalks and preventing women from entering the clinic. The statute was enacted as a public safety measure after the State found less intrusive measures inadequate. The Court held the statute was subject to intermediate scrutiny.

Writing for the majority, Chief Justice Roberts found the while the Commonwealth provided

evidence of pro-life advocates obstructing access at only one clinic, the statute applied to every clinic in the State. The Court rejected the State's argument that other approaches to the problem were unworkable, holding that the evidence in the record was insufficient to support that position. The State had not tried other approaches to the problem that were effective in other states. The Chief Justice wrote that it is not enough that a restriction on free speech is easier for the State to administer, that the "prime objective of the First Amendment is not efficiency." *Id.*, at 134 S.Ct. 2540.

Here, the State's very modest efforts at delivering information to its target audience regarding the availability of services, including abortion services, do not establish the necessity of compelling private citizens to "supplement" those efforts. The legislative finding that the FACT Act is "necessary" to "supplement" the State's minimal efforts is not supported. The statute fails intermediate scrutiny.

STRICT SCRUTINY

This Court finds that Article I, Section 2 of the California Constitution is in accord with the standards suggested by *Evergreen*. The compelled speech is political in nature. This statute should to be analyzed using strict scrutiny. That standard for compelled statements for political speech is neutral on the political issue of abortion. The Legislature may not use the wall of the physician's office as a billboard to advertise the availability of low cost abortions, but neither may it compel physicians to describe a fetus as a "whole, unique, living human being" as was

approved using a First Amendment rational basis test in *Rounds, supra*, 530 F.3d 724, 734-735.

COMPELLED SPEECH

Compelled speech is that which forces a speaker to say that which he or she may not believe. Compelled speech is undoubtedly necessary in many circumstances. But compelled speech of a political or cultural nature is not the tool of a free government.

In *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, the U.S. Supreme Court examined a case where West Virginia compelled public school students to salute the national flag and recite the pledge of allegiance, which at that time had no reference to God. Students who were Jehovah's Witnesses believed that the salute was a form of idolatry. They refused to give the salute and pledge. Refusal to participate was punished as an act of disobedience resulting in expulsion. In 1943, the United States was in the midst of history's most destructive war against totalitarian governments at their most evil. West Virginia had sons who already had, and more who soon would perish or return maimed from that war. West Virginia's requirement of a modest patriotic affirmation could be viewed as a necessary measure at a time when the nation's future depended on national unity.

The Court found West Virginia's compelled salute and recitation violated the First Amendment because it invaded the speaker's "individual freedom of mind", (*Id.*, 319 U.S. 624, 637), and the "sphere of intellect and spirit", (*Id.*, 319 U.S. 624, 642. The Court relied

entirely upon the right of free expression, requiring no religious motive on the part of the refusing student. *Id.*, 319 U.S. 624, 636-637.

The FACT Act violates "individual freedom of mind". The State can deliver its message without infringing upon anyone's liberty. It may purchase television advertisements as it does to encourage Californians to sign up for Covered California or to conserve water. It may purchase billboard space and post its message directly in front of Scharpen Foundation's clinic. It can address the issue in its public schools as part of sex education.

Compelled speech must be subject to reasonable limitation. This statute compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message.

In this case, however virtuous the State's ends, they do not justify its means.

RULING

The Court finds that the FACT Act violates Article I, Section 2 of the California Constitution. Plaintiff Scharpen Foundation is entitled to a declaration that the FACT Act is unconstitutional and a permanent injunction prohibiting the Attorney General, the County Counsel of Riverside County, and the City Attorney of the City of Temecula from taking any action to enforce that statute against it, its officers, and its employees.

Dated: 10/30/17

Gloria C. Trask
Hon. Gloria C. Trask
Judge of the Superior Court