No. _____

In The
Supreme Court of the United States

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC AND ALTERNATIVE WOMEN'S CENTER,

Petitioners,

v.

KAMALA HARRIS,
Attorney General of the State of California,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of California enacted Assembly Bill ("AB") 775, which requires certain pregnancy clinics to post or distribute information directing visitors to local government offices for taxpayer-subsidized abortion and other services. The law was focused on religious, pro-life clinics founded on beliefs that abortion is a grave moral evil. The Ninth Circuit Court of Appeals, while acknowledging that the law was content-based, applied intermediate scrutiny and upheld it. Meanwhile, the Second and Fourth Circuits have invalidated similar restrictions.

There are two major questions presented, the first of which entails three distinct circuit splits:

1. Does a determination that a law is content-based leave room for a court to apply something less than strict scrutiny?

   A) Did this Court's decision in *Reed v. Town of Gilbert* establish a bright-line rule for content-based speech?

   B) Is content-based, compelled speech subject to lower scrutiny if it is deemed to be an abortion-related disclosure?

   C) Does the First Amendment permit lower scrutiny for content-based restrictions on professional speech or professional facilities?

2. Does a law requiring religious non-profits to post a government message antithetical to their beliefs trigger heightened or minimal scrutiny under the Free Exercise Clause?

PARTIES

The parties to this Petition are A Woman's Friend Pregnancy Resource Clinic and Alternative Women's Center. Collectively the Petitioners are referred to as A Woman's Friend.

Respondent is Xavier Becerra, in his official capacity as Attorney General for the State of California.[1]

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

Petitioner, A Woman's Friend Pregnancy Resource Clinic, has no parent corporation and issues no stock.

Petitioner, Alternative Women's Center, has no parent corporation and issues no stock.

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[1] By operation of law, Mr. Becerra replaces Kamala Harris who resigned as California's Attorney General after having been elected to the U.S. Senate. See Rule 25(d) of the Fed. Rules of Civil Procedure.

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OPINIONS BELOW

The opinion of the court of appeals is reported at No. 15-17517, 2016 U.S. App. LEXIS 18534 (9th Cir. Oct. 14, 2016) and is fully set forth in the Petitioners' Appendix (Pet. App. at 1-3). The opinion of the district court is reported at 153 F. Supp. 3d 1168 (E.D. Cal. 2015) and is fully set forth at Pet. App. at 4-97.

In addition, the related case of *National Institute of Family and Life Advocates v. Harris* (*NIFLA*), is reported at 839 F.3d 823 (9th Cir. 2016) and is fully set forth at Pet. App. at 99-142.

STATEMENT OF JURISDICTION

This Petition is filed pursuant to Supreme Court Rule 11. The Court of Appeals issued a decision on October 14, 2016. The Court of Appeals denied panel rehearing and rehearing en banc, on December 20, 2016. Pet. App. at 98. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Health & Safety Code §123472(a)

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

(1) The notice shall state:

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

(2) The information shall be disclosed in one of the following ways:

(A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.

(B) A printed notice distributed to all clients in no less than 14-point type.

(C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

(3) The notice may be combined with other mandated disclosures.

Cal. Health & Safety Code §123473

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

(1) Providing the covered facility with reasonable notice of noncompliance, which

informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.

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

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Lawmakers in California require life-affirming religious ministries to notify patients of the availability of free or low cost abortions. Referred to in the legislation as *crisis pregnancy centers* (or "CPC"), these ministries are compelled to provide contact information for a government entity that will facilitate an abortion. Failure to communicate this message subjects a CPC to a $500 and subsequently $1,000 penalty.

This Petition should be granted to resolve circuit splits on three issues, all related to the proper level of scrutiny for content-based, compelled speech. First, at

least five circuits have determined that this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), established a bright-line rule that any content-based regulation of speech is subject to strict scrutiny. In contrast, the Ninth and Eleventh Circuits maintain that, notwithstanding *Reed*, *professional* and *commercial speech* restrictions that are content-based require only intermediate scrutiny.

The second split involves the level of scrutiny for abortion-related speech. In this case, the Ninth Circuit candidly acknowledged a split among the circuits over the level of review. The Ninth Circuit uses intermediate scrutiny, as has been announced in this case. But the Fourth Circuit has refrained from definitively settling on a standard, though it expressed more discomfort with compelled speech and described its approach as heightened intermediate scrutiny in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). But the Fifth and Eighth Circuits apply only a reasonableness test. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008). That split alone merits review. In contrast to all of these circuits, A Woman's Friend will argue that since such disclosures compel speech, under this Court's precedents the highest level of scrutiny is proper. A Woman's Friend's position is that compelled speech is even more onerous than censorship. By forcing one to communicate a message contrary to conviction, compulsory speech constitutes an assault on freedom of conscience.

Third, the particular type of speech mandated by AB 775 has now been reviewed by three of the Circuit Courts of Appeals, with divergent approaches and outcomes. Two of those circuits have found such mandates Constitutionally infirm as compelled speech. *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 435 (2014); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184 (4th Cir. 2013). In contrast, the Ninth Circuit has upheld the notice requirement.

In a related but distinct vein, A Woman's Friend asks the Court to review the Free Exercise implications of the decision below. A Woman's Friend here does not allege a circuit split, but rather a string of lower appellate decisions that have so misapplied this Court's jurisprudence of the last twenty-seven years that they can no longer be ignored. These errors have reached the point where the Court below believed that *Employment Div. v. Smith*, 494 U.S. 880 (1990), required only minimal scrutiny of a coercive and punitive statute that the Legislature acknowledged to have been primarily directed at certain religious organizations. This, the First Amendment surely cannot condone.

STATEMENT OF THE CASE

A. Statutory Background And Proceedings Below

On October 9, 2015, Governor Edmund G. Brown Jr. signed into law Assembly Bill 775, known as the Reproductive FACT Act (or "Act") which adds sections 123470 to 123473 to the California Health and Safety Code.

The next day this suit was filed in the Eastern District of California. Ten days later the Plaintiffs filed an amended complaint, adding a Plaintiff from southern California. ER 333.[2] Defendant, Attorney General Kamala Harris ("Attorney General"), filed an answer on November 9, 2015. A motion to preliminarily enjoin sections 123472 and 123473 of the Act was filed less than a week later. District Court Judge Kimberly J. Mueller issued an order denying the preliminary injunction.

On December 23, 2015, Plaintiffs filed their notice of appeal in the Ninth Circuit Court of Appeals. Five days later the Plaintiffs filed an emergency motion in the district court to enjoin the Act until a motion seeking relief under Rule 8 of the Federal Rules of Appellate Procedure could be filed with The Ninth Circuit Court of Appeals. The District Court denied the motion. A motion to enjoin the Act as against these Plaintiffs was filed in the Court of Appeals on the following

[2] One of the Plaintiffs, Crisis Pregnancy Center of Northern California, withdrew from the case leaving the remaining two Petitioners.

day, December 31, 2015. On January 11, 2016, the Court denied said motion. A motion to consolidate this case with *Living Well Medical Clinic v. Harris*, No. 15-17497 was filed on January 8, 2016, by the Attorney General. The motion was denied on January 11, 2016. However, the appellate panel joined three cases in oral argument as related and ultimately issued a main opinion in *NIFLA v. Harris*, No. 16-55249. The orders in this present case before this Court and *Living Well* referred to the *NIFLA* decision. Pet. App. at 99-142. Attorneys for all three cases filed motions for rehearing and rehearing en banc. The panel ordered the Attorney General to file a response. On December 20, 2016, the Ninth Circuit denied all three motions.

B. Summary Of The Facts

California lawmakers passed the Reproductive FACT[3] Act, which imposes speech requirements on "licensed covered facilities." The Act applies to a licensed facility "whose primary purpose is providing family planning or pregnancy-related services," and that satisfies two or more of the following:

[3] FACT is an acronym for *freedom-accountability-comprehensive care-transparency*. Legislative Digest for AB 775. Excerpts of Record ("ER") 207.

(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 related testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers to collect health information from clients.

Cal. Health & Safety Code §123471(a)

The Reproductive FACT Act requires that a licensed covered facility shall disseminate to clients on site the following notice:

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

Cal. Health & Safety Code §123472(a)(1)

The disclosure notice for licensed covered facilities requires the notice disclosed in one of three ways: (A) posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility; (B) a printed notice distributed to all clients in no less than 14-point type; and, (C) a digital notice that can be read at the time of check-in or arrival. Cal. Health & Safety Code §123472(a)(2).[4]

The bill focuses on crisis pregnancy centers referred to in the legislative history as "CPCs." Committee reports explain: "According to a 2011 report by the Public Law Research Institute of UC Hastings College of the Law, CPCs are pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center."[5] Pet. App. at 84.

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[4] The Reproductive FACT Act has another notice provision involving unlicensed facilities. Cal. Health & Safety Code §123472(b)(1) ("This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."). ER 210. As licensed health clinics, Petitioners do not challenge that provision.

[5] AB 775 Bill Analyses, Senate Rules Committee, June 24, 2015. ER 254, ¶ 1. Senate Health Committee, June 24, 2015 (ER 261, ¶ 1); Senate Rules Committee, June 24, 2015. ER 268, ¶ 1. The committee reports filed by Plaintiffs were not submitted to prove the truth of the matters asserted in said reports. Indeed, Plaintiffs take issue with the representations made therein. Instead, the reports filed merely go to identify the type of entities that are the subject of the law.

C. Petitioners

Based on religious convictions, these clinics strongly object to being compelled to speak the messages required by the Act's "disclosure" provisions.[6] Pet. App. at 33-34, 84. The Petitioners are life-affirming pregnancy centers (collectively "A Woman's Friend"). Pet. App. at 33. A Woman's Friend falls within the Reproductive FACT Act because it offers, and will continue to offer, to women and girls a variety of high quality medical services at their clinics, such as consultations, pregnancy testing, ultrasound examinations, and medical referrals. Pet. App. at 33, 60. They provide education related to sexually transmitted diseases and infections, information regarding abortions and abortion procedures, prenatal education, nutrition information, and fetal development education. Pet. App. at 20, 23, 26. Additionally, A Woman's Friend also provides Bible-based post abortion emotional and spiritual healing and recovery courses, and other practical support related to pregnancy. *Id.*, 153 F. Supp. 3d at 1183.

A Woman's Friend is a religious not for profit corporation (Pet. App. at 17, 24), that does not perform abortions and does not give referrals or otherwise give information to girls and women directing them to abortion providers, and does not counsel girls and women to obtain abortions. Pet. App. at 17, citing Hearing on

[6] ER 341, 343-44, 346, 349.

A.B. 775 Before the Senate Comm. on Health, 2015-2016 Sess. 6 (Cal. 2015).

Instead, the clinics encourage girls and women to consider the options to abortion and the risks and consequences of an abortion.[7] The basis for their opposition to abortion is their religious beliefs and moral convictions. A Woman's Friend holds the biblically-based conviction that human life is a precious gift of immeasurable value given by God, and that the taking of innocent human life by abortion is evil and a sin. Pet. App. at 39-40.[8] In light of that, to the extent that the legislative committee reports describing *crisis pregnancy centers* as "pro-life largely Christian belief-based organizations,"[9] such is true as to these Petitioners. Pet. App. at 14, 84.

However, A Woman's Friend does not engage in commercial transactions, providing all services and items free of charge.[10] Pet. App. at 18, 20. A Woman's Friend receives no governmental funding (Pet. App. at 74); all funds coming from donations of individuals, local businesses, and churches.[11] Many of the workers and those interacting with and serving the clients are

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[7] ER 336-37, 341, 343, 346.

[8] ER 341, 344, 346.

[9] ER 254, ¶ 1, ER 261, ¶ 1 and ER 268, ¶ 1.

[10] ER 335-38; Declaration of Tamara DeArmas ("DeArmas decl.") ¶ 18 (ER 279); Declaration of Carol Dodds ("Dodds decl."), ¶¶ 23(6) and 28 (ER 293-94).

[11] AVC ¶¶ 26, 33, 40 (ER 341, 344, 346).

volunteers, including but not limited to licensed physicians and registered nurses.[12] Pet. App. at 20, 27. In addition to offering pregnancy-related medical services they provide to their clients, A Woman's Friend brings the message of the gospel of Jesus Christ to their clients. Often at the request or with the permission of the client, the volunteer worker prays with the client regarding her situation: requesting God to intervene and provide guidance and assistance.[13] Pet. App. at 18, 20.

A Woman's Friend disagrees with the statement memorialized in the Reproductive FACT Act, the content of which directly contradicts the foundational religious principles upon which these CPCs operate, as well as the message they convey to their clients regarding abortion.[14]

D. Respondent

The Reproductive FACT Act gives the Attorney General enforcement authority over CPCs relative to the law. Cal. Health & Safety Code §123473(a). Moreover, the District Court judicially noticed the Attorney General's comments in support of the Reproductive FACT Act. In finding the case ripe, Judge Mueller noted that the Attorney General "has introduced no

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[12] *Id.*

[13] AVC ¶¶ 9-11, 23, 30, 37 (ER 335-36, 340-41, 343, 345).

[14] DeArmas decl., ¶ 22 (ER 280); Dodds decl., ¶¶ 30-31 (ER 295).

evidence and has not argued she will exercise her discretion to defer civil enforcement of the Act against plaintiffs." Pet. App. at 28 at n. 8.

E. Factual Basis For Relief

The State, knowing full well that crisis pregnancy centers are Christian belief-based organizations (Pet. App. at 14, 84), affirmatively requires the dissemination of the abortion services statement. The notice poses a threat to the mission, practices and existence of religiously-based life-affirming clinics such as A Woman's Friend. Hence, A Woman's Friend cannot and will not comply with the notice requirement. Pet. App. at 30.

There are real and imminent consequences facing A Woman's Friend. Section 123473(a) of the Act provides that "[c]overed facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1000) for each subsequent offense." By its refusal to communicate the State's message, A Woman's Friend remains subject to enforcement action by the Attorney General of potentially one thousand dollars per day after the initial five hundred dollar fine is assessed.

Absent relief from this Court, A Woman's Friend has no adequate remedy at law, as the violation of

constitutional rights poses imminent injury and irreparable harm.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exposes Major Fault Lines Separating The Ninth Circuit From Nearly All Other Circuits And This Court In At Least Three Areas Underlying Content-Based Restrictions On Speech.

The decision below creates several distinct yet interrelated circuit splits on core First Amendment standards. A Woman's Friend will approach this as one overriding question – the proper standard for evaluating content-based speech restrictions – with three subsidiary questions raised by the decision below.

A Woman's Friend sought a preliminary injunction to forestall the required posting and distribution of government-created messages on their premises that are diametrically opposed to their mission and beliefs. A Woman's Friend believes this mandate raises chilling implications as content-based and viewpoint-based compelled speech. The Ninth Circuit disagreed, holding: 1) the mandate was content-based but not viewpoint-based, and the two do not necessarily have the same standard applied to them (Pet. App. at 116); 2) this Court's decision in *Reed* does not always mandate strict scrutiny for content-based restrictions (Pet. App. at 126-32); 3) the Ninth Circuit uses its own approach for professional speech, and under that

approach, intermediate scrutiny should be applied (Pet. App. at 126); and, 4) the mandate at issue here should be treated as an abortion-related disclosure and subjected to intermediate scrutiny, not as compelled speech subject to strict scrutiny. Pet. App. at 123-27.

These holdings triggered circuit splits on at least three issues.

The first split is whether this Court's decision in *Reed v. Town of Gilbert* announced a rule that a content-based speech law is *always* subject to the highest level of judicial review. In light of *Reed*, no less than five circuits have determined that the government must demonstrate a narrowly tailored compelling state interest, which uses the least restrictive means, for any content-based speech law. Rejecting this approach, though, two circuits have now gone their own way and do not view *Reed* as laying down a clear-cut rule for content-based speech.

Next, three circuits have now reviewed similar notices imposed on CPCs. Two have determined that the compulsion to speak the government's message fails to hold up under First Amendment review. The Ninth Circuit stands alone in upholding such notices, affording wide latitude to the government to compel speech on an issue of intense public debate.

Third, the Ninth Circuit's opinion noted that "there is currently a circuit split regarding the appropriate level of scrutiny to apply" in abortion related disclosure cases. Pet. App. at 123.

This Petition merits a grant of review to resolve the circuit splits on these three issues, as further explained below.

A. The circuits are not in agreement as to whether content-based speech laws are always subject to strict scrutiny.

In 2015 this Court handed down the decision in *Reed*. The Court embraced a straightforward reading of the text of the First Amendment's prohibition that "Congress shall make no law . . . abridging the freedom of speech." To the majority, a content-based law is subjected to the highest level of judicial review, regardless of the "government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.*, 135 S. Ct. at 2228, quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

Reed has since been applied by appellate panels in the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits. In four cases, this Court granted petitions for certiorari, vacating judgments and remanding to the respective circuits in light of the decision in *Reed*.[15]

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[15] *See Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015) (remanded to the First Circuit); *Cent. Radio Co. v. City of Norfolk*, 135 S. Ct. 2893 (2015) (remanded to the Fourth Circuit); *Wagner v. City of Garfield Heights*, 135 S. Ct. 2888 (2015) (remanded to the Sixth Circuit); *Herson v. City of Richmond*, 136 S. Ct. 46 (2015) (remanded to the Ninth Circuit).

Most of the circuits now accept the holding in *Reed* as a bright-line drawn between content-based and content-neutral laws relating to speech. Whenever the government crosses that line, the burden of articulating and proving a compelling state interest must be borne. In contrast, two circuits – the Ninth and Eleventh – have read the same decision and see shades of gray when the law involves *professional* and *commercial speech*.

1. At least five circuits have read *Reed* as a bright-line rule for content-based speech.

Following *Reed*, the Third Circuit adjusted its First Amendment approach to labeling and record-keeping requirements for producers of sexually-explicit material. Where before it had deemed the federal statutes content-neutral, focusing on their underlying purpose, the Circuit now applies strict scrutiny as follows: Based on the Supreme Court's holding in *Reed* "we cannot look behind a facially content-based law to a benign motive in order to shield the law from the rigors of strict scrutiny." *Free Speech Coal., Inc. v. AG United States*, 825 F.3d 149, 163 (3d Cir. 2016). Throughout its opinion, the Third Circuit's acknowledgment of its obligation to align – and when necessary realign – its holdings with those of this Court stands in marked contrast to the tone of the opinion from which Petitioners now seek relief.

Meanwhile, on remand from this Court following *Reed*, the Fourth Circuit scrapped its prior approach to sign codes and has brought its jurisprudence into conformity: "Now informed by the Supreme Court's directives in *Reed* . . . [b]ecause the former sign code was a content-based regulation of speech, we apply strict scrutiny in determining its constitutionality." *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016). The Fourth Circuit had no trouble recognizing that its previous approach had been abrogated. *Id.*, at 632-33.

On remand from this Court in a political sign case, the Sixth Circuit likewise reversed its prior course and applied strict scrutiny, where before it had used only intermediate scrutiny. That Court heeded *Reed*, declaring: A law that is content based is subject to strict scrutiny. *Wagner v. City of Garfield Heights*, No. 13-3474, 2017 U.S. App. LEXIS 718 (6th Cir. Jan. 13, 2017). Likewise, the Circuit reviewed false political statement laws finding they "only govern speech about political candidates during an election. Thus, they are content-based restrictions focused on a specific subject matter and are subject to strict scrutiny." *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016).

The Seventh Circuit is now just as clear. Changing course from a prior opinion that had deemed an anti-panhandling ordinance to be content neutral because it ostensibly focused on subject matter but not content or viewpoint, the court subsequently observed: "*Reed* understands content discrimination differently. . . . Any

law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). Judge Manion joined this opinion in full but concurred separately to "underscore the significance" of *Reed* and praise the "much-needed clarity" it brought to First Amendment cases. *Id.*, at 413.

Lastly, the D.C. Circuit has changed its approach to restrictions on political speech to reflect *Reed*. "Among restrictions on political speech, particularly troublesome are those that are based on the content of the speech. A law prohibiting speech that 'draws distinctions based on the message a speaker conveys' must serve a compelling interest. . . ." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 508 (D.C. Cir. 2016).[16]

[16] In addition to these circuits that have clearly acknowledged that *Reed* changed the way they should approach content-based restrictions, the First, Second and Federal Circuits have noted the importance of *Reed* without having occasion to expound on its full import. *Rideout v. Gardner*, 838 F.3d 65, 71 (1st Cir. 2016); *Cutting v. City of Portland*, 802 F.3d 79, 86 (1st Cir. 2015); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 132 (2d Cir. 2015); and *In re Tam*, 808 F.3d 1321, 1334 (Fed. Cir. 2015). These latter two decisions are now pending in this Court (*Expressions Hair Design v. Schneiderman*, 137 S. Ct. 30 (2016) and *Lee v. Tam*, 137 S. Ct. 30 (2016)).

2. The Ninth and Eleventh Circuits maintain post-*Reed* exceptions to strict scrutiny for content-based speech, particularly when it is labeled "professional" or "commercial" speech.

Notwithstanding *Reed*, the Ninth Circuit maintains that some content-based restrictions are reviewed under intermediate scrutiny rather than strict scrutiny if the law is not viewpoint based. Pet. App. at 116. It is no coincidence that this Court reversed the Ninth Circuit in *Reed*; that appellate court continues to look for ways to limit *Reed*'s impact. It simply prefers its own Circuit jurisprudence. Thus, instead of following *Reed* for the standard of scrutiny, the Ninth Circuit relied on *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016) (en banc). This choice is all the more baffling since *Swisher* dealt with symbolic speech criminalized by the Stolen Valor Act. In *Swisher*, the en banc panel sought to apply Justice Breyer's concurrence in *United States v. Alvarez*, 567 U.S. 709 (2012), which dealt with another section of the same statute. In *NIFLA*, the Ninth Circuit has now juxtaposed *Reed* and *Alvarez* against each other, when the two are not in conflict.

Pushing back against this Court and the other circuits, the Ninth Circuit insists, "The fact that the Act regulates content, moreover, does not compel us to apply strict scrutiny." Pet. App. at 116. Instead, the appellate court deemed the notice *professional speech* that, under its prior decision in *Pickup v. Brown*, 740 F.3d

1208 (9th Cir. 2014), "is best understood as along a continuum." Pet. App. at 126. In this case, that means intermediate scrutiny. Pet. App. at 126.

The Eleventh Circuit meanwhile, seems to want it both ways – avoiding the question of whether *Reed* requires strict or permits intermediate scrutiny by holding that certain content and even viewpoint-based restrictions fail either test. In *Dana's R.R. Supply v. Attorney General, State of Florida*, 807 F.3d 1235, 1248 (11th Cir. 2015), the panel opined that "[a]s is so often true, the general rule that content-based restrictions trigger strict scrutiny is not absolute." Like the Ninth Circuit, the Eleventh Circuit proffers that the exception to the "general rule" includes *professional* and *commercial speech*. *Id.*, at 1246. Remarkably, the Eleventh Circuit invoked intermediate scrutiny even though it determined the law in question was not only content-based but viewpoint-based as well. *Id*., at 1248. Here, its path diverged from the Ninth Circuit, which attempted to draw a distinction between viewpoint and content-based restrictions for analytical purposes.

Just last month, the en banc court in *Wollschlaeger v. Gov. of Fla.*, 2017 U.S.App. LEXIS 2747 (11th Cir. Feb. 16, 2017), showcased the uncertainty some courts are having when approaching content-based restrictions on professional speech. There, the Eleventh Circuit disagreed with the Ninth Circuit's professional speech doctrine as outlined in *Pickup*. But while expounding in detail on the dangers of content-based restrictions,

the Eleventh Circuit again could not bring itself to definitively choose between strict and intermediate scrutiny, and thus held that the content-based restriction on doctors' speech violated either standard.

In contrast to the majority of other circuits, the Ninth and Eleventh Circuits have produced a blurred, unfocused analysis for content-based restrictions that is nearly the opposite of *Reed*'s attempt to bring clarity with a bright-line rule. In sum, the two circuits proffer the untenable position that a content-based law can be subject to only intermediate scrutiny if the subject of the legislation deals with a commercial enterprise or a profession.

3. Summary of A Woman's Friend's position

As would be more fully explained in a merits brief, the essence of A Woman's Friend's position is that a natural reading of the First Amendment text reveals strong restraints upon the government, not rationalization of strong restraints upon the citizenry. This Court's opinion in *Reed* recaptures that understanding by subjecting a government promulgation of a content-based speech law to the highest standard of judicial review. At least five circuits have accepted that understanding of *Reed*. The contrary positions of the Ninth and Eleventh Circuits can neither be squared with *Reed* or the original public understanding of the Free Speech Clause.

It was accepted by the court below that the Reproductive FACT Act compels speech. Pet. App. at 117. Compelled speech, like viewpoint discrimination, is an especially pernicious type of *content-based* regulation. *Riley v. National Federation of the Blind of NC*, 487 U.S. 781, 797-98 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

But the position of A Woman's Friend does not end with that presupposition. Just as censorship via a *viewpoint* regulation on speech is an egregious subset of a content-based restriction, so too is a law that compels speech. Does A Woman's Friend thus assert that compelled speech is as onerous as censorship? No – it is worse. *Riley, Miami Herald* and related decisions demonstrate that forced silence, while stifling, is less dangerous to a free society than forced utterance.

It stands to reason that of the various forms of governmental speech regulations, compelled speech ranks as the most egregious. The requirement to communicate something in conflict with personal conviction inflicts a wound to conscience more grievous than forced silence. Such is this Act. To life-affirming religious ministries, directing a pregnant woman – through use of the imperative verb *contact* – to an entity that facilitates abortion poses an existential threat.

A regulation that compels speech requires the most exacting form of scrutiny available under law. Therefore, consistent with *Reed* and its predecessors, the Petition should be granted to restore the highest standard of judicial review.

B. The circuits split on the level of review for abortion-related disclosure cases.

While treating compelled speech with the most exacting scrutiny should settle any subsidiary questions about the appropriate level of review, the Ninth Circuit nevertheless described a second circuit split that factored into its analysis and has prompted needless confusion. The split stems from differing interpretations of a paragraph in the plurality opinion in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). The panel observed, "[T]here is currently a circuit split regarding the appropriate level of scrutiny" for abortion related notices. Pet. App. at 123.

The panel explains the circuit split as follows: "[C]ourts have not applied strict scrutiny in abortion-related disclosure cases, even when content-based. See *Stuart*, 774 F.3d at 248-49 (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (applying a reasonableness test); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (applying a reasonableness test)." Pet. App. at 122-23.

Assessing this landscape, the Ninth Circuit held, "[w]e rule that strict scrutiny is inappropriate, and that *Casey* did not announce a level of scrutiny to apply in abortion related disclosure cases." Pet. App. at 123. Believing itself to be freed from this Court's precedents, the Ninth Circuit then reverted to its own – the

continuum it created in *Pickup* – under which it felt intermediate scrutiny was appropriate.

A Woman's Friend agrees that the circuits are divided on abortion-related speech and disclosure cases, and this Court should resolve that division. The Ninth Circuit offered false choices, though, on this question. In the first place, A Woman's Friend sharply disputes that this should be categorized as a disclosure case in the same sense as those to which the Ninth Circuit pointed. Disclosure typically connotes facts about the *discloser's own* products, services or facilities. *See, e.g.*, *Pursuing Am.'s Greatness v. FEC*, 831 F.3d at 508 (discussing range of disclosure cases). Disclosure is manifestly not synonymous with providing directions to a government office for alternative services.

Second, the Ninth Circuit sets up a false choice between intermediate scrutiny and reasonableness, ignoring strict scrutiny as an option. It is far from clear whether the Fifth and Eighth Circuits would continue to use the lowest level of scrutiny for abortion-related disclosures, or heed the instruction of *Reed* as most other circuits have done. The Ninth Circuit's reliance on the Fourth Circuit's use of intermediate scrutiny is also misplaced, since that Circuit struck down restrictions indistinguishable from those in this case and has subsequently embraced *Reed*. Regardless of whether the Ninth Circuit stands with one other circuit or has become an isolated island on this question, abortion-related speech is not, and should not become, an exception to the Free Speech Clause.

Just such a danger was recognized by Judge Manion of the Seventh Circuit in his concurrence to *Norton v. City of Springfield*, discussed above. "*Reed* now requires any regulation of speech implicating religion or abortion to be evaluated as content-based and subject to strict scrutiny. . . ." 806 F.3d at 413. The heaviest of burdens should thus be shouldered by the government in this area, consistent with the ringing declaration, "Congress shall make no law . . . abridging the freedom of speech. . . ."

C. The circuits split on compelled speech notices specific to CPCs.

AB 775 does not arise in a legislative or judicial vacuum. The Second and Fourth Circuits have struck down regulations remarkably similar to the Reproductive FACT Act. *Evergreen Ass'n v. City of N.Y.*, *id.*; *Centro Tepeyac v. Montgomery Cty.*, *id.* Like the Ninth Circuit, the Second and Fourth Circuits recognized that the regulations compelled speech. *Evergreen*, 740 F.3d at 249; *Centro Tepeyac*, 722 F.3d at 189-91.

In the case coming out of the Second Circuit, the City of New York required that pregnancy service centers post a notice as to:

> (1) whether or not a center has "a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center" (status disclosure);

> (2) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider" (government disclosure); and,
>
> (3) whether or not a center "provide[s] or provide[s] referrals for abortion," "emergency contraception," or "prenatal care" (services disclosure).

Evergreen, 740 F.3d at 238.

When analyzing compelled speech, the Second Circuit explained, "[W]e consider the context in which the speech is made. Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities . . . provide alternatives." *Id.*, at 249 (citation omitted). In view of that, the panel struck down the government disclosure and services disclosure notices.[17]

In the case from the Fourth Circuit, the Montgomery County Board of Health required that an organization that (A) has a primary purpose to provide pregnancy-related services; (B) does not have a licensed medical professional on staff; and, (C) provides information about pregnancy-related services, for a fee or as a free service post a sign that "the Center does not have a licensed medical professional on staff," and that "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider." *Centro Tepeyac*,

[17] The status disclosure was upheld. *Id.*, at 246-49.

722 F.3d at 186. A center that does not "refer or provide for abortion" challenged the requirement to post the two statements. Regarding the second statement, the Fourth Circuit affirmed the issuance of a preliminary injunction by the district court, which wrote, " 'the Resolution requires [Centro Tepeyac] to say something it might not otherwise say' and thus constitutes a content-based regulation of speech." *Id.*, at 189.[18]

Although the Ninth Circuit in this case also found that the notice compelled speech, the panel reviewed the law under intermediate scrutiny as *professional speech* and unlike the other two circuits, upheld the similar notice requirements. The Ninth Circuit's approach to *professional speech* rests on two dubious presumptions. The first presumption is in the existence of professional speech as a doctrine segregated from ordinary First Amendment standards. Even if professional speech receives special treatment, the second presumption is that the government need not demonstrate a compelling state interest if the notice is content-based. These two presumptions will be dealt with in turn.

[18] The denial of the preliminary injunction as to the first statement was affirmed. *Id.*, at 190.

1. The Petition should be granted to determine whether the Free Speech Clause contemplates a category of *professional speech*, and if so, whether such *professional speech* remains compelled speech subject to strict scrutiny.

A Woman's Friend maintains that a professional speech rubric is a poor fit for the challenged regulation, since no professional is actually the subject of the regulation and since the mandate deliberately interposes itself into the middle of an intense national debate. Even assuming that the required posting involves professional speech, this presumes two legal premises that have not been established.

First, it presumes the existence of a category of less-protected speech by *professionals*. This Court has not established that category. The Fifth Circuit recently observed that "[t]he Supreme Court has never formally endorsed the professional speech doctrine, though some circuits have embraced it based on Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 230-33 (1985)." *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). In dicta, this Court wrote that "[s]peech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Fla. Bar v. Went for It*, 515 U.S. 618, 634 (1995).

Second, if *professional speech* exists as its own category, the circuits, including the Ninth, assume the state need not show a compelling interest even when the restriction is content-based. As discussed above, such a doctrine gives the government an opportunity to place content-based restrictions on speech – or even to compel speech – without passing through the crucible of strict scrutiny so long as the speech involves a professional.

This approach crosses the bright-line rule that A Woman's Friend believes this Court drew in *Reed*. The difficulties expressed by the appellate courts in wrestling with professional speech are amply expressed – and at some length – by the Eleventh Circuit in its very recent en banc decision in *Wollschlaeger*, discussed above, which diverged from the Ninth Circuit's continuum. As this professional speech debate is now providing courts like the Ninth Circuit with a rationale for restricting speech on one of the most intense national debates of the last half-century, review of this Petition, and this particular sub-issue, is warranted.

II. The Decision Below Illustrates How Far The Circuit Courts Have Strayed In Applying The Free Exercise Clause.

The last issue squarely presented by the Ninth Circuit's decision is the degree to which the Free Exercise Clause has been constricted and rendered unavailable to litigants like A Woman's Friend. In straightforward terms, the Ninth Circuit's position is

that the absence an explicit "reference to any religious practice, conduct, belief, or motivation" makes the law *ipso facto* "facially neutral." Pet. App. at 139, citing *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015). Here, California lawmakers sought to curb the ministries of CPC's that they noted are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." Pet. App. at 84.[19] The problem with the Ninth Circuit's approach is that it provides a safe harbor for religious discrimination so long as the legislative drafter is not brazen or dimwitted enough to specifically mention religion on the face of the text. Thus perhaps the loftiest and most treasured of constitutional rights is relegated to the lowest level of judicial review. A Woman's Friend proffers that the yardstick of strict scrutiny, rather than rational basis, should measure a law aimed at religious institutions or persons.

In the twenty-seven years since this Court decided *Employment Div. v. Smith*, 494 U.S. 880 (1990) (*Smith II*), A Woman's Friend submits that the lower courts have gone further than this Court – or the Framers – ever intended. As a result, a legislature may now identify particular religious ministries as targets, and order them to repeat a government mantra on a matter of intense public debate, with little more than a passing glance from the judiciary. This strikes at the heart

[19] AB 775 Bill Analyses, Senate Rules Committee, June 24, 2015. ER 254, ¶ 1. Senate Health Committee, June 24, 2015 (ER 261, ¶ 1).

of more than one clause within the First Amendment and is a first-order threat to the building blocks of the Bill of Rights.

Properly understood, this Court's decisions in *Smith II* and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), represent a balanced view of the Free Exercise Clause. Regrettably, these seminal cases have not been properly understood, and the Ninth Circuit has become one of the least sympathetic toward Free Exercise violations. Relying on its prior decision in *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), the Ninth Circuit has turned a blind eye toward the Legislature's unabashed, admitted move to control what it knew to be largely Christian, belief-based organizations. Pet. App. at 84. The panel asserted plainly that "[w]ith respect to the free exercise claim, the Act is a neutral law of general applicability, which survives rational basis review. *See* [NIFLA Pet. App. at 138-40]." Pet. App. at 3. The portion of the *NIFLA* opinion cited states simply that the Act is facially neutral because it "references no religious practice" and "proscribes the same conduct for all regardless of motivation." *Id*., quoting *Stormans*, 794 F.3d at 1077.

The Ninth Circuit's jurisprudence on the Religion Clause has strayed far afield, even from *Smith II*.[20] In *Smith II* it was noted that there was "no contention

[20] A number of Justices have called into question the viability of *Smith II*. *See Lukumi*, 508 U.S. at 559 (Souter, J., concurring); *id.*, at 578 (Blackmun, J., concurring, joined by O'Connor, J.).

that Oregon's drug law represents an attempt to regulate religious beliefs." *Smith II*, 494 U.S. at 888. Likewise, in a case involving a religious objection to Social Security Numbers, this Court noted "[t]here is no claim that there is any attempt by Congress to discriminate invidiously or any *covert* suppression of particular religious beliefs." *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (emphasis added). This Court further noted, "there is nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs." *Id.*, at 708. In striking contrast to this case, the laws at issue in *Smith II* and *Bowen* were such that lawmakers had no notion that the exercise of religion by the faithful would be negatively impacted.

After this Court's decision in *Smith II* this Court rejected the notion that "our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative." *Lukumi*, 508 U.S. at 534. The Religion Clauses "forbid[] subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971) and "covert suppression of particular religious beliefs," *Bowen*, 476 U.S. at 703. Hence, "even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" subject laws to strict scrutiny review. *Lukumi*, 508 U.S. at 547.

While this Court's statutory interpretations in cases like *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), have resurrected rights of conscience in limited circumstances, the Court's long silence on Free Exercise has not led to greater liberty,

but greater limitation. The Petition should be granted to restore the balance of this Court's prior jurisprudence.

CONCLUSION

The Ninth Circuit's opinion seeks to limit *Reed* by carving out exceptions for content-based speech if it involves "abortion-related disclosures" or professional speech. Several of the other circuits have soundly rejected the Ninth Circuit's approach, and none have gone so far to allow compelled speech on a matter of great national debate. This Court should grant this Petition for a Writ of Certiorari to resolve the division. The Petition should also be granted to restore the fundamental promise of the Free Exercise Clause, which has been virtually abandoned in the Ninth Circuit.

Date: March 20, 2017

Respectfully submitted,

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MATTHEW B. MCREYNOLDS

Attorneys for Petitioners

2016 U.S. App. LEXIS 18534

Woman's Friend Pregnancy Res. Clinic v. Harris

United States Court of Appeals for the Ninth Circuit June 14, 2016, Argued and Submitted, San Francisco, California; October 14, 2016, Filed No. 15-17517

A ***WOMAN'S FRIEND*** PREGNANCY RESOURCE CLINIC, a California Religious Nonprofit Corporation; CRISIS PREGNANCY CENTER OF NORTHERN CALIFORNIA, a California Religious Nonprofit Corporation; ALTERNATIVE WOMEN'S CENTER, Plaintiffs-Appellants, v. KAMALA HARRIS, Attorney General, State of California, Defendant-Appellee.

Counsel: For A ***WOMAN'S FRIEND*** PREGNANCY RESOURCE CLINIC, a California Religious Nonprofit Corporation, Alternative Women's Center, Plaintiff-Appellants: Matthew B. McReynolds, Esquire, Attorney, Kevin Trent Snider, Chief Counsel, Pacific Justice Institute, Sacramento, CA; Michael John Peffer, Esquire, Senior Counsel, Pacific Justice Institute, Santa Ana, CA.

For KAMALA HARRIS, Attorney General, State of California, Defendant-Appellee: Marc A. LeForestier, Supervising Deputy Attorney General, Noreen Patricia Skelly, Attorney, AGCA-Office of the California Attorney General, Sacramento, CA.

For Physicians For Reproductive Health, Amicus Curiae: Kristen Law Sagafi, Tycko & Zavareei, LLP, Oakland, CA.

For Information Society Project at Yale Law School, Amicus Curiae: Priscilla Joyce Smith, Esquire, Information Society Project, Yale Law School, New Haven, CT.

Judges: Before: D.W. NELSON, TASHIMA, and OWENS, Circuit Judges.

Opinion

MEMORANDUM*

A Woman's Friend Pregnancy Resource Clinic, et al. (collectively A Woman's Friend) appeals from the district court's denial of their motion for a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act). We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

1. The district court properly found that A Woman's Friend cannot demonstrate a likelihood of success on their First Amendment free speech or free exercise claims. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). With respect to the free speech claim, the Act

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

regulates licensed clinics' professional speech, and is subject to intermediate scrutiny, which it survives. *See Nat'l Inst. of Family & Life Advocates (NIFLA) v. Harris*, No. 16-55249, 2016 U.S. App. LEXIS 18515, *44-48 (9th. Cir. 2016). The Act's notice that applies to unlicensed clinics survives any level of review. *See* 2016 U.S. App. LEXIS 18515 at *41. With respect to the free exercise claim, the Act is a neutral law of general applicability, which survives rational basis review. *See* 2016 U.S. App. LEXIS 18515 at *47.

2. Because we affirm the district court's finding that A Woman's Friend cannot demonstrate a likelihood of success on their First Amendment claims, thus failing to meet the first, most important *Winter* factor, *see Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en Banc), we need not parse their showing under the remaining *Winter* factors.[1]

[1] We also conclude that A Woman's Friend have not raised "serious questions" going to the merits of their claims; thus, the alternate test set forth in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011), does not apply. The district court's conclusion that there were serious questions going to the merits was harmless error because the district court appropriately denied the motion for a preliminary injunction.

153 F. Supp. 3d 1168

A Woman's Friend Pregnancy Res. Clinic v. Harris

United States District Court for the Eastern District of California

December 18, 2015, Decided;
December 21, 2015, Filed

No. 2:15-cv-02122-KJM-AC

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, CRISIS PREGNANCY CENTER OF NORTHERN CALIFORNIA, ALTERNATIVES WOMEN'S CENTER, Plaintiffs, v. KAMALA HARRIS, Attorney General of the State of California, In Her Official Capacity, Defendant.

Counsel: For A Woman's Friend Pregnancy Resource Clinic, a California Religious Nonprofit Corporation, Crisis Pregnancy Center of Northern California, a California Religious Nonprofit Corporation, Alternative Women's Center, Plaintiffs: Kevin Trent Snider, LEAD ATTORNEY, Matthew Brown McReynolds, Pacific Justice Institute, Sacramento, CA.

For Kamala Harris, Attorney General, State of California, Defendant: Noreen Patricia Skelly, LEAD ATTORNEY, Office Of The Attorney General, Sacramento, CA; Marc A. LeForestier, California Attorney General's Office, sSacramento, CA.

Judges: Kimberly J. Mueller, UNITED STATES DISTRICT JUDGE.

Opinion by: Kimberly J. Mueller

Opinion

ORDER

Crisis pregnancy centers devoted to providing alternatives to abortion and discouraging abortion, also known as CPCs, have been operating in this country for several decades at least. Recently, the practices of some CPCs have prompted several state and municipal legislative bodies to adopt regulations governing the information provided to women seeking reproductive care. The changing landscape effected by implementation of the federal Affordable Care Act also has provided a backdrop to state and local legislative action. In the last year, the California Legislature adopted a provision known as the FACT Act, AB 775, which governs all clinics providing family planning or pregnancy-related services, including CPCs. In passing AB 775, the Legislature articulated its intent to supplement its own prior efforts to advise women of the state's reproductive health programs. As applicable here, the new law, scheduled to take effect January 1, 2016, requires licensed facilities that meet certain criteria to provide a notice to clients regarding the availability of free or low-cost public family planning services. Three CPCs operating in this judicial district challenge AB 775 as unconstitutional, in violation of their First Amendment Free Speech and Free Exercise rights. In the pending motion for preliminary injunction they seek to block the new law's taking effect

pending full litigation of this action. Having carefully considered the parties' briefs, the parties' arguments at a specially set hearing, and the applicable law, the court DENIES plaintiffs' motion for the reasons set forth below.

I. PROCEDURAL HISTORY

Plaintiffs filed this action in this court on October 10, 2015. Compl., ECF No. 1. Before the State answered, plaintiffs amended the complaint. First Am. Compl. (FAC), ECF No. 4. The amended complaint alleges the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the Act) is unconstitutional both on its face and as applied. FAC P 4. It includes two claims: (1) the Act is unconstitutional because it violates plaintiffs' rights to freedom of speech under the First Amendment to the United States Constitution, *id*. PP 44-47; and (2) the Act is unconstitutional because it violates plaintiffs' rights to free exercise of religion under the same Amendment, *id*. PP 48-51. Plaintiffs request declaratory judgment that the Act is unconstitutional on its face and as applied, preliminary and permanent injunctive relief prohibiting enforcement of the Act, attorneys' fees and costs, and all other appropriate relief.

The State answered on November 9, 2015. ECF No. 7. It denies the Act is unconstitutional, Answer PP 44-51, and it advances one affirmative defense: It asserts the action is barred because the claims are not ripe for review, *id*. at 9.

Plaintiffs filed this motion for a preliminary injunction on November 13, 2015, Mot. Prelim. Injunction, ECF No. 8; Mem. P. & A., ECF No. 9. At hearing, plaintiffs clarified their motion is based on an as-applied challenge only. The State opposed the motion on December 4, 2015, ECF No. 16, and plaintiffs replied on December 11, 2015, ECF No. 17. The court held a hearing on December 18, 2015. Kevin Snider and Matthew McReynolds appeared for plaintiffs, and Noreen Skelly and Marc LaForestier appeared on behalf of the State.

II. THE ACT

A. Text of Statute

California Assembly Bill (AB) 775 enacts new sections of the California Health and Safety Code, comprising "the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act." Cal. Health & Safety Code § 123470. The Act provides in pertinent part, that a

> "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:
>
> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

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

Id. § 123471. A facility covered by the Act is required to disseminate a notice to clients:

> (a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.
>
> (1) The notice shall state:
>
> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

(2) The information shall be disclosed in one of the following ways:

(A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.

(B) A printed notice distributed to all clients in no less than 14-point type.[1]

(C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

(3) The notice may be combined with other mandated disclosures.

Id. § 123472.

The law imposes civil penalties for failure to comply with the notice requirements:

(a) Covered facilities that fail to comply with the requirements of this article are liable for

[1] During the hearing, both parties agreed the second option provided by the Act, if exercised by a clinic, mandates a printed notice be distributed to all clients at the time of check-in or arrival. The court having consulted that language of the Act after hearing continues to read the applicable text as allowing the printed notice to be distributed on site to clients at any time before, during, or after the time of check-in or arrival.

> a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:
>
> (1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.
>
> (2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).
>
> (b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

Id. § 123473.

The Act exempts two types of facilities from the new regulation:

> (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.

> (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

Id. § 123471.

B. Legislative History and Purpose[2]

Federal health care policy provides a backdrop to the state law at issue here. In 2010, Congress passed the federal Patient Protection and Affordable Care Act (ACA), a law which made millions of Californians, 53 percent of them women, newly eligible for Medi-Cal. *Hearing on AB 775 Before the Assembly Comm. on Health*, 2015-2016 Sess. 2 (Cal. 2015), ECF No. 11-2 (Pls.' Ex. 2). The ACA allowed California to establish or expand several programs that provide reproductive health care and counseling to low-income women. AB 775 § 1.

In California, more than 700,000 women become pregnant every year. AB 775 § 1. Of those pregnancies, approximately one-half are unintended. *Id*. In 2010,

[2] This background is drawn from the filings by both parties, which include documents from the Official California Legislative Information Website, and thus constitute public documents and statements. The court takes judicial notice of these public statements, available generally at http://leginfo.ca.gov. *See also* Fed. R. Evid. 201 (governing judicial notice); *Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1080 n.17 (N.D. Cal. 2013) (publicly available documents published on a government website may be subject to judicial notice); *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 561 n.18 (N.D. Cal. 2009) (same; court may take judicial notice of such a document *sua sponte*).

64.3 percent of unplanned births in California were publicly funded. *Id*. By 2012, more than 2.6 million California women were in need of publicly funded family planning services. *Id*. At the moment they learn they are pregnant, thousands of women remain unaware of the California programs available that provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery. *Id*.

In order to ensure California residents can make their personal reproductive health care decisions in an informed manner, the California Legislature passed the Act. As noted above, the Act requires licensed clinics that give family planning or pregnancy-related services to provide a notice to consumers regarding their reproductive rights and the availability of such services in California.[3] *Id.* But the state Legislature identified a need to supplement its own efforts to advise women of the state's reproductive health programs, particularly because pregnancy decisions are time sensitive. AB 775 § 1. The Act was seen as the "most

[3] The Act also requires unlicensed facilities that provide pregnancy-related services to disseminate and post a notice informing consumers that they are not licensed medical facilities and to include the notice in their advertising materials. Pls.' Ex. 2 at 2. Plaintiffs do not challenge portions of the bill that address unlicensed facilities. Thus, this order only applies to portions of the bill that address licensed facilities, including the CPCs at issue in this case.

effective way" to ensure women quickly obtain the information and services needed to make and implement timely reproductive decisions. *Id.*

Assemblyman David Chiu first introduced the Act on February 25, 2015, with the goal of providing "technical, non-substantive changes" to a law that prohibited a person from "selling, offering for sale, giving away, distributing, or otherwise furnishing materials intended to determine the presence of pregnancy, unless that person has obtained a certificate of acceptability from the State Department of Public Health declaring that the materials have been approved as to efficacy and safety by the department." *Assemb. Chiu Intro. AB 775, 2015-2016 session*, 99 (Cal. 2015).

On March 26, 2015, Chiu's bill was amended to include text more similar to the statutory language ultimately adopted. *See Assemb. Chiu First Amend. AB 775, 2015-2016 session*, 98 (Cal. 2015) ("Assemb. First Amend."). Specifically, the amendment included provisions requiring a licensed covered facility to disseminate a notice to all clients stating that "every pregnant woman has a right to decide whether to have a child or to obtain abortion care." *Id.*

On April 8, 2015, the bill was again amended, removing the language added in the March 26 amendment. *See Assemb. Chiu Second Amend. AB 775, 2015-2016 session*, 97 (Cal. 2015) ("Assemb. Second Amend."). In its place, a provision was added to state the following:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women.

Id.

By incorporating this language, the Legislature sought to address a concern regarding crisis pregnancy centers ("CPCs"), facilities used by many pregnant women throughout California. *Id.* CPCs, which may be licensed or unlicensed, provide a wide array of resources related to reproductive health. *Id.* at 7. Many CPCs, however, do not offer services other than what they describe as "pro-life" pregnancy options, so they do not make abortion referrals or procedures. *Hearing on A.B. 775 Before the Senate Comm. on Health*, 2015-2016 Sess. 6 (Cal. 2015), ECF No. 11-6 (Pls.' Ex. 6). This is because CPCs are commonly affiliated with organizations that do not believe women should have abortions. Pls.' Ex. 2 at 7. Many CPCs are Christian belief-based organizations. Pls.' Ex. 6 at 6.

As perceived by the Legislature, these beliefs lead CPCs to interfere with a woman's ability to be fully informed and exercise her reproductive rights, primarily by posing as full-service women's health clinics but discouraging women from seeking abortions. *Id.* To prevent women from accessing abortion resources, some CPCs use "intentionally deceptive advertising and counseling practices [which] often confuse, misinform, and . . . intimidate women from making fully-informed, time-sensitive decisions about critical healthcare." *Id.*

Assemblyman Chiu and Assemblywoman Autumn Burke, the co-authors of AB 775, based their findings in part on a 2015 report by the National Abortion Rights Action League (NARAL), a vocal pro-choice organization. Pls.' Ex. 2 at 2. For the report, NARAL sent several researchers into CPCs to receive the counseling offered. *Id.* Many of the researchers reported being provided with inaccurate information regarding the risks of abortion, including being told that many women commit suicide after having an abortion and that abortions can cause breast cancer. *Id.*

On April 25, 2015, the Assembly Judiciary Committee held a hearing on the bill. *Hearing on A.B. 775 Before the Assembly Comm. on Judiciary*, 2015-2016 Sess. 1 (Cal. 2015), ECF No. 11-3 (Pls.' Ex. 3). The committee considered whether the Act as proposed would regulate all pregnancy centers or just CPCs. *Id.* Legislators took account of a 2010 report issuing from the University of California, Hastings College of Law regarding CPC practices and potential legislative options for regulating them. Pls.' Ex. 2 at 5-6. The options identified in the report ranged from creating new regulations to leveraging existing regulations aimed specifically at medical services. *Id.* Cognizant of the potential for First Amendment challenges, legislators decided to regulate all pregnancy centers, including but not limited to CPCs. *Id.*

After two additional amendments, eliminating a reference to a right to privacy in the findings and substituting the language appearing in the law enacted,[4] the Assembly passed AB 775 on May 26, 2015 by a vote of 49 to 26. *Assemb. Unoff. Ballot AB 775, 2015-2016 Sess.* (Cal. 2015). The Senate adopted the bill later in the year on September 3, 2015 by a vote of 24 to 14. *Sen. Unoff. Ballot. AB 775, 2015-2016 Sess.* (Cal 2015). The bill was forwarded to the Governor on September 16, 2015, who signed it into law on October 9, 2015. *Id.*; *see* Complete Bill History of AB 775.

Attorney General Kamala Harris was a primary co-sponsor, along with NARAL and Support Black Women for Wellness. *Hearing on A.B. 775 Before the Senate Comm. on Rules*, 2015-2016 Sess. 6 (Cal. 2015) (Pls.' Ex. 7). Supporters included the California Religious Coalition for Reproductive Choice, the California Immigrant Policy Center, and California Latinas for Reproductive Justice. *Id.* Organizations in opposition to AB 775 included the Alliance for Defending Freedom, the Alternatives Pregnancy Center, the California Catholic Conference, and the California Right to Life Committee. *Id.*

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[4] *See Assemb. Chiu Third Amend. AB 775, 2015-2016 session*, 97 (Cal. 2015) ("Assemb. Third Amend."); *see also See Assemb. Chiu Fourth Amend. AB 775, 2015-2016 session*, 97 (Cal. 2015) ("Assemb. Fourth Amend.")

III. THE PARTIES

A. A Woman's Friend Pregnancy Resources Clinic (A Woman's Friend)

A Woman's Friend is a tax-exempt, non-profit religious corporation established under section 501(c)(3) of the Internal Revenue Code and located in Marysville, California. Dodds Decl. P 2, ECF No. 10-1; FAC P 9. It is licensed under California Health and Safety Code section 1204.[5] FAC P 9. It offers all of its services free of charge. Dodds Decl. P 28. It was organized "for the express purpose of providing alternatives to abortion for women experiencing unplanned pregnancies." *Id.* P 2. Its bylaws provide more specifically that its purpose "is to help a pregnant woman in crisis to understand [and] work through alternatives so she can make

[5] "Only the following defined classes of primary care clinics shall be eligible for licensure [under section 1204]: . . . A 'free clinic' means a clinic operated by a tax-exempt, nonprofit corporation supported in whole or in part by voluntary donations, bequests, gifts, grants, government funds or contributions, that may be in the form of money, goods, or services. In a free clinic there shall be no charges directly to the patient for services rendered or for drugs, medicines, appliances, or apparatuses furnished. No corporation other than a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954 as amended, or a statutory successor thereof, shall operate a free clinic; provided, that the licensee of any free clinic so licensed on the effective date of this section shall not be required to obtain tax-exempt status under either federal or state law in order to be eligible for, or as a condition of, renewal of its license. No natural person or persons shall operate a free clinic." Cal. Health & Safety Code § 1204(a)(1)(B).

an informed decision about the outcome of her pregnancy." *Id.* P 3. "In addition, A Woman's Friend seeks to provide counsel and practical help to all parties experiencing a crisis produced by an unplanned pregnancy." *Id.* "A Woman's Friend finds abortion an unacceptable alternative." *Id.*

A Woman's Friend requires its employees, volunteers, and board members to read and sign a statement of faith. *Id.* P 4. Among other affirmations, the statement of faith confirms the person believes "the Bible to be the inspired, the only infallible authoritative Word of God"; "that there is one God, eternally existent in three persons: Father, Son, and the Holy Spirit"; and that "salvation is received through faith in Jesus Christ as Savior and Lord and not as a result of good works." *Id.* A Woman's Friend also incorporates prayer throughout its operations, including at the beginning of every employee's or volunteer's shift and in every board meeting. *Id.* P 5. A Woman's Friend's "motivation for the ministry is spiritual," and "[n]o commercial transactions take place at the clinic."[6] *Id.* P 28.

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[6] The State points out the qualifier "at the clinic." *See* Opp'n 10, ECF No. 16 ("[Ms. Dodd's declaration] is . . . ambiguous about whether transactions, be they commercial or charitable, do occur. . . . The statement ["at the clinic"] suggests that transactions occur elsewhere or in other circumstances."). The record includes no evidence of transactions other than transactions at the clinic. The evidence before the court suggests none take place. *See* Dodds Decl. P 28 ("A Woman's Friend provides all of its services (as well as all products, such as literature, vitamins, maternity and infant clothing, and baby furniture) free of charge.").

A Woman's Friend refers to those who seek its services as "clients." *See, e.g.*, *id.* P 6. Clients may call or walk in to the clinic. *Id.* Clients are greeted by a receptionist, who usually schedules an appointment for the same day or the next business day. *Id.* The receptionist helps clients fill out a form to request a service and what services clients need. *Id.* P 7. The receptionist also copies the clients' picture ID. *Id.* A registered nurse, whom A Woman's Friend refers to as a "Client Advocate," then meets with clients in a consultation room and fills out an information sheet. *Id.* PP 8, 13-19. The nurse instructs clients on the administration of a pregnancy test, and the test is administered. *Id.* P 9.

If the test is positive, the nurse estimates a client's due date and the date her pregnancy began. *Id.* P 10. The nurse collects statistical and medical information, including the client's vital signs, blood type, contraceptive use, history of pregnancies, surgeries, hospitalizations, sexually transmitted infections, other illnesses, substance abuse, current medications, and other information.[7] *Id.* P 15. The nurse alerts the client to symptoms that indicate immediate or more comprehensive medical care is necessary, including the symptoms of ectopic pregnancy and miscarriage. *Id.* P 10. The nurse also offers brochures, pamphlets, referrals, and a medical appointment. *Id*. The nurse explains the services

[7] Ms. Dodds's declaration does not specify whether this information is collected from all clients or from only those whose pregnancy tests are positive, but the context suggests this information is collected only if the test is positive. *See id.* PP 15-19.

A Woman's Friend offers, which include pre-parenting classes and a selection of used and new children's clothing, maternity clothing, baby furniture, and other childcare supplies, *id.* all of which a Woman's Friend offers free of charge, *id.* P 28. The nurse advises the client to obtain health insurance benefits for prenatal care. *Id.* P 16. The nurse teaches the client about prenatal health and well-being, nutrition, and fetal development and offers to perform a limited first trimester ultrasound. *Id.* P 17. Usually an ultrasound appointment is scheduled for a later date, although sometimes an ultrasound may be provided the same day. *Id.*

If the pregnancy test is negative, the nurse encourages the client to seek confirmation from a physician and offers information about sexually transmitted infections or diseases and sexual abstinence. *Id.* P 12.

Whether the test is positive or negative, before the client leaves, the nurse informs her it is a "life-affirming faith based organization" and gives her a copy of the New Testament, two DVDs, a gospel tract, and popcorn and candy. *Id.* The nurse asks the client for permission to pray together and asks her to fill out a client-service questionnaire. *Id.*

The medical staff at A Woman's Friend includes a medical doctor, a doctor of obstetrics and gynecology, and several registered nurses. *Id.* P 20. Its medical director is a medical doctor licensed to practice in California. *Id.* P 27. He reviews A Woman's Friend's services annually to ensure these services comply with evidence-based medical standards and provide clients

with true, correct, and current information. *Id.* P 21. A Woman's Friend is "committed to providing its clients with accurate and complete information about both prenatal development and abortion" and "assisting women to carry to term by providing emotional support and practical assistance." *Id.* P 23. "It is not a practice of A Woman's Friend to discuss birth control with clients unless the client asks a direct question." *Id.* P 25. "All questions regarding this and other medical information are directed to licensed medical personnel for a response." *Id.* Nevertheless, A Woman's Friend does distribute literature that states abstinence is the only sure way to avoid pregnancy and sexually transmitted infections. *Id.* A Woman's Friend does not provide ongoing prenatal care or emergency services, and it advises its clients to obtain these services from a physician or local hospital. *Id.* P 16.

Carol Dodds, the CEO of A Woman's Friend, *id.* P 1, has submitted a declaration to express her belief that the Act's notice provisions are "utterly contrary to our faith and what the organization wishes to say," *id.* P 30. Under her understanding of the Act, if A Woman's Friend does not display the notice, it will be fined $500 for the first offense and $1,000 for each subsequent offense. *Id.* She avers that these penalties "would financially jeopardize the work of the clinic." *Id.* P 31.

B. Crisis Pregnancy Center of Northern California (CPCNC)

CPCNC is a religious non-profit corporation established under section 501(c)(3) of the Internal Revenue Code and located in Redding, California. FAC P 10. It is licensed under California Health and Safety Code section 1204. *Id.* It offers all of its services free of charge. Gibbs Decl. P 22, ECF No. 10-2. It is an affiliate of Care Net, and has adopted Care Net's mission statement and statement of faith. *Id.* PP 4-5. Care Net is a national organization whose mission states that "every human life begins at conception and is worthy of protection." *Id.* P 5. "Care Net envisions a culture where women and men faced with pregnancy decisions are transformed by the gospel of Jesus Christ and empowered to choose life for their unborn children and abundant life for their families." *Id.* P 6. Care Net's statement of faith explains its belief that the Bible is "the inspired, the only infallible, authoritative Word of God"; that "there is one God, eternally existent in three persons; Father, Son and Holy Spirit"; and that "salvation is received through faith in Jesus Christ as Savior and Lord and not as a result of good works," among other tenets. *Id.* P 7. In the same vein, CPCNC is a "religiously based organization" and exists "to help women and men in need" rather than to "engage in commercial transactions." *Id.* PP 2, 22. CPCNC refers to those who seek its services as "clients." *See, e.g.*, *id.* P 9.

CPCNC's day-to-day activities "are focused on offering free services to families that are in need of assistance throughout pregnancy and through their child's third year." *Id.* P 10. It offers its clients pregnancy tests, first trimester ultrasounds, referrals, an educational program, counseling, and mentoring. *Id.* PP 10, 22. CPCNC also offers classes on nutrition, labor and delivery, parenting, pregnancy, community resources and referrals, and other topics. *Id.* It also offers information about sexually transmitted infections or diseases, and offers information about sexual abstinence if requested. *Id.* P 23.

CPCNC's staff includes four registered nurses and a registered diagnostic medical sonographer. *Id.* P 15. Its medical director is a licensed obstetrician and medical doctor. *Id.* The medical director oversees its medical procedures, reviews, approves, and signs off on ultrasounds, and accepts referrals for clients in need of prenatal and pediatric care. *Id.* The medical director also regularly consults with CPCNC's medical sonographer. *Id.* CPCNC's staff includes other, non-medical personnel, but they do not provide medical advice. *Id.* P 19. CPCNC trains its staff members over a period of six to twelve months before they begin work with clients. *Id.* P 13. Its staff takes care not to answer questions beyond their scope of practice and refers clients to medical doctors, the emergency room, and other local medical facilities as necessary. *Id.*

CPCNC is "extremely adamant" about its commitment to care and competence. *Id.* P 20. When CPCNC's

clients are pregnant, its services are intended to provide them with information about the options available to them, including carrying a child to term, raising the child, obtaining an adoption, or abortion. *Id.* CPCNC desires that each client "make an educated choice with the proper information," based on facts and the truth and after thorough consideration of all available options. *Id.* P 21.

Shelly Gibbs, CPCNC's CEO, *id.* P 1, has submitted a declaration explaining her understanding that the Act "requires that a licensed clinic like CPCNC provide a notice that girls and women may receive free or low cost abortions." *Id.* P 24. She understands that "the notice requires CPCNC to communicate that our clients contact the County social services and actually provide the phone number." *Id.* She believes the notice is "diametrically opposed to the religiously based mission and goals of CPCNC," and explains that "[b]ecause the notice is to be conspicuously posted in the waiting room so that it can easily be read, it is among the first communications, if not the first communication, made to a client." *Id.*

C. Alternatives Women's Center (AWC)

AWC is a religious non-profit corporation established under section 501(c)(3) of the Internal Revenue Code and located in Escondido, California. DeArmas Decl. P 2, ECF No. 10; FAC P 11. It is licensed under Health and Safety Code section 1204. FAC P 11; DeArmas Decl. P 7. It offers its services free of charge.

DeArmas Decl. PP 18-19. It describes itself as a "Christian-based community medical clinic." *Id.* P 3. Its objective "is to provide to pregnant women, the community and to others, a Biblically guided and based Christian response to pregnancy, parenting and sexuality." *Id.* P 4. According to its bylaws, AWC must not "support nor promote abortion as an acceptable option available to pregnancy, including pregnancy resulting from rape or incest." *Id.*

"AWC is a religious ministry and is motivated by spiritual concerns." *Id.* P 18. It "does not act out of economic interest." *Id.* AWC's staff and volunteers sign a statement of faith as part of their application. *Id.* P 3. This statement explains the person believes "that the Bible is the only inspired Word of God and is free from error"; that "there is one God, the creator and preserver of all things" and "He exists eternally in three persons: the Father, the Son, and the Holy Spirit, who are of one substance and equal in power and glory"; that "man can only be saved by the grace of God, through faith on the basis of the work of Jesus Christ and by the agency of the Holy Spirit"; and "that human life begins at conception and is valued by God from conception onward." *Id.* In short, "all Board Members, officers, employees, and volunteers must be Christians." *Id.* P 5.

AWC refers to those who seek its services as "patients." *See, e.g.*, *id.* P 12. When a patient arrives at AWC, she receives a packet from a receptionist, who leads her to a consultation room. *Id.* The receptionist

gets to know the patient and confirms AWC's understanding of her expectations for the appointment. *Id.* A nurse then gives the patient a "Decision Guide," and the nurse helps the patient complete the guide if necessary. *Id.* This decision guide is part of AWC's "holistic (whole person) approach to healthcare," which follows a "PIESS" assessment looking to the patient's "Physical . . . , Intellectual, Emotional, psycho-Social and Spiritual" needs. *Id.* P 12. The nurse then shows the patient where and how to complete a pregnancy test. *Id.* If the test is positive, the nurse records the patient's vital signs, height, and weight, and reviews the patient's medical history. *Id.* If a patient exhibits symptoms of a condition requiring further medical attention, AWC refers her to appropriate treatment. *Id.* AWC then offers education on the patient's medical options using a website, and a nurse offers a same-day ultrasound. *Id.* At the conclusion of the appointment, AWC provides any requested educational materials, gives the patient prenatal vitamins, and requests permission to follow up with the patient to learn whether she has obtained prenatal care or an abortion and to confirm her well-being. *Id.*

If a patient is not pregnant, AWC offers information about reproductive health, including menstrual cycles, fertility, methods of birth control, and sexually transmitted diseases and infections. *Id.* P 15. AWC offers referrals if the patient requests tests for sexually transmitted diseases and infections. *Id.* It recommends sexual abstinence "as the best and safest

way for single women to protect their health which includes their sexual/medical, intellectual, emotional, psycho-social and spiritual health." *Id.*

AWC's medical staff consists of medical doctors, obstetricians and gynecologists, and registered nurses. *Id.* P 10. It has a Medical Director and Obstetrics Director. These doctors are available by phone and can consult a patient's medical records and test results. *Id.* P 17. Tamara DeArmas, AWC's CEO, *id.* P 1, submitted a declaration explaining that "AWC provides accurate evidence-based education to all their patients and does not now nor has it ever knowingly given false or inaccurate medical advice," *id.* P 13. AWC takes time to ensure each patient has the information she needs to make an informed choice about her pregnancy. *Id.*

Ms. DeArmas also explains that "[r]eferring girls and women, who come through our doors, to where they can get a low cost or free abortion runs directly against the mission and goals of AWC." *Id.* P 20. She understands the Act's notice requirements will force AWC "to advertise for the County regarding abortion services against our will." *Id.* She finds the notice provisions particularly problematic because, as she understands them, a notice must be posted in the waiting area, and it will be the first message AWC's patients receive. *Id.*

D. Defendant Harris

Defendant Harris is the Attorney General of the State of California. As noted above, she was one of AB

775's sponsors. Pls.' Ex. 7, at 1. Upon passage of AB 775 into law, defendant issued a statement that she was "proud to have co-sponsored the Reproductive FACT Act, which ensures that all women have equal access to comprehensive reproductive health care services, and that they have the facts they need to make informed decisions about their health and their lives." Attorney General Kamala D. Harris Issues Statement on Governor Brown Signing Reproductive FACT Act into Law (Oct. 9, 2015).[8] She "commend [ed] Governor Brown for signing AB 775 and thank[ed] Assemblymembers David Chiu and Autumn Burke for championing this important law."

Under section 123473(a), Defendant will have authority to enforce the Act's notice provisions. *See* Cal. Health & Safety Code § 123473(a). She has introduced no evidence and has not argued she will exercise her discretion to defer civil enforcement of the Act against plaintiffs.

IV. JURISDICTION; RIPENESS

The State argues this action is unripe such that the court is without jurisdiction. Ripeness is a question of timing. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

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[8] The court takes judicial notice of this public statement, published on the official website for the Office of the Attorney General of the State of California, available currently at https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-statement-governor-brown-signing.

It is a doctrine "designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). It includes "both a constitutional and a prudential component." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). The court addresses each component in turn.

A. Constitutional Ripeness

Generally speaking, "the constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Cal. Pro-Life Council, Inc. v. Getman (Getman)*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). In other words, the constitutional aspects of ripeness may often be characterized as "standing on a timeline." *Thomas*, 220 F.3d at 1138. As does the doctrine of standing, ripeness "focuses on whether there is sufficient injury." *Portman*, 995 F.2d at 903. A sufficient injury is an injury-in-fact: "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations and quotation marks omitted). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 301, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) (citation and quotation marks omitted).

When a plaintiff challenges a statute's constitutionality, "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Thomas*, 220 F.3d at 1139. That is, a statute's passage does not alone make for a ripe claim. *Id.* Rather, the plaintiffs must face a "genuine threat of imminent prosecution." *Id.* In other words, "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). "To show such a 'realistic danger,' a plaintiff must 'allege[] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder.'" *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Babbitt*, 442 U.S. at 298) (alterations in *Lopez*). The Ninth Circuit has listed three factors that may aid the court's decision on this front: "(1) 'whether the plaintiffs have articulated a concrete plan to violate the law in question,' (2) 'whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings,' and (3) 'the history of past prosecution or enforcement under the challenged statute.'" *Getman*, 328 F.3d at 1094 (quoting *Thomas*, 220 F.3d at 1139). Similar considerations inform the court's decision when the question is expressed in terms of standing and injury in fact. *See, e.g.*, *Lopez*, 630 F.3d at 786.

The *Thomas* court took care to clarify that this test allows pre-enforcement challenges of laws that allegedly infringe on a plaintiff's constitutional rights. 220 F.3d at 1137 n.1. Under longstanding federal precedent, a plaintiff need not "await the consummation of threatened injury to obtain preventive relief." *Getman*, 328 F.3d at 1094; *see also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("Courts have found standing where no one had ever been prosecuted under the challenged provision."). This is particularly true in the context of First Amendment free-speech cases. *Getman*, 328 F.3d at 1094; *LSO*, 205 F.3d at 1155. For example, "when the State of Virginia passed a law banning the display of certain sexually-explicit material where juveniles could examine it, the Supreme Court found that booksellers had standing to object, even though the law had not yet been enforced." *LSO*, 205 F.3d at 1155 (citing *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 386, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)). To reach this decision, the Court considered that Virginia "ha[d] not suggested that the newly enacted law will not be enforced" and concluded the plaintiffs had "alleged an actual and well-founded fear that the law will be enforced against them." *Am. Booksellers*, 484 U.S. at 393.

Both the Ninth Circuit's decision in *LSO* and the Supreme Court's decision in *American Booksellers* concerned statutes that risked the chilling of constitutionally protected speech. *See Am. Booksellers*, 484 U.S. at 393; *LSO*, 205 F.3d at 1155-56. This was also the case in *Getman*. *See* 328 F.3d at 1094-95. Here, by contrast,

plaintiffs argue the Act compels rather than chills their speech; however, the court sees no reason to distinguish the cases on that basis. The Supreme Court has held that "the 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, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). Moreover, the alleged injury motivating the reasoning in *American Booksellers, Getman*, and *LSO* – self-censorship – may logically be substituted in this case for the alleged injury of compelled speech; that is, just as a plaintiff may be constitutionally injured by self-censorship, a plaintiff may be injured if compelled to speak. *See also Riley v. Nat. Fed. of the Blind of N.C.*, 487 U.S. 781, 796-97, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance. . . .").

Here, the Act imposes notice requirements on "licensed covered facilities," which, as set forth above, are defined in three parts: (1) the facility is licensed under California Health and Safety Code section 1204; (2) the facility's "primary purpose is providing family planning or pregnancy-related services"; and (3) two or more of the listed conditions are satisfied.[9] Cal. Health

[9] Again, those conditions are as follows: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling

& Safety Code § 123471(a); *see also id.* § 123472(a) (notice requirements). Under this definition, each of the three plaintiff organizations is a "licensed covered facility." Each is licensed under Health and Safety Code section 1204. FAC PP 9-11. Each plaintiff's primary purpose is the provision of pregnancy-related services. *See* Dodds Decl. P 3; Gibbs Decl. P 10; DeArmas Decl. P 4. And each satisfies two or more of the conditions listed in section 123471(a). *See* Dodds Decl. PP 9-12, 15, 17 (A Woman's Friend offers and provides obstetric ultrasounds, offers pregnancy testing, and collects health information from clients); Gibbs Decl. PP 10, 23 (CPCNC offers pregnancy tests, obstetric ultrasounds, and "offer[s] abstinence information resources if requested or as needed"); DeArmas Decl. PP 12, 15 (AWC conducts pregnancy tests, reviews patients' medical history, conducts obstetric ultrasounds, and offers counseling and contraceptive methods).

As "licensed covered facilities," all three plaintiffs are subject to the notice requirements of Health & Safety Code section 123472(a). Should the law be upheld, they will face two choices: comply with the Act's notice provisions come January 1, 2016 or not. Should plaintiffs elect to comply with the notice provisions, they argue they will be compelled to make a statement

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about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients." Cal. Health & Safety Code § 123471(a) (line breaks removed).

contrary to both their religious beliefs and the purposes of their formation. Should they elect not to comply, they risk an enforcement action and may face civil penalties of five hundred dollars for a first offense and one thousand dollars for each later offense. *See* Cal. Health & Safety Code § 123472(a) (notice requirements); *id.* § 123473(a) (civil penalty provisions). The Act is not yet effective, but the State has not suggested it will decline to enforce it. Indeed it argues that should enforcement of the Act be enjoined, the State would be unable to prevent harm to "the millions of California women who 'are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery,' but are unaware of the public programs available to provide them with those vital services." Opp'n at 19 (quoting AB 775 § 1(b)).

Two of the three *Getman* factors weigh in favor of the claims' ripeness. One, the plaintiffs have articulated a concrete plan to violate the Act in question. The court disagrees with the State that plaintiffs have not expressly professed their intent to disobey with the Act's notice provisions. The plaintiffs' declarations leave no doubt they believe displaying or distributing the notices would conflict with their religious beliefs and the purposes of their organizations. *See, e.g.*, Dodds Decl. PP 29-31; Gibbs Decl. P 24; DeArmas Decl. P 20; *see also LSO*, 205 F.3d at 1156 ("We are not persuaded by the [defendants'] contention that [the plaintiff] was required to plead that a particular . . . licensee had in fact refused to lease premises to [it]. . . ."). Two, the

State has in effect communicated its intent to enforce the Act. *See Getman*, 328 F.3d at 1094. The court recognizes that the state has not, strictly speaking, "communicated a specific warning or threat to initiate proceedings," *id.* and has not given notice as required by section 123473(a)(1), but in light of applicable Supreme Court authority, this shortfall does not yet deprive the court of jurisdiction. *See, e.g.*, *Am. Booksellers*, 484 U.S. at 393 ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them."). The State has not disavowed plans to enforce the Act. *See LSO*, 205 F.3d at 1155. Defendant Harris's recent co-sponsorship of the Act, her future role in its enforcement and the absence of any suggestion she will not enforce the Act also show the case is ripe. *See Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996).

The court finds that although plaintiffs cannot at this time possibly show a history of prosecution or enforcement prior to the Act's taking effect, this action is constitutionally ripe. *See, e.g.*, *LSO*, 205 F.3d at 1155 ("[E]nforcement history alone is not dispositive. Courts have found standing where no one had ever been prosecuted under the challenged provision."). This is not a case of uncertainties, hypotheticals, or contingencies. The parties do not dispute the Act applies to plaintiffs' organizations. The Act requires the provision of a specific notice, which the plaintiffs argue violates specific tenets of their religious beliefs and specific provisions

of their charters or bylaws. The Act foresees only one consequence of noncompliance: a fine. The Act was signed recently and will go into effect on January 1, 2016. The State has made no effort to advise the court or plaintiffs it intends not to enforce it against them. Plaintiffs' alleged impending injuries suffice to ensure constitutional ripeness.

B. Prudential Ripeness

The prudential component of ripeness "focuses on whether there is an adequate record upon which to base effective review." *Portman*, 995 F.2d at 902-03. The decision is discretionary. *Thomas*, 220 F.3d at 1142. The court must "evaluate both [1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration." *Texas v. United States*, 523 U.S. at 300; *Thomas*, 220 F.3d at 1141 (9th Cir. 2000).

1. Fitness for Judicial Decision

The Supreme Court and Ninth Circuit have recognized the difficulty of deciding constitutional questions without the necessary factual context. *See, e.g.*, *W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 312, 88 S. Ct. 450, 19 L. Ed. 2d 546 (1967) (per curiam); *Thomas*, 220 F.3d at 1141; *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510.

For example, in *W.E.B. Du Bois Clubs*, the Attorney General requested a hearing and order that the

plaintiffs must register as a "communist-front organization." 389 U.S. at 310. In response, the plaintiffs challenged the statute that granted the Attorney General authority to make this request. *Id.* The statute in question provided that before the government could punish the plaintiffs for failure to register, the "Subversive Activities Control Board," an administrative agency, was required to find that the plaintiffs in fact operated a communist-front organization and issue an order to that effect. *Id.* at 311. And before such an order could issue, the statute required a full, public evidentiary hearing in which the plaintiffs could be represented by counsel, present evidence, and conduct cross-examination. *Id.* The plaintiffs challenged the registration requirement and sought to enjoin any hearing as unconstitutional. *Id.* But the Supreme Court found the action premature because "important and difficult constitutional issues would be decided devoid of factual context" and because it was unclear whether the plaintiffs were covered by the statute. *Id.* at 312.

Similarly, in *American-Arab Anti-Discrimination Committee*, the U.S. Immigration and Naturalization Service (INS) detained the plaintiffs, who were non-immigrant aliens, because they were members of the Popular Front for the Liberation of Palestine (PFLP). 970 F.2d at 504-05. The government alleged the PFLP advocated and taught the "international and governmental doctrines of world communism," which meant the detainees would be deported. *Id.* at 505.[10] Citing

[10] At the time, 8 U.S.C. § 1251 provided as follows, in relevant part:

W.E.B. DuBois Clubs, the Ninth Circuit found the case was not ripe. *Id.* at 510-12. It was unclear to the court whether the detainees were actually members of the PFLP and what actions had allegedly brought them within the parameters of the statute in question. *Id.* at 510-11. In addition, the statute had never been interpreted by any court. *Id.* at 511. Neither had the INS offered an interpretation. *Id.*

In *Thomas v. Anchorage Equal Rights Commission*, several landlords challenged an Alaska statute that banned discrimination on the basis of marital status, arguing the statute violated the First Amendment's Free Exercise and Free Speech Clauses. 220 F.3d at 1137. The Ninth Circuit found the case was not ripe. *Id.* It summarized its holding as follows:

> No prospective tenant has ever complained to the landlords, let alone filed a complaint

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(a) Any alien in the United States . . . shall, upon order of the Attorney General, be deported who –

. . .

(6) is or at any time has been, after entry, a member of the following classes of aliens:

. . .

(D) Aliens . . . who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization. . . .

> against them. Neither the Alaska State Commission for Human Rights nor the Anchorage Equal Rights Commission has ever initiated an investigation into the landlords' rental practices or commenced a civil enforcement action or criminal prosecution under the challenged laws. No violation of the laws is on the horizon and no enforcement action or prosecution is either threatened or imminent. Indeed, the principal enforcement agencies had never even heard of these landlords before they filed this action. Simply put, at this stage the dispute is purely hypothetical and the injury is speculative.

Id. Later on in the circuit court's opinion, it called the record before it "remarkably thin and sketchy, consisting only of a few conclusory affidavits." *Id.* at 1141.

In *Thomas*, the court acknowledged that some pre-enforcement actions may be ripe from a prudential point of view, especially if they concern "purely legal" issues. *Id.* at 1141-42; *accord San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 ("[P]ure legal questions that require little factual development are more likely to be ripe."). But that was not the situation in *Thomas*; no "concrete factual scenario" demonstrated how the laws, as applied, infringed the landlords' constitutional rights. *Id.*

Here, unlike in *W.E.B. DuBois Clubs, American-Arab Anti-Discrimination Committee*, and *Thomas*, plaintiffs' claims are concrete and clearly delineated by evidence, including their declarations, the text of the

Act, and the Act's legislative history. Plaintiffs' declarations are detailed, specifying what they understand the Act will require of them and how the notice provisions they challenge conflict with their constituents' religious convictions and provisions of their charters and bylaws. Moreover, the disputes here concern questions for which the record includes sufficient evidence: the scope of the protection provided by the First Amendment's Free Exercise and Freedom of Speech Clauses given a specific notice required by California law.

The State's arguments to the contrary are framed in only general terms. It argues the plaintiffs' claims "appear to include as-applied components" and therefore it believes adjudication of this case "depends on the facts surrounding any conceivable application of the statute." Opp'n at 7. But the State identifies no particular difficulty or uncertainty that will arise if the case goes forward now. The court also notes other federal courts have recently adjudicated similar disputes, apparently without the sort of difficulties that arise in unripe cases. *See, e.g.*, *Evergreen Ass'n of N.Y. v. City of N.Y.*, 740 F.3d 233 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 435, 190 L. Ed. 2d 327 (2014); *Greater Balt. Ctr. v. Mayor and City Council of Balt.*, 721 F.3d 264 (4th Cir. 2013) (en banc). This case is suited for judicial decision now.

2. Hardship to the Parties Should the Court Withhold Consideration

As noted above, the prudential ripeness doctrine also countenances the court's consideration of whether the parties will suffer a hardship if the court withholds a decision. *Texas v. United States*, 523 U.S. at 300-01. This analysis "dovetails, in part, with the constitutional consideration of injury." *Thomas*, 220 F.3d at 1142.

When a plaintiff challenges a statute or regulation, hardship is more likely if the statute has a direct effect on the plaintiff's day-to-day operations. *See Texas v. United States*, 523 U.S. at 301. Hardship is less likely if the statute's effect is abstract. *See id.* (rejecting argument that ongoing "threat to federalism" or "threat to personal freedom" could constitute hardship "unless the person's primary conduct is affected"). The court may also consider whether the parties' dispute may be adjudicated more concretely in a later proceeding, or if the denial of relief would foreclose later resolution. *See Thomas*, 220 F.3d at 1142; *Am.-Arab Anti-Discrimination Comm.*, 970 F.2d at 511.

Here, the court is satisfied the plaintiffs stand to suffer a hardship should the court withhold a decision. The Act impacts the plaintiffs' day-to-day operations by requiring they either post a notice, hand out a printed notice, or provide digital notice. Starting January 1, 2016, the plaintiffs face a difficult decision: display a notice they argue violates their First Amendment rights or risk stiff civil penalties. The State has

identified no specific advantage associated with delaying this litigation.

This case is ripe from both constitutional and prudential perspectives. The court thus proceeds to the merits of plaintiffs' motion.

V. LEGAL STANDARD

A preliminary injunction is an extraordinary remedy awarded only upon a clear showing the moving party is entitled to such relief. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Federal Rule of Civil Procedure 65 provides a court may issue a preliminary injunction to preserve the relative position of the parties pending a trial on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981). The party seeking a preliminary injunction must show it is "likely to succeed on the merits," "likely to suffer irreparable harm in the absence of the preliminary relief," "the balance of equities tips in [its] favor," and "an injunction is in the public interest." *Winter*, 555 U.S. at 20.

Alternatively, in the Ninth Circuit, if a plaintiff cannot show a likelihood of success but can show "serious questions going to the merits" with the "balance of hardships tip[ping] *sharply* in the plaintiff's favor," and can satisfy the other two *Winter* factors, then a preliminary injunction can also be proper. *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1291 (9th

Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (finding the "serious question" sliding scale test survived *Winter*)) (emphasis in *Shell*). Lastly, a court need not reach the other prongs if the moving party cannot as a threshold matter demonstrate a "fair chance of success on the merits." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012) (quoting *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009) (internal quotation marks omitted).

In deciding on whether to grant a preliminary injunction, the court may rely on declarations, affidavits, and exhibits, among other things, and such evidence does not need to conform to the standards of Federal Rule of Civil Procedure 56. *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *see also Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial"); *Bracco v. Lackner*, 462 F. Supp. 436, 442 n.3 (N.D. Cal. 1978) (evidence considered in ruling on preliminary injunction does not need to conform to standards for summary judgment). "The urgency necessitating the prompt determination of the preliminary injunction; the purpose of a preliminary injunction, to preserve the status quo without adjudicating the merits; and the [c]ourt's discretion to issue or deny a preliminary injunction are all factors supporting the considerations of affidavits." *Bracco*, 462 F. Supp. at 442 n.3. The trial court has discretion to

decide how much weight to give to each affiant's statement. *See Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

VI. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Claim One: First Amendment Freedom of Speech

The court first considers plaintiffs' likelihood of success on their free speech claim. The parties disagree about the appropriate level of scrutiny to apply to the Act. Plaintiffs contend the Act is subject to strict scrutiny because the required notice amounts to a content-based regulation. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, *supra*, 487 U.S. at 795. Accordingly, laws compelling speech are considered to be content-based regulations generally subject to strict scrutiny, albeit with some exceptions.[11] *Id*.; *see also*

[11] "[T]he violation of the First Amendment is all the more blatant" when the government targets particular views taken by speakers on the subject. *Rosenberger v. Rector*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination."). Plaintiffs do not appear to argue that the Act discriminates based on their viewpoint, and the record does not suggest the State's rationale for the Act was to discriminate against a certain viewpoint. The required notice notifies the public about the full spectrum of reproductive health care services available in California and does not express an ideological viewpoint on the services mentioned. In addition, the Act also applies to all pregnancy-related health providers regardless of their beliefs on abortion.

Turner Broad. Sys. v. FCC, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). The State argues the court should instead adopt one of the lesser levels of scrutiny applicable to either compelled commercial speech, professional conduct, professional speech within the confines of the patient-provider relationship, or abortion-related disclosures. At hearing, the State, while maintaining its position that the speech at issue is both commercial and professional, acknowledged that of the two doctrines, professional speech is the better fit.

As discussed below, after considering the alternatives, the court finds the Act regulates professional speech within the confines of the patient-provider relationship, which is reviewed under no greater than intermediate scrutiny. The court next finds the Act survives intermediate scrutiny for professional speech and would likely survive even strict scrutiny for fully protected speech. The court concludes plaintiffs are not likely to succeed on the merits of their free speech claim, but have raised serious questions going to the merits under the Ninth Circuit's "serious questions" approach.

1. Commercial Speech

a) Legal Standard

Content-based regulations are subject to lesser scrutiny when they concern commercial speech. Compelled commercial speech is subject to either intermediate scrutiny, *Central Hudson Gas & Elec. Corp. v.*

Pub. Serv. Comm'n, 447 U.S. 557, 563-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), or, if the law compels disclosure of "purely factual and uncontroversial information," rational basis review, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) ("[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248-53, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010). The Supreme Court has articulated several justifications for its differential treatment of commercial speech: an advertiser may easily verify the truth of the information it disseminates about a specific product or service, *Central Hudson Gas*, 447 U.S. at 564 n.6; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24; commercial speech may be more durable and less likely to be chilled than other types of speech due to the advertiser's economic self-interest, *Central Hudson Gas*, 447 U.S. at 564 n.6; *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24; and the State has an interest in regulating the underlying commercial transaction, *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).

The Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas*, 447 U.S. at 561, and as speech that "does no more than propose a commercial transaction," *Va.*

State Bd. of Pharmacy, 425 U.S. at 752; *see also Bolger v. Youngs Drug Prods.* Corp., 463 U.S. 60, 66, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) (describing proposal of a commercial transaction as "the core notion of commercial speech"); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (reviewing definition of commercial speech). However, the Court has recognized the difficulty of "drawing bright lines that will clearly cabin commercial speech as a distinct category." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). Accordingly, when it is not clear whether speech is commercial, the Court in *Bolger* set out three factors relevant to the determination: (i) whether the speech is an advertisement, (ii) whether the speech refers to a specific product, and (iii) whether the speaker has an economic motive for the speech. 463 U.S. at 66-68; *see also Ass'n of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728 (9th Cir. 1994) (reviewing *Bolger* factors). While "[t]he combination of all these characteristics . . . provides strong support for the . . . conclusion that [speech is] properly characterized as commercial speech," *Bolger*, 463 U.S. at 67, it is not necessary that each of the characteristics "be present in order for speech to be commercial," *id*. at 67 n.14. When commercial speech is "inextricably intertwined with otherwise fully protected speech," the court applies the test for fully protected expression. *Riley*, 487 U.S. at 796. "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Id*. The court does not "parcel out

the speech, applying one test to one phrase and another test to another phrase." *Id*.

The context of the speech affected also plays a role in a court's decision. For example, in *Riley*, the Supreme Court considered whether North Carolina had impermissibly compelled disclosures by professional fundraisers and noted "the context of a verbal solicitation": "if the potential donor is unhappy with the disclosed percentage" of charitable contributions collected during the previous 12 months that were actually turned over to charity, "the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id*. at 799-800. Referencing *Riley*, the Second Circuit in *Evergreen* considered the fact that the compelled speech was to be made in the context of the "public debate over the morality and efficacy of contraception and abortion." *Evergreen*, *supra*, 740 F.3d at 249; *see also NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) ("[E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values.").

b) Analysis

Here, each plaintiff clinic has submitted a declaration stating it does not charge fees for any of its services or otherwise conduct commercial transactions. The declaration of AWC, for example, avers

> AWC does not charge any fee to girls and women who use its services, providing all of its services free of charge. Additionally, AWC does not solicit a donation from girls or women who are at the clinic seeking services. Moreover, AWC does not have a cashier to receive a payment from a patient should a girl or woman attempt to pay for services. In sum, AWC is a religious ministry and is motivated by spiritual concerns and does not act out of economic interest.
>
> To be clear, there are no monetary transactions between the patients and those at the clinic. . . .

DeArmas Decl. PP 18-19. Similarly, Ms. Dodds and Ms. Gibbs state that A Woman's Friend and CPCNC, respectively, provide all of their services free of charge. *See* Dodds Decl. P 28; Gibbs Decl. P 22.

Rather than being driven by an economic motive, the declarations state that the clinics' motivation is "spiritual," DeArmas Decl. P 18; Dodds Decl. P 28, and "to help women and men in need," Gibbs Decl. P 22. The plaintiff clinics are all religiously based organizations, and their services are guided by their religious beliefs. *See* DeArmas Decl. PP 2-4 (stated objective is to provide Biblically guided and Christian response to pregnancy); Dodds Decl. PP 2, 4, 10, 12, 19, 23; Gibbs Decl. PP 2-7 (clinic provides Christ-centered support). During client appointments, the declarations state that the plaintiff clinics provide their clients with accurate information about pregnancy, abortion, and

other health topics. *See, e.g.*, DeArmas Decl. PP 13-15; Dodds Decl. PP 3, 12, 16, 21, 25; Gibbs Decl. PP 10, 13, 21, 23. This includes counseling clients through their health and pregnancy decisions and presenting them with alternatives to abortion. *See* DeArmas Decl. PP 4, 15; Dodds Decl. PP 2-3 (purpose of clinic is to help a woman work through alternatives when she experiences unplanned pregnancy); Gibbs Decl. PP 5-6, 20-21. In the course of client counseling, the plaintiff clinics do not support or promote abortion as an acceptable alternative to pregnancy. *See* DeArmas Decl. PP 4, 20; Dodds Decl. P 3; Gibbs Decl. PP 6, 9, 24.

Based on the limited evidence before the court at this stage, plaintiffs have shown that their speech is non-commercial. First, plaintiffs' speech is not consistent with the core notion of commercial speech: it does not appear to relate solely to their economic interests, *see Central Hudson Gas*, 447 U.S. at 561, and does not simply propose a commercial transaction, *see Va. State Bd. of Pharmacy*, 425 U.S. at 762. Neither is plaintiffs' speech commercial under the three *Bolger* factors. Under the first two factors, at least some of plaintiffs' speech relates to the solicitation of clients for patronage of their medical services, which several courts have found to constitute an advertisement for a "specific product," *see, e.g.*, *Am. Acad. of Pain Mgmt*, 353 F.3d at 1106; *Fargo Women's Health Organization, Inc. v. Larson*, 381 N.W.2d 176, 180-81 (N.D. 1986). However, plaintiffs appear to have no economic motive for their speech under the third factor, because they do

not charge any fees for their services or use their services to solicit donations directly. In addition, the nature of plaintiffs' services and speech bears little resemblance to other contexts in which courts have applied the commercial speech doctrine. *See, e.g.*, *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 131-36 (2d Cir. 2009) (requiring restaurants to post calorie-content information on menus); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2011) (requiring manufacturers to label products and packaging to inform consumers products contain mercury); *Zauderer*, 471 U.S. at 626 (requiring lawyers to include statement on advertisements for contingency-fee-based representation that client faces potential liability for legal costs if the lawsuit is unsuccessful). Here, the clinics' activities are integrally connected to their religious and political beliefs, and the speech required by the Act brushes up against a controversial public debate revolving around abortion. *Evergreen*, 740 F.3d at 249.

Although the State suggests the goods or services plaintiffs provide have value and argue this value is sufficient for a transaction to be considered commercial, even if no money is exchanged, the State cites no authority for this proposition in the free speech context.[12] *Cf.* Black's Law Dictionary (9th ed. 2009) (defining commerce as the "exchange," as opposed to free

[12] The State cites cases finding that non-profits engaged in "commerce" within the meaning of the Commerce Clause or antitrust laws. *See* ECF No. 16 at 10-11 (citing *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 117 S. Ct.

provision, "of goods and services"). Indeed, other district courts have expressed concern that such a definition would expand the commercial speech doctrine too far, and diminish the constitutional protection for speech made by organizations such as churches, which distribute goods of value to their members for religious purposes. *See Evergreen Ass'n, Inc. v. City of N.Y.*, 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011), *aff'd in part, vacated in part*, 740 F.3d 233 (2d Cir.), *cert. denied*, 135 S. Ct. 435, 190 L. Ed. 2d 327 (2014); *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804, 814 (D. Md. 2011), *aff'd sub nom. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012), *aff'd in part, vacated in part en banc*, 721 F.3d 264 (4th Cir. 2013); *cf. Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 464 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012), *aff'd en banc sub nom. Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184 (4th Cir. 2013). The court likewise declines to adopt the expanded definition of commercial speech the State advances.

Even if the court assumes some of plaintiffs' speech is commercial under a broad reading of the *Bolger* factors, the Act potentially impacts additional

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1590, 137 L. Ed. 2d 852 (1997) (Commerce Clause), and *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Connecticut*, 156 F.3d 535 (4th Cir. 1998) (antitrust laws)). However, courts apply a different definition of "commerce" and consider different policy considerations in classifying speech as commercial speech in the Commerce Clause and antitrust environments, as contrasted to the free speech context here. *See Camps Newfound/Owatonna, Inc.*, 520 U.S. at 573-74; *Virginia Vermiculite, Ltd.*, 156 F.3d at 540-41.

types of speech beyond advertisement of the clinics' medical services. Because the Act requires plaintiffs to disseminate the written notice on site, the Act may have some potential to impact the communications plaintiffs typically make to their clients during clinic visits, including protected informative and ideological speech relating to abortion. Plaintiffs' declarations state the clinics provide their clients with accurate information about pregnancy, abortion, and other health topics, and that they counsel their clients through their pregnancy decisions from a Christian perspective. As a result, plaintiffs' speech bears some resemblance to the charitable solicitations at issue in *Riley*, *supra*. In *Riley*, the Supreme Court recognized that "solicitation is characteristically intertwined with informative and perhaps persuasive speech." 487 U.S. at 796 (citation omitted). The Court held that speech does not retain its commercial character when it is so intertwined with fully protected speech that the court cannot parcel out one component part of speech from another. *Id*. Here, as in *Riley*, it would be "artificial and impractical" to try to separate plaintiffs' speech intended to solicit patronage of its services from its informative or persuasive speech. *See id*. Accordingly, plaintiffs have established at least a colorable claim that any arguably commercial speech they make during the course of client visits is "inextricably intertwined with otherwise fully protected speech," and thus has lost its purely commercial character. *See Centro Tepeyac*, 722 F.3d at 189. The intermediate level of scrutiny established in *Central Hudson Gas*, 447 U.S. at 563-66, therefore does not apply.

In addition, because plaintiffs' speech is not "commercial," it is not appropriate to apply the rational basis test articulated in *Zauderer*, 471 U.S. at 651. Although the State contends "[a] non-profit can just as easily deceive a consumer of pregnancy-related services as a for-profit entity," ECF No. 16 at 11, and "[m]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values," *id*. at 12 (quoting *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001)), *Zauderer's* rational basis test only applies in the commercial context. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), the Supreme Court clarified:

> Although the State may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of 'purely factual and uncontroversial information,' outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps to the permissive law of defamation.

Id. at 573 (citations omitted) (quoting *Zauderer*, 471 U.S. at 651); *cf. Riley*, 487 U.S. at 796 n.9 ("Purely commercial speech is more susceptible to compelled disclosure requirements."). Moreover, the factual nature of

the information in the notice does not in itself entitle the Act to rational basis review. In *Riley*, the Supreme Court held that a required disclosure is not upheld simply because it involves compelled statements of fact, rather than opinions. 487 U.S. at 797-98 (reasoning that both compelled statements of opinion and compelled statements of fact burden protected speech).

In sum, the Act is not subject to intermediate scrutiny for the regulation of commercial speech, or rational basis review for laws requiring the disclosure of "purely factual and uncontroversial information" under *Zauderer*.

2. Professional Speech

Courts have construed the First Amendment as allowing some leeway for the state to regulate professionals to protect the health, morals, and general welfare of its citizens, even if the state's regulation has an incidental effect on protected speech or other constitutional rights. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881-84, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality opinion); *Shea v. Bd. of Med. Examiners*, 81 Cal. App. 3d 564, 577, 146 Cal. Rptr. 653 (1978). However, the Supreme Court has never directly addressed the appropriate level of scrutiny for professional speech regulations, and the framework for professional speech remains murky at best. The Ninth Circuit's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), articulates some guiding principles and establishes a continuum of protection

for professional speech. But because *Pickup* ultimately addressed professional conduct, *id.* at 1229, uncertainty still exists as to what level of scrutiny applies at the midpoint of protection, especially in the context of abortion-related disclosures. Circuit courts are currently split as to whether *Casey* announced a distinct "reasonableness" test for mandated disclosures that provide truthful, non-misleading information relevant to a patient's decision to have an abortion, and the Ninth Circuit has not reached the issue.

Here, the court first finds the Act regulates what is best characterized as professional speech, and the speech lands at the midpoint of the continuum described in *Pickup v. Brown*. The court next finds the applicable level of scrutiny is either intermediate scrutiny or the less-demanding "reasonableness" test under *Casey*. The court need not decide which of the two tests applies, because the court ultimately holds the Act survives intermediate scrutiny.

a) Does The Act Regulate Professional Speech?

Although the Supreme Court has not articulated a precise test for what constitutes professional speech, several lower courts have looked to Justice Jackson's concurrence in *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945), and Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 105 S. Ct. 2557, 86 L. Ed. 2d 130 (1985), for guidance. *See, e.g.*, *Wollschlaeger v. Governor of the State of Fla.*, No.

12-14009, 814F.3d1159, 2015 U.S. App. LEXIS 21573, 2015 WL 8639875, at *20 (11th Cir. Dec. 14, 2015); *Pickup*, 740 F.3d at 1228; *Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (Justice White's concurrence provides "sound, specific guidelines" for defining professional speech); *Locke v. Shore*, 682 F. Supp. 2d 1283, 1291-92 (N.D. Fla. 2010), *aff'd*, 634 F.3d 1185 (11th Cir. 2011); *In re Rowe*, 80 N.Y.2d 336, 342, 604 N.E.2d 728, 590 N.Y.S.2d 179, (Ct. App. 1992).

In *Thomas*, Justice Jackson said,

> [A] rough distinction [between a valid professional regulation and an impermissible restriction on speech] always exists, I think, which is more shortly illustrated than explained. A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right. . . . Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.

323 U.S. at 544-45 (Jackson, J., concurring); *see also Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc*., 952 P.2d 768, 773 (Colo. Ct. App. 1997) (holding that First Amendment does not permit a court to hold a dentist liable for statements published in book or made during news program, even when statements were contrary to

opinion of medical establishment); *cf.* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 949 (2007) ("When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment."). Building on Justice Jackson's statement, Justice White in *Lowe* wrote:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession.

472 U.S. at 232 (White, J., concurring); *cf. Pickup*, 740 F.3d at 1228.

Courts have interpreted these concurrences as describing two characteristics that can make a person's speech "professional" under the First Amendment: being a member of a profession, and having a quasi-fiduciary relationship with a client. *See, e.g.*, *Wollschlaeger*, 2015 U.S. App. LEXIS 21573, 2015 WL 8639875, at *19; *accord Pickup*, 740 F.3d at 1228-29. For example, in *Evergreen*, *supra*, the district court concluded the pregnancy center plaintiffs did not engage in professional speech because they were not licensed to practice medicine and did not tailor their

services to the individual needs and circumstances of their clients. 801 F. Supp. 2d at 207 (considering mandatory disclosures about the clinics' medical licensing status and services offered). The district court in *Tepeyac v. Montgomery County* similarly interpreted the concurrences in *Thomas* and *Lowe*, *supra*, as suggesting that "speech may be labeled 'professional speech' when it is given in the context of a quasi-fiduciary – or actual fiduciary – relationship, wherein the speech is tailored to the listener and made on a person-to-person basis." 779 F. Supp. 2d at 467. The court concluded the clinic in that case did not engage in professional speech because it provided general pregnancy-related information, rather than individualized advice tailored to particular cases. *Id*.

Here, the challenged provision of the Act applies only to "licensed covered facilities." Cal. Health & Safety Code § 123472(a). As described above, a licensed covered facility is defined as a facility licensed under California Health and Safety Code section 1204, or an intermittent clinic operating under a primary care clinic as provided by subdivision (h) of section 1206. *Id*. § 123471(a). For a clinic to be licensed, an applicant must provide "[d]iagnostic, therapeutic, radiological, laboratory and other services for the care and treatment of patients for whom the clinic accepts responsibility." Cal. Code Regs. tit. 22, § 75026. In addition, "[e]very medical clinic shall have a licensed physician designated as the professional director," and "[a] physician, physician's assistant or a registered nurse shall be present whenever medical services are provided."

Id. § 75027. Unlike the pregnancy centers in *Evergreen* and *Tepeyac*, plaintiffs' declarations here establish that each clinic holds a medical license in the State of California, has Licensed Medical personnel on staff, and provides medical services. *See* DeArmas Decl. PP 7, 10-17; Dodds Decl. PP 10, 14-22, 27, 29; Gibbs Decl. PP 9, 10, 14-17. These facts weigh in favor of treating the relationship between plaintiffs and their clients or patients as a professional relationship.

Moreover, under the test provided in Justice White's concurrence in *Lowe*, plaintiffs appear to "exercise judgment on behalf of the client in the light of the client's individual needs and circumstances," 472 U.S. at 232 (White, J., concurring), creating a quasi-fiduciary relationship with their clients. For example, as noted above, plaintiff AWC performs a holistic Physical, Intellectual, Emotional, psycho-Social, and Spiritual (PIESS) assessment of each patient and reviews each patient's medical history. DeArmas Decl. P 12. AWC's doctors are available to consult "specific patient ultrasound findings, medical documentation and needs." *Id*. P 17. Similarly, registered nurses at A Woman's Friend create a medical chart and take a medical history and assessment of each client. Dodds Decl. PP 14-15, 19. CPCNC offers a variety of health services "depending upon the needs and requests of the client." Gibbs Decl. P 10. A volunteer medical director signs off on the clinic's ultrasounds, accepts referrals for clients in need of prenatal care, and connects with the nurse sonographer "for specific needs for the center or clients." *Id*. P 15. Each clinic counsels each woman

so she understands the alternatives to abortion and makes the best choice for her particular pregnancy. *See* DeArmas Decl. P 13; Dodds Decl. P 3; Gibbs Decl. P 21.

Plaintiffs' licensing status and the facts provided in their declarations support the characterization of their communications as professional speech uttered in the context of individualized client care, as described in the concurrences in *Thomas* and *Lowe*. Although the compelled speech may be disseminated by staff in the waiting room rather than by a doctor in the examining room, the State's regulatory licensing structure extends to the clinic as a whole, and the individualized medical relationship between plaintiffs and their clients can properly be characterized as extending at least as far as the walls of the clinic. In addition, the content of the required notice itself relates to the medical profession, because it provides information relevant to patients' medical decisions. The Act is therefore properly analyzed under the precedent on professional speech. The court next considers how plaintiffs' professional speech should be categorized under *Pickup v. Brown*.

b) *Pickup* Continuum

In *Pickup v. Brown*, the Ninth Circuit described the First Amendment protection available to professionals with reference to a continuum. At one end of the continuum, First Amendment protection is at its greatest where a professional is engaged in public dialogue on matters of public concern. 740 F.3d at 1227.

At the midpoint, First Amendment protection of a professional's speech is "somewhat diminished" within the confines of a professional relationship. *Id*. at 1228. Examples of this type of speech include informed consent requirements, licensing requirements, professional disciplinary proceedings, and negligence actions. *Id*. At the other end of the continuum, the state's power is at its greatest where the state primarily regulates professional conduct, such as prohibiting the administration of certain drugs or forms of treatment. *Id*. at 1229. Other circuits have made similar distinctions when deciding the appropriate level of scrutiny to apply to laws regulating professional speech. *See Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill v. Stuart*, ___U.S. ___, 135 S. Ct. 2838, 192 L. Ed. 2d 887 (2015); *King v. Governor of the State of New Jersey*, 767 F.3d 216, 224-29, 233-37 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048, 191 L. Ed. 2d 955 (2015); *Wollschlaeger*, 2015 U.S. App. LEXIS 21573, 2015 WL 8639875, at *20-21.

In *Pickup*, the Ninth Circuit determined that a statute prohibiting licensed health providers from offering sexual orientation change efforts (SOCE) therapy to minors landed at the conduct end of the continuum, even though the treatment was performed in part through the spoken word. *See* 740 F.3d at 1229. Because the regulated activities were therapeutic, not symbolic, the court reasoned they were not "an act of communication" that transforms conduct into First Amendment speech. *See id*. at 1230 (quoting *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 131 S. Ct.

2343, 2350, 180 L. Ed. 2d 150 (2011)). The court compared the statute to a ban on a particular drug: the ban primarily regulates conduct, even though it has the incidental effect of prohibiting a doctor from using words to write a prescription for the drug. *See id*. at 1229.

Here, the State's briefing argues the Act primarily regulates professional conduct, where the State's power is at its greatest. Alternatively, in a position embraced at hearing, the State argues the speech regulated by the Act belongs at the midpoint of the continuum as speech within the confines of a professional relationship. The court concludes the Act lands at the midpoint of the continuum.

The Act does not primarily regulate professional conduct. In contrast to the law at issue in *Pickup*, the Act is not directed at regulating specific treatment or services performed by health providers; its primary purpose is to communicate information to patients about reproductive medical services. *See, e.g.*, *Assembly Committee on Health Hearing*, Def.'s Ex. A, at 3 (stating purpose of bill is to inform California women about their reproductive rights and available health services). In interpreting previous Ninth Circuit opinions, the *Pickup* court clarified that "doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself." 740 F.3d at 1227 (emphasis in original) (citing *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000), and *Conant v. Walters*, 309 F.3d

629 (9th Cir. 2002)); *see also id.* at 1231 ("Certainly, under *Conant*, content-or viewpoint-based regulation of communication about treatment must be closely scrutinized. But a regulation of only *treatment itself* – whether physical medicine or mental health treatment – implicates free speech interests only incidentally, if at all." (emphasis in original)). Because the Act requires providers to communicate prescribed speech about available reproductive medical services, the court finds it does not primarily regulate conduct.

Neither does the Act restrict a professional's ability to engage in public dialogue at the other end of the spectrum. The only speech the Act compels is the dissemination of a notice that provides truthful, nonmisleading information to the clinics' clients during their appointments at the clinic site. The Act does not otherwise restrict speech. The clinics and their staff remain free to publicly advocate on public matters and even to criticize the Act during appointments with their clients. This narrow scope suggests the Act's purpose is to regulate speech within the professional relationship, rather than to suppress a disfavored message within the public debate or advance a favored viewpoint.

Because the Act regulates speech within the confines of a professional relationship, the speech at issue here falls at the midpoint of the *Pickup* continuum. The court next considers what level of scrutiny the court should apply to the Act.

c) Level of Scrutiny

In *Pickup v. Brown*, the Ninth Circuit described speech at the midpoint of the continuum as receiving "somewhat diminished" First Amendment protection, but the court did not specify the appropriate level of scrutiny accorded speech within the confines of a professional relationship. *See* 740 F.3d at 1228. The court therefore turns to persuasive out-of-circuit authority for guidance in determining the appropriate level of scrutiny.

In the context of abortion-related disclosures, circuit courts are split as to whether the Supreme Court's decision in *Casey* announced a less demanding "reasonableness" test, or whether some formulation of an intermediate level of scrutiny should apply. In *Casey*, the plurality upheld under the First Amendment a regulation requiring a doctor to disclose certain information to a patient before performing an abortion to ensure she understands the full consequences of her decision:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752(1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429

> U.S. 589, 603, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

505 U.S. at 884. The Fifth and Eighth Circuits have read *Casey* to mean that the state does not violate the First Amendment when it enacts reasonable regulations requiring a physician to provide truthful, non-misleading information relevant to a patient's decision regarding an abortion. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575-77 (5th Cir. 2012) (describing *Casey's* response to the First Amendment claim as "clearly not a strict scrutiny analysis," and "if anything, the antithesis of strict scrutiny"); *Rounds II*, 686 F.3d 893 (quoting *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 734 (8th Cir. 2008) (en banc) ("*Rounds I*")). Drawing on *Casey* and *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007), the Fifth and Eighth Circuits reasoned that such regulations are justified because the state has a significant role in regulating the medical profession, and the state has a legitimate interest in respecting the life within a woman. *See* 667 F.3d at 575-76; *Rounds I*, 530 F.3d at 734-35.

In contrast, the Fourth Circuit in *Stuart* concluded the "single paragraph" in *Casey* responding to the First Amendment challenge did not intend to announce a guiding standard of scrutiny superseding traditional First Amendment considerations in the context of abortion-related disclosures. *Stuart*, 774 F.3d at 248-49; *cf. Wollschlaeger*, 2015 U.S. App. LEXIS 21573,

2015 WL 8639875, at *21 (noting the "brief treatment" of the First Amendment issue in *Casey* did not provide much insight into how to analyze regulations of professional speech or why the statute at issue survived scrutiny under the First Amendment). Instead, the court in *Stuart* adopted the intermediate standard of scrutiny applied in the commercial speech context, because it is "consistent with Supreme Court precedent and appropriately recognizes the intersection . . . of regulation of speech and regulation of the medical profession in the context of an abortion procedure." 774 F.3d at 248-49. The court ultimately concluded that the statute at issue, which required doctors to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions, did not withstand intermediate scrutiny, because it was not narrowly drawn to achieve the government's interest in protecting fetal life. *Id*. at 250, 255.

In *Wollschlaeger*, the Eleventh Circuit considered the appropriate level of scrutiny to apply to a statute restricting physicians' ability to inquire about their patients' firearm ownership. 2015 U.S. App. LEXIS 21573, 2015 WL 8639875. The court ultimately did not conclusively determine what level of scrutiny should apply, finding the statute at issue survived even strict scrutiny; it did however provide a helpful discussion of the professional speech framework. *See* 2015 U.S. App. LEXIS 21573, [WL] at *19-24. The court suggested in dicta that an intermediate level of scrutiny likely applied to the statute at issue, because the restriction implicated both the state's interest in regulating the

practice of the professions to protect the public, and the state's interest in regulating relationships of a fiduciary character to prevent undue advantage. *See* 2015 U.S. App. LEXIS 21573, [WL] at *22-24. However, the court noted that a broad reading of the Supreme Court's recent decision in *Reed v. Town of Gilbert, Ariz*., 576 U.S. __, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), may suggest that all content-based regulations, including commercial and professional speech, are now subject to strict scrutiny. *Id*. 2015 U.S. App. LEXIS 21573, [WL] at *24.

In consideration of all that is before it, the court finds the Act is subject to no greater than intermediate scrutiny. Intermediate scrutiny properly accounts for the intersection of compelled speech and the government's regulatory interests in the context of the facts of this case. As in *Wollschlaeger* and the cases involving abortion-related disclosures, the speech here implicates the State's interests both in regulating the medical profession and in regulating fiduciary relationships, which supports the application of a level of scrutiny lower than strict scrutiny. Again, the speech is made within the confines of the patient-provider relationship in the course of a client's visit to the clinic site, and the speech provides information relevant to the client's medical decisions. In addition, intermediate scrutiny is consistent with the Ninth Circuit's conclusion in *Pickup* that speech at the midpoint of the continuum is accorded "somewhat diminished" protection under the First Amendment. *See* 740 F.3d at 1228. At this point, the court need not determine whether

the Act is subject to the specific holding of *Casey* or whether *Casey* announces a less demanding "reasonableness" test in the context of abortion-related disclosures, because the court ultimately holds the Act survives even intermediate scrutiny.

Although the court concludes the Act is subject to a lesser level of scrutiny for professional speech, the court finds plaintiffs have raised "serious questions" regarding the applicable level of scrutiny, specifically whether strict scrutiny should apply, for purposes of the Ninth Circuit's "serious questions" approach to preliminary injunctions. As discussed above, the Supreme Court has not directly addressed the applicable level of scrutiny for professional speech, and a broad reading of the Supreme Court's recent decision in *Reed* may lead reasonable jurists to conclude that all content-based regulations are now subject to strict scrutiny. In addition, one could make the case that certain factual differences between this action and the relevant precedent support the application of strict scrutiny here. For example, the required notice is not necessarily disseminated by a doctor in the examining room, and plaintiffs' medical speech may be more intertwined with their religious and political speech than the medical speech in the cases discussed. In light of this legal landscape, the court analyzes the Act under both intermediate and strict scrutiny to evaluate plaintiffs' likelihood of success on the merits.

3. Application of Scrutiny

a) Intermediate Scrutiny

To survive intermediate scrutiny, the Act must "directly advance [] a substantial governmental interest" and be "drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653 at 2667-68, 180 L. Ed. 2d 544 (2011). "There must be a fit between the Legislature's ends and the means chosen to accomplish those ends." *Id*. at 2668 (citation and quotation marks omitted). This formulation seeks to ensure "not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message." *Id*. At this stage, the court finds the Act survives intermediate scrutiny.

(1) Governmental Interest

Here, the stated purpose of the Act is to ensure that California residents know their rights and the health care resources available to them when they make their personal reproductive health care decisions. *See* AB 775 §§ 1, 2. The State has a strong interest in ensuring that pregnant women are fully advised of the range of health care options available to them in California at the time they are making their reproductive decisions. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy."); *Am.*

Life League, Inc. v. Reno, 47 F.3d 642, 656 (4th Cir. 1995) (noting, in Free Exercise Clause challenge, that government has compelling interest in "promoting unobstructed access to reproductive health facilities"). The State also has a compelling interest in regulating the practice of the professions, regulating fiduciary relationships, and promoting the public health more broadly. *See, e.g.*, *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975) ("States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."); *Watson v. Maryland*, 218 U.S. 173, 176, 30 S. Ct. 644, 54 L. Ed. 987 (1910); *Aid for Women v. Foulston*, 441 F.3d 1101, 1119-20 (10th Cir. 2006); *cf. Varandani v. Bowen*, 824 F.2d 307, 311 (4th Cir. 1987) (observing, in Due Process context, that government has "compelling interest in assuring safe health care for the public").

As noted above, according to AB 775's author, the federal ACA has made millions of Californians, 53 percent of them women, newly eligible for Medi-Cal. Assembly Committee on Health, Def.'s Ex. A, at 3; *see also* AB 775 § 1. More than 700,000 California women become pregnant every year, approximately half of them unintentionally. AB 775 § 1. Although 64.3 percent of unplanned births in California in 2010 were publicly funded, the Legislature found that thousands of

women remain unaware of the public programs available to them. *Id*. Plaintiffs do not challenge these findings. The court finds the statute advances substantial governmental interests.

(2) Whether the Act is Properly Drawn to Achieve the Governmental Interest

The court finds the Act directly advances the State's interest in informing women of the availability of publicly funded health resources and the manner in which the woman can access those resources. *See* AB 775 § 1. In addition, the court finds the Act is narrowly drawn to achieve that interest and does not overly burden speech. The required notice provides no more compelled speech than is necessary to convey the desired factual information. The notice provides the information in neutral language and does not incorporate ideological commentary or convey an opinion. Although it includes the word "abortion," the word appears in the context of a list describing the full spectrum of reproductive health care services available in California. The notice includes the phone number of the local county social services office, which provides women with a direct and efficient manner in which to access the listed resources. As noted above, the Act does not otherwise restrict plaintiffs' speech. Plaintiffs remain free to advocate their viewpoint, or even to communicate disagreement with the Act or required notice. The Act does not seek to suppress a disfavored message. *See Sorrell*, 131 S. Ct. at 2668.

Although plaintiffs argue the Act is overly burdensome because it would be the first message clients receive when they walk through the clinics' doors, posting the notice "conspicuously" in the waiting area is just one of the three options allowed under the Act. Under the second option, the Act does not specify when the clinic must distribute the printed notice to its clients, saying only that it must be distributed to all of its clients in the specified typeface and size. Moreover, the notice may be combined with other mandated disclosures. Cal. Health & Safety Code § 123472(3). The court finds the Act is narrowly drawn to achieve its interest while providing plaintiffs with manageable options, and that the means chosen accomplish the State's ends. *See id*. at 2667-68.

b) Strict Scrutiny

Alternatively, if the court applies strict scrutiny, the Act "must be narrowly tailored to promote a compelling Government interest," and must use the least restrictive means to achieve its ends. *United States v. Playboy Entm't*, 529 U.S. 803, 813. However, the government is only required to choose an alternative means when it would be "at least as effective in achieving the legitimate purpose that the statute was enacted to serve," *Reno*, 521 U.S. 844, 874.

Whether the Act would also survive strict scrutiny is a closer question, but the court finds the Act would likely survive even this highest level of scrutiny. The interests advanced by the Act are likely compelling

governmental interests, and the Act is narrowly tailored to promote those interests. The required notice affects speech no more than is necessary to convey the desired factual information. In addition, the less restrictive alternative means proposed by plaintiffs would likely not be as effective in achieving the statute's purpose. Plaintiffs first suggest the State could use selective funding to give clinics incentives to make the notice, but it is not clear the State would be able to disseminate the information as widely through selective funding. For example, plaintiffs do not receive governmental funding and their position suggests government funding would not be an effective method of persuading them to disseminate the notice. Plaintiffs next argue the State could disseminate the information itself. However, this argument ignores the Legislature's finding that "the most effective way to ensure women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities . . . to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources." AB 775 § 1. Although the State could increase its efforts to promote public awareness through its own ad campaign, the court at this stage finds that plaintiffs have not refuted the Legislative determination that requiring dissemination of the notice at the time of a clinic visit is more likely to reach the intended recipients at the time they are making their time-sensitive reproductive decisions.

c) Evergreen

The Second Circuit's decision in *Evergreen* does not change the court's conclusions above. In *Evergreen*, the Second Circuit considered an ordinance requiring pregnancy services centers, New York's equivalent to CPCs, to make the following three disclosures: (1) whether or not they have a licensed medical provider on staff (the "Status Disclosure"); (2) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider" (the "Government Message"); and (3) whether or not they "provide or provide referrals for abortion," "emergency contraception," or "prenatal care" (the "Services Disclosure"). *See* 740 F.3d at 238. The ordinance required the CPCs to provide the disclosures at their entrances and waiting rooms, on advertisements, and during telephone conversations. *Id*. The legislative history of the ordinance suggested its purpose was to prevent deceptive advertising and misleading practices by CPCs in order to ensure women have prompt access to the type of care they seek. *See id.* at 239-41. For example, testimony had been offered that certain CPCs intentionally selected locations in proximity to a Planned Parenthood facility and used misleading tactics to prevent women from entering the Planned Parenthood facility. *See id.* at 239.

The Second Circuit in *Evergreen* concluded the Status Disclosure regarding licensure status would survive even strict scrutiny, but that the Government

Message and Services Disclosures would not withstand even intermediate scrutiny. *See id.* at 237-38, 246-51. The court found the Status Disclosure advanced compelling state interests in public health and combating consumer deception. *Id*. at 246-49. The court found it was narrowly tailored and the least restrictive means of achieving its purpose, because city-sponsored advertisements could not alert consumers whether a particular pregnancy center had a licensed medical provider at the time they interacted with the center. *Id*. at 247.

In contrast, the court found the Government Message and Services Disclosures would not survive even intermediate scrutiny, because the Status Disclosure alone may be sufficient to achieve the ordinance's purpose, and the Government Message and Services Disclosures overly burdened speech. *Id*. at 249-51. Specifically, the court found the Government Message would not withstand scrutiny because it required pregnancy centers to "affirmatively espouse the government's position on a contested public issue," though inclusion of the word "encourages" and because the government could communicate the message itself through an advertising campaign. *Id*. at 250. The court concluded the Services Disclosure would not withstand scrutiny because it mandated discussion related to controversial political topics at the beginning of the centers' contact with potential clients. *Id*. at 249.

Here, the State compares the Act's notice requirement to the Status Disclosure, while plaintiffs argue the notice is more similar to the Government Message

or Services Disclosure. The court finds the Act's notice is distinguishable from all three disclosures in *Evergreen*, because the Act seeks to advance different governmental interests. Although the legislative history of the Act suggests part of the Legislature's motivation was to combat deceptive practices by some CPCs, the legislative history also suggests a key purpose of the challenged provision was to inform women of the free and low-cost publicly funded health services available to them at the time they are making their time-sensitive reproductive decisions. The Legislature was concerned with women who may not be aware that certain health options are available to them, and wanted to ensure women in California are informed of the full range of free and low-cost services available to them when they make their reproductive decisions. In this way, the Act more closely resembles informed consent cases than deceptive advertising cases.

The specific language of the required notice and the means of disseminating the notice further distinguish the Act from the Government Message and Services Disclosure in Evergreen. Although the topic of abortion may trigger discussion of controversial political topics, it presents factual information about abortion, as well as the other health services available, in neutral language. Unlike the Government Message in *Evergreen*, which stated the government "encourages" women who may be pregnant to consult with a licensed provider, the required notice here does not express a

particular ideological position with respect to reproductive issues. In addition, the statute at issue in *Evergreen* was much more burdensome on speech. It required the CPCs to provide the disclosures at their entrances and waiting rooms, on advertisements, and during telephone conversations. In concluding the Service Disclosure did not withstand scrutiny, the Second Circuit found it significant that the statute required the CPCs to utter the required speech at the very beginning of their contact with potential clients. Here, in contrast, the Act only requires that the notice be posted on the wall of the waiting room or disseminated to clients through a printed or electronic notice. Under the printed notice option, plaintiffs may wait and distribute the printed notice to their clients later on in the appointment, instead of uttering the speech at the beginning of their contact. Although the court considers the analysis in *Evergreen*, that analysis is based on different facts and it ultimately does not affect the court's conclusions in this action.

d) Conclusion

For the foregoing reasons, the court at this stage finds the Act survives intermediate scrutiny for professional speech made within a patient-provider relationship, and would likely be upheld even if the court applied strict scrutiny. Accordingly, plaintiffs have not shown a likelihood of success on the merits of their free speech claim.

However, plaintiffs have raised "serious questions going to the merits" of their free speech claim under the Ninth Circuit's approach to preliminary injunctions. *See Cottrell*, 632 F.3d at 1135. As discussed above, plaintiffs have raised "serious questions" whether strict scrutiny applies to the Act. In addition, they have raised "serious questions" whether the Act would survive strict scrutiny – in particular, whether less restrictive means would be at least as effective in achieving the Act's purpose. But before turning to whether plaintiffs have also shown "the balance of hardships tips sharply in [their] favor," the court considers their second claim.

B. Claim Two: Free Exercise of Religion

The court considers plaintiffs' likelihood of success on their Free Exercise claim. As with the free speech claim above, the parties disagree about the appropriate level of scrutiny to apply. Plaintiffs contend the Act unconstitutionally interferes with their right to free exercise of religion. As a result, they argue the Act is subject to strict scrutiny. The State argues the Act is a neutral law of general applicability, and is subject to rational basis review.

As discussed below, the court finds in this report the Act is a neutral law of general applicability, subject to rational basis review. The court also concludes the Act would survive rational basis review. Accordingly, plaintiffs are not likely to succeed on the merits of this claim.

1. Free Exercise Claim

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., Amend. I.[13] The right to exercise one's religion freely, however, "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). Indeed, an individual's religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. *Smith*, 494 U.S. at 878-79 (1990).

A neutral law of general applicability need not be supported by a substantial or compelling government interest, even when "the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

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[13] Although *Smith* was superseded by the Religious Freedom Restoration Act of 1993 (RFRA), the Supreme Court later held that RFRA applies only to the federal government and not the states. *See Holt v. Hobbs*, ___ U.S. ___, 135 S. Ct. 853, 859-60, 190 L. Ed. 2d 747 (2015); *City of Boerne v. Flores*, 521 U.S. 507, 532-36, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). This remains true today for all cases but those governed by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). *See Holt*, 135 S. Ct. at 859-60; *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 n.4 (9th Cir. 2015).

Such a law need only survive rational basis review. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015). For laws that are not neutral and not generally applicable, strict scrutiny applies. *Id*. at 1076. The tests for "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Stormans*, 794 F.3d at 1076 (quoting *Lukumi*, 508 U.S. at 531). Nevertheless, the court must consider each criterion separately so as to evaluate the text of the challenged law as well as the "effect . . . in its real operation." *Id*. Accordingly, the court assesses below whether the Act is neutral and generally applicable.

a) Neutrality

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. . . ." *Id*. A law must be both facially and operationally neutral. *Id*.

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id*. Here, because the Act makes no reference to any religious practice, conduct, belief, or motivation, it is facially neutral.

The more challenging question is whether the Act is operationally neutral, particularly at the preliminary injunction stage, where the law has not yet gone into effect. But pre-enforcement challenges are nonetheless susceptible to this test. *See Stormans*, 794 F.3d

at 1073 (discussing whether state rules not yet in effect were operationally neutral).

Two decisions provide guidance. In *Lukumi*, practitioners of the Santeria religion, which prescribes ritual animal sacrifice as a principal form of devotion, challenged city ordinances restricting the slaughter of animals. 508 U.S. at 524-25. One of the challenged ordinances flatly prohibited the sacrifice of animals, but the definition of "sacrifice" excluded "almost all killings of animals except for religious sacrifice" and provided an additional exemption for kosher slaughter. *Id*. at 535-36. The net result of this definition, the Court ruled, was that "few if any killings of animals are prohibited other than Santeria sacrifice." *Id*. at 536. Because of the way the ordinance operated in practice, it actually prohibited only Santeria sacrifice. *Id*. In this way, the challenged ordinance accomplished a "religious gerrymander," an impermissible attempt to target religious practices through careful legislative drafting. *Id*.

In contrast, the appellate court in *Stormans* found the rules at issue to operate neutrally. 794 F.3d at 1078. In *Stormans*, pharmacy owners and pharmacists with religious objections to dispensing emergency contraceptives challenged state rules requiring a pharmacy to deliver or dispense such drugs. *Id*. at 1072. For individual pharmacists, the rules contained an exemption for those who had "religious, moral, philosophical, or personal objections to the delivery" of contraceptives. *Id*. The rules did not contain a similar requirement for pharmacies. *Id*.

The court nonetheless found the rules operationally neutral. When looking at the exemption as applied to individual pharmacists, the court noted the rulemakers' conscious decision to avoid unduly burdening pharmacists who objected to dispensing a prescription medication. *See id*. at 1076 ("As an initial matter, we note that as they pertain to pharmacists, the rules specifically protect religiously motivated conduct.") (emphasis omitted).

Regarding the law's application to pharmacies, the court discussed three main points. First, it reviewed the public policy undergirding the state's decision not to carve out a religious objections exemption. Specifically, the court noted the state rules provided "practical means to ensure the safe and timely delivery of all lawful and lawfully prescribed medications to the patients who need them." *Id*. at 1077. This purpose would have been significantly undermined if pharmacies refused to deliver needed prescriptions because of a religious objection, especially in rural areas where pharmacies were sparse. *See id.* at 1078 ("The time taken to travel to another pharmacy . . . may reduce the efficacy of those drugs"). Second, the court noted the rules' delivery requirement, as related to pharmacies, applied to all objections to deliveries that did not fall into an exemption, regardless of the motivation behind those objections. *Id.* Finally, the court noted the delivery requirement also applied to all prescription products, not just contraceptives, making the requirement broadly applicable to a range of drugs, including those not subject to religious objections. *See id*.

Akin to the law in *Stormans*, the Act provides no exemption for religious objections. But this lack of an exemption does not render the Act unconstitutional, because such exemptions are not constitutionally required. *See Smith*, 494 U.S. at 890 (holding states may make nondiscriminatory religious practice exemptions, but that such exemptions are not constitutionally required). Additionally, the notice provision to which plaintiffs object applies to all licensed facilities with limited exceptions unrelated to religion, and regardless of the reason for objections. Finally, the notice provision applies to multiple forms of contraception and reproductive care, not just abortion, requiring that clients be informed of their right of access to "comprehensive family planning services," including "all forms of FDA-approved methods of contraception" and prenatal care. AB 775 § 1. The Act is operationally neutral.

The court reaches this conclusion notwithstanding plaintiffs' argument that the Legislature "zeroed in on 'crisis pregnancy clinics' " or CPCs by affiliating CPCs with "pro-life (largely Christian belief-based) organizations." Mem. P. & A. at 24. Laws targeting religious conduct for distinctive treatment are not shielded merely by facial neutrality. *Id. (citing Lukumi*, 508 U.S. at 534). And the record before the court shows it was the activities of CPCs, many of them Christian-based, that largely motivated the Act's notice requirement.[14] As

[14] The court recognizes the other motivation behind this act, namely "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the

noted by the Act's authors, reports showed at least some CPCs were giving clients "inaccurate information about reproductive health, including only information "regarding the risks of abortion, . . . that many women commit suicide after having an abortion, and . . . abortions can cause breast cancer." Pls.' Ex. 3 at 5.

In a limited sense this case resembles *Lukumi*, where the Legislature considered the activities inherent in the petitioner's Santeria religious practice when deciding whether to ban these activities. But in *Lukumi*, unlike in this case, the Legislature's target was not the activity of animal killings or sacrifices, but the practice of Santeria itself. Animal killings, to the extent they were not associated with the practice of Santeria, were not prohibited. *See Lukumi*, 508 U.S. at 543 ("Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision."). Here, in contrast, the Legislature's target in part, dishonest tactics meant to discourage abortions, is burdened by the notice requirement regardless of any religious motivation, if

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health care services available to them." AB 775 § 2. But a law that aims to regulate religious conduct for distinctive treatment is not rendered constitutional simply because its stated purpose is benign or neutral. *See Lukumi*, 508 U.S. at 534 (holding laws that target religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality).

burdened at all.[15] The authors' suggestion is correct: the Act "regulate[s] all pregnancy centers, not just CPCs, in a uniform manner." Pls.' Ex. 5 at 3.

b) General Applicability

The court next considers whether the Act is generally applicable. *Lukumi*, 508 U.S. at 542. If a law promotes the government's interest "only against conduct motivated by religious belief" but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable. *Id*. at 543, 545. A law is generally applicable despite exemptions if it does not "afford unfettered discretion [to its enforcers] that could lead to religious discrimination," because the exemptions are "tied to particularized objective criteria." *Stormans*, 794 F.3d at 1081-82.

Here, the Act requires licensed pregnancy centers to post notices informing women of a range of reproductive options available to them. The Act carves out two exemptions: (1) those clinics "directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies"; and (2) those licensed primary care clinics enrolled as a Medi-Cal provider and provider in the Family Planning, Access,

[15] Although the legislature discussed CPC tactics used to discourage abortions, AB 775 does not inhibit the use of such tactics. Notwithstanding AB 775, CPCs can continue to engage in practices designed to discourage women from obtaining abortions.

Care, and Treatment (PACT) Program. Cal. Health & Safety Code § 123471(c).

The legislative history provides insights into why these exemptions were made. According to the Assembly Judiciary Committee report, the first exemption was provided to clinics operated by the federal government in order to avoid preemption concerns. Pls.' Ex. 3 at 12. As to the second exemption, the Committee report explained a licensed primary care clinic that is both a Medi-Cal provider and a Family PACT provider already offers the full continuum of health care services as described in the notice to be disseminated under the statute, that is, comprehensive family planning services, contraception, prenatal care, and abortion. *Id*. Accordingly, there was no need to subject such facilities to the notice provisions. *Id*.

These justifications are "tied to particularized, objective criteria," such that the exemptions do not allow for "unfettered discretion that could lead to religious discrimination." *Stormans*, 794 F.3d at 1082. They are a far cry from those in *Lukumi*, where the exemptions were allowed for killing animals if seen as "important," "self-evident," and "obviously justified," broad terms susceptible to wide-ranging discretion in enforcement. 508 U.S. at 544. The Act here is generally applicable.

2. Application of Rational Basis Review

Because the Act is neutral and generally applicable, the court applies rational basis review, which requires a rational relation to a legitimate governmental

purpose. *Stormans*, 794 F.3d at 1084. Plaintiffs have the burden to negate every conceivable basis that might support the law at issue. *Id*.

The stated purpose of the notice provision is to ensure that women "quickly obtain the information and services they need to make and implement timely reproductive decisions." AB 775 § 1. The law's sponsors identified a need to supplement the State's existing efforts in advising women of its reproductive health programs, because pregnancy decisions are time-sensitive and competent care early in pregnancy is important. *Id*. As mentioned above, the State has a legitimate interest in ensuring women make an informed decision regarding an abortion. *See Casey*, 505 U.S. at 881-83. The Act's purpose is legitimate.

The means used to effectuate this purpose, mandating a notice informing visitors to licensed facilities of the range of reproductive care resources available, is rationally tailored to the purpose of helping women quickly obtain information necessary to making "personal reproductive health care decisions." AB 775 § 1. Requiring dissemination of the notice at the time of a clinic visit is more likely to reach the intended recipients at the time they are making their time-sensitive reproductive decisions. The law is rational and survives the level of constitutional scrutiny due on this claim.

Accordingly, plaintiffs have not shown a likelihood of success on their Free Exercise claim, and have not

raised serious questions going to the merits of this claim.

VII. IRREPARABLE HARM, BALANCE OF HARDSHIPS AND PUBLIC INTEREST

A preliminary injunction may issue when the moving party raises serious questions going to the merits and demonstrates the balance of hardships tips sharply in its favor, so long as the court also considers the other two prongs of the *Winter* test, the likelihood of irreparable injury and the public interest. *Cottrell*, 632 F.3d at 1134-35. Having found plaintiffs have raised serious questions going to the merits of their free speech claim, the court considers whether plaintiffs have shown there is a likelihood of irreparable injury, whether the balance of hardships tips sharply in plaintiffs' favor, and whether an injunction is in the public interest.

A. Irreparable Injury

Plaintiffs allege injury in the form of interference with their constitutional right to free speech and monetary injuries from the civil penalties of the Act imposes. Plaintiffs argue they will suffer irreparable harm if the Act is not enjoined, because it raises serious First Amendment questions, and the failure to provide notice as required under the Act will result in a civil penalty of $500 for the first violation and an additional $1,000 for every subsequent violation. Mem. P. & A. at 21; *see* Cal. Health & Safety Code § 123472(a)

(notice requirement); *id.* § 123473(a) (civil penalty provisions). The State argues plaintiffs have submitted no evidence to support an alleged injury. Opp'n at 19.

While the Supreme Court has held "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009), a mere "assertion of First Amendment rights does not automatically require a finding of irreparable injury, . . . entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits," *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989). Rather, it is "purposeful unconstitutional suppression of speech [that] constitutes irreparable harm for preliminary injunction purposes." *Goldie's Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) ("[D]irect penalization, as opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury."). Here, the court has found the Act regulates speech within the confines of a professional relationship, and plaintiffs have raised serious questions that this compelled speech violates their freedom of speech. This is sufficient to constitute irreparable injury.

Regarding the civil penalties, monetary injury generally does not constitute irreparable injury. *LA Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). However, financial losses that would be unrecoverable due to California's

Eleventh Amendment sovereign immunity do constitute irreparable injury. *Cal. Hos. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1157 (E.D. Cal. 2011); *see also Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (Eleventh Amendment bars retrospective monetary relief against a state thus making a monetary injury irreparable). Plaintiffs' inability to recover from the State alone is sufficient to constitute possible irreparable injury.

Plaintiffs must establish the irreparable harm is likely, not just possible *Alliance for the Wild Rockies*, 632 F.3d at 1131 (citing *Winter*, 555 U.S. at 22). The harm must not be speculative, but imminent. *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988). Given that plaintiffs have raised serious questions on the merits of their free speech claim, plaintiffs have shown a likelihood of irreparable injury to their First Amendment rights. *See Tracy Rifle and Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 2015 U.S. Dist. LEXIS 92711, 2015 WL 4395025, at *9 (E.D. Cal. July 16, 2015). In addition, as the Act is scheduled to take effect January 1, 2016, there is an impending threat of civil penalties being imposed if plaintiffs do not comply with the notice requirement. There are no contingencies that need occur before the alleged injuries are experienced, nor are the alleged injuries merely speculative. *Compare City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (finding the future injury was not sufficiently real and imminent, where city

councilmembers alleged they would be exposed to civil liability by enforcing an ordinance if the constitutionality of the ordinance were challenged in the future).

Plaintiffs have shown they are likely to suffer irreparable injury.

B. Balance of Hardships

The court next examines whether plaintiffs have established that the balance of hardships tips sharply in their favor. *Winter*, 555 U.S. at 20. To assess this prong, the court "balance[s] the interests of all parties and weigh[s] the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citing *L.A. Mem'l Coliseum Comm'n*, 634 F.2d at 1203). Here, it is not enough for there to be serious questions as to the merits of a First Amendment claim. *See Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1012 (9th Cir. 2007). Rather, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987).

Here, the State argues if the Act is enjoined, the injunction will harm women in California who are in need of "publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery," but unaware of the free public programs available providing these services. Opp'n at 19. The State points to the legislative

history, which reported that "[i]n 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended." AB 775 § 1. Although 64.3 percent of unplanned births in California in 2010 were publicly funded, the Legislature found that thousands of women remain unaware of the public programs available to them. *Id.* If the statute is enjoined, during the injunction, the women eligible for the free or low-cost comprehensive publicly funded family planning services and pregnancy-related care will have reduced access to all of the information they need to make a fully informed decision about their pregnancy. *See id*. Though the preliminary injunction plaintiffs seek would only enjoin enforcement of the Act as to the three plaintiffs, Reply at 11, their clients are California residents. At hearing, counsel was unable to identify the number of women plaintiffs serve. And, the state argues, "[a]ll California women, regardless of income, should have access to reproductive health services." *Id*.

Hence, on the one hand, if the court denies the injunctive relief, plaintiffs are likely to suffer irreparable injuries with respect to their constitutional rights and incur civil penalties, neither of which can be adequately remedied through damages. *See Selecky*, 586 F.3d at 1138. On the other hand, granting an injunction would interfere with the Legislature's intention to provide accurate information to all women seeking family planning or pregnancy-related services from

plaintiffs. *See* AB 775 § 1. As discussed above, California has a special interest in protecting and regulating trades that closely concern public health. *See Nat'l Ass'n for Advancement of Psychoanalysis*, 228 F.3d at 1054-55; *see also Am. Acad. of Pain Mgmt*., 353 F.3d at 1109 ("States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." (citation omitted)).

Secondly, when a party seeks injunctive relief against a state government, concerns of comity and federalism are raised. *See Clark v. Coye*, 60 F.3d 600, 603-04 (9th Cir. 1995). And "any time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977) (Rehnquist, J., in chambers).

Plaintiffs argue they will suffer irreparable injury if the injunction is not granted; the court agrees. However, the State has also shown a strong interest in providing public health – the health of the California women who seek services from plaintiffs. And plaintiffs have provided no evidence to challenge the State's findings. Thus, in weighing the injuries both parties are likely to suffer, the court finds plaintiffs have not established the balance of hardships tips sharply in their favor.

C. Public Interest

Even if plaintiffs established the balance of hardships tips sharply in their favor, plaintiffs also bear the burden of showing the injunction is in the public interest. *Winter*, 555 U.S. at 20. While the court's analysis of the balance of hardship is narrowed to the parties affected, the court can consider the hardships to all individuals covered by the Act, not limited to the parties, in assessing the public interest. *Golden Gate Rest. Ass'n v. City & County of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008). Though "[p]ublic interest favors the exercise of First Amendment rights," *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014), "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may [then] in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982). In considering whether the public interest is impaired, the court weighs only the public interest in light of the likely consequences of the injunction and need not reach possibilities that are highly speculative. *See Golden Gate Rest. Ass'n*, 512 F.3d at 1126.

Plaintiffs argue there is a "significant interest in upholding First Amendment principles." Mem. P&A at 22 (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter*, 555 U.S. 7, 129 S. Ct. 365, 172

L. Ed. 2d 249). Plaintiffs further contend when constitutional grounds are threatened, and where the State has shown no "urgency for the particular enactment" posing the threat, it is in the public interest to make sure the Act is constitutional before effectuating it. Mem. P&A at 22.

Here, if the injunction is granted, it will limit the ability of a subset of women who are or may be pregnant from accessing the straightforward information in the required notice when they are making their time sensitive reproductive decisions. And "[t]he general public has an interest in the health of state residents." *Selecky*, 586 F.3d at 1139 (citing *Golden Gate Rest. Ass'n*, 512 F.3d at 1126 (quotation marks omitted)). The Act is intended to provide notice of such healthcare services to women in California and there is a general public interest in ensuring the women of this state know they have access to publicly funded healthcare related to family planning, contraception, abortion, and prenatal care and delivery. Enjoining the Act would interfere with the public interest regarding the health of state residents.

Accordingly, though the public interest favors upholding the First Amendment, the public interest also favors ensuring California women are fully informed as to their reproductive healthcare options. The grant of an injunction would not only affect the parties here, but would also have an effect on non-parties and the greater public. *See Selecky*, 586 F.3d at 1139. Weighing

the two effects, the court finds plaintiffs have not carried their burden in showing the injunction is in the public interest.

VIII. CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction enjoining AB 775 from taking effect is DENIED.

IT IS SO ORDERED.

DATED: December 18, 2015

/s/ Kimberly J. Mueller

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, a California Religious Nonprofit Corporation and ALTERNATIVE WOMEN'S CENTER, Plaintiffs-Appellants, v. KAMALA HARRIS, Attorney General, State of California, Defendant-Appellee.	No. 15-17517 D.C. No. 2: 15-cv-02122-KJM-AC Eastern District of California, Sacramento ORDER (Filed Dec. 20, 2016)

Before: D.W. NELSON, TASHIMA, and OWENS, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Owens voted to deny the petition for rehearing en banc. Judge Nelson and Judge Tashima recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are **DENIED.**

839 F.3d 823

United States Court of Appeals
for the Ninth Circuit

June 14, 2016, Argued and Submitted,
San Francisco, California; October 14, 2016, Filed

No. 16-55249

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, a Virginia corporation, DBA NIFLA; PREGNANCY CARE CENTER, a California corporation, DBA Pregnancy Care Clinic; FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation, Plaintiffs-Appellants,

v.

KAMALA HARRIS, in her official capacity as Attorney General for the State of California; THOMAS MONTGOMERY, in his official capacity as County Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; EDMUND G. BROWN, JR., in his official capacity as Governor of the State of California, Defendants-Appellees.

No. 16-55249

Summary:

SUMMARY*

Civil Rights

The panel affirmed the district court's denial of a motion for a preliminary injunction sought by three

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

religiously-affiliated non-profit corporations to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act.

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

As a threshold matter, the panel held that appellants' claims were constitutionally and prudentially ripe. Addressing the free speech claim, the panel concluded that the proper level of scrutiny to apply to the Act's regulation of licensed clinics was intermediate scrutiny, which the Act survived. With respect to unlicensed clinics, the panel concluded that the Act survived any level of scrutiny.

The panel also rejected appellants' arguments that they were entitled to a preliminary injunction based on their free exercise claims. The panel held that the Act is a neutral law of general applicability, which survived rational basis review. The panel concluded that appellants were unable to demonstrate a likelihood of success on the merits of their First Amendment claims.

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Kristen Law Sagafi and Martin D. Quiñones, Tycko & Zavareei LLP, Oakland, California, for Amicus Curiae Physicians for Reproductive Health.

Priscilla Joyce Smith, Brooklyn, New York, for Amicus Curiae Information Society Project at Yale Law School.

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

Opinion by: Dorothy W. Nelson

Opinion

D.W. NELSON, Senior Circuit Judge:

The National Institute of Family and Life Advocates, et al. appeal from the district court's denial of their motion for a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act). The Act requires that licensed pregnancy-related clinics disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. The Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed by the State of California. Appellants allege that the Act violates their fundamental rights, including their First Amendment guarantees to free speech and the free exercise of religion.

We affirm the district court's denial of Appellants' motion for a preliminary injunction. For the free speech claim, we conclude that the proper level of scrutiny to apply to the Act's regulation of licensed clinics is intermediate scrutiny, which it survives. With respect to unlicensed clinics, we conclude that the Act survives any level of scrutiny. For the free exercise claim, we conclude that the Act is a neutral law of

general applicability, and that it survives rational basis review. Appellants, therefore, are unable to show the "most important" factor under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008): likelihood of success on the merits. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

BACKGROUND

I. The FACT Act

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

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

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

Id. at § 1(b).

The Legislature also found that the ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers (CPCs). CPCs "pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions" in order to fulfill their goal of "interfer[ing] with women's ability to be fully informed and exercise their reproductive rights." Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3. The Legislature found that CPCs, which include unlicensed and licensed clinics, employ "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." *Id.* There are approximately 200 CPCs in California. *Id.*

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

Thus, as required under the Act, all licensed covered facilities must disseminate a notice (the Licensed Notice) stating, "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Cal. Health & Safety Code § 123472(a)(1). The Act defines a licensed covered facility as "a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services," and that also satisfies two or more of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility

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

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

> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type. (B) A printed notice distributed to all clients in no less than 14-point type. (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures.

Id. § 123472(a)(2).

The Act also covers unlicensed facilities. An unlicensed clinic is "a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services" and that also satisfies two of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

Id. § 123471(b). Unlicensed clinics must disseminate a notice (the Unlicensed Notice) stating, "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.* § 123472(b)(1). The Unlicensed Notice must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." *Id.* § 123472(b). Information in advertising material must be "clear and conspicuous," and the onsite notice must be "at least 8.5 inches by 11 inches and written in no less than 48-point type, and . . . posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.* § 123472(b)(2)-(3).

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

II. Procedural History

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

Appellants are strongly opposed to abortion. None provide abortions or referrals for abortions. NIFLA's

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[1] In addition to this appeal, this panel also heard argument in related cases *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 15-17517, ___ Fed. Appx. ___, 2016 U.S. App. LEXIS 18534 (9th Cir. 2016), and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497, ___ Fed. Appx. ___, 2016 U.S. App. LEXIS 18532 (9th Cir. 2016).

mission is to "empower the choice for life," and Pregnancy Care Clinic "provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child, rather than abortion." Fallbrook believes "that human life is a gift of God that should not be destroyed by abortion."

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

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[2] The district court's finding that the City Attorney of El Cajon is not a proper defendant was harmless error. The Act grants the City Attorney the power to enforce the Act. *See* Cal. Health & Safety Code § 123473. The City Attorney, therefore, is a proper defendant.

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

enforcement of the Act prior to the full litigation of the action.

The district court denied Appellants' motion for a preliminary injunction. The court found that Appellants were unable to show a likelihood of success on their free speech claim. With respect to the Licensed Notice, the court held that the Act either regulated professional conduct subject to rational basis review, or professional speech subject to intermediate scrutiny, and the Act survived both levels of review. The court also held that the Act did not constitute viewpoint discrimination. With respect to the Unlicensed Notice, the court held that it withstood any level of scrutiny. In addition, Appellants could not show a likelihood of success on the merits of their free exercise claim because, the court held, the Act is a neutral law of general applicability which survived rational basis review. The court then explained that even though Appellants raised "serious questions going to the merits," *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011), they could not demonstrate that the other *Winter* factors weighed in favor of granting a preliminary injunction.

STANDARD OF REVIEW

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

ANALYSIS

I. Appellants' Claims Are Justiciable.

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

We reject these arguments.

A. Appellants' Claims Are Constitutionally Ripe.

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

of past prosecution or enforcement of the challenged statute. *Id.*

These factors allow for plaintiffs to bring pre-enforcement challenges to laws that they claim infringe their fundamental rights. *See id.* at 1137 n.1. Indeed, we have long recognized that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. . . . [p]articularly in the First Amendment-protected speech context[.]" *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (citation omitted); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988).

Appellants' claims are constitutionally ripe. Before the district court and this Court, Appellants have explicitly stated that they will not comply with the Act, even if enforced. Appellants have made this pledge of disobedience although they are aware that violators of the Act are subject to civil penalties. Cal. Health & Safety Code § 123473(a). The AG, moreover, has not stated that she will not enforce the Act. *See Am. Booksellers Ass'n*, 484 U.S. at 393 ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them."). A lack of enforcement history is not a compelling reason to find Appellants' claims unripe in this

context.[4] The Act did not go into effect until January 1, 2016, approximately one month before the district court denied the motion for a preliminary injunction. Appellants, therefore, could not have demonstrated a significant history of enforcement. *See Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (affording the factor of past prosecution "little weight" when the challenged law was new); *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("[E]nforcement history alone is not dispositive. Courts have found standing where no one had ever been prosecuted under the challenged provision.").

B. Appellants' Claims Are Prudentially Ripe.

Even if a case is constitutionally ripe, we have discretionary power to decline to exercise jurisdiction. *Thomas*, 220 F.3d at 1142. When assessing prudential ripeness, we consider: (1) the fitness of the issues for

[4] Moreover, we note that NIFLA filed a 28(j) letter informing the Court that, on August 16, 2016, Los Angeles City Attorney Michael Feuer sent an enforcement letter to co-counsel for NIFLA. In the letter, the City Attorney provided notice that The People of the State of California planned to make an *ex parte* application for an order to show cause why a preliminary injunction should not issue and a temporary restraining order enjoining the Pregnancy Counseling Center, a member of NIFLA, from violating the FACT Act. The City indicated it also would file a complaint containing a single cause of action – violation of California Business & Professions Code § 17200, *et seq.* – and seeking equitable relief and civil penalties. NIFLA states this chilled the speech of the Pregnancy Counseling Center.

judicial decision and; (2) hardship to the parties if we were to withhold jurisdiction. *Id.* at 1141.

This Court has stated that "[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Wolfson*, 616 F.3d at 1060 (quoting *U.S. W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). When evaluating hardship "[w]e consider whether the 'regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (quoting *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 783 (9th Cir. 2000)). "[A] litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Id.* (quoting *MFS Intelenet, Inc.*, 193 F.3d at 1118).

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

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

We also conclude that the parties would face immediate and significant hardships if we were to decline to exercise jurisdiction. Until we issue a decision,

Appellants must routinely choose between holding fast to their firmly held beliefs about abortion, or complying with the Act. And although the San Diego County Counsel claims that he will suffer hardship if he is forced to defend the Act, we find more significant the definite and direct hardship that all parties will suffer if we were to decline to find jurisdiction. As noted, without a decision, Appellants must continually choose between obeying the law or following their strongly held convictions about abortion, and the AG will have to choose whether or not to enforce a law without the benefit of a ruling on its constitutionality.

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

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

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

factors. *All. for the Wild Rockies*, 632 F.3d at 1134-35 (citation omitted).

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

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

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

[5] We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985). Commercial speech "does no more than propose a commercial transaction." *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir.

Notice survives intermediate scrutiny. We also conclude that the Unlicensed Notice survives any level of scrutiny. Thus, the district court did not err in finding that Appellants cannot show a likelihood of success on the merits of their free speech claims.

1. Strict Scrutiny Is Inappropriate.

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

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

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

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2010) (citation omitted). The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech.

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

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

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

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

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

Sorrell, however, did not rely solely on legislative intent. The Court concluded that the law "on its face burden[ed] disfavored speech by disfavored speakers," allowing use of the pharmacy records by all "but a narrow class of disfavored speakers." *Id*. at 564, 573. Thus, while "a statute's stated purpose may also be considered," *Sorrell* did not turn exclusively on the law's motivation or purpose. *Id.* at 565. Importantly, the law in *Sorrell* applied to the speakers that were the targets of the law, while it exempted others. In sharp contrast, as discussed, the Act applies to almost all licensed and unlicensed speakers. Other than the two narrow exceptions unrelated to viewpoint, the Act applies equally to

clinics that offer abortion and contraception as it does to clinics that oppose those same services.

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

Conant is distinguishable. Again, other than the two exceptions, the Act applies to all clinics, regardless of their stance on abortion or contraception. Next, unlike in *Conant*, the Act does not favor or disfavor any particular viewpoint. Indeed, contrasting this case with the Fourth Circuit's recent decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), confirms that the Act does not engage in viewpoint discrimination. In *Stuart*, the Fourth Circuit held that a statute that required doctors to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions violated the physicians' First Amendment rights. 774 F.3d at 255-56. In so doing, the Fourth Circuit concluded that the law compelled speech that "convey[ed] a particular opinion," which was, "to convince women seeking abortions to change their minds or reassess their decisions." *Id.* at 246. Here, however, the Act does not convey any opinion. The Licensed Notice and the Unlicensed Notice do not imply or suggest any

preference regarding family-planning services. Instead, the Licensed Notice merely states the existence of publicly-funded family-planning services, and the Unlicensed Notice only states that the particular clinic in which it is distributed is not licensed.

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

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

In arguing that content-based regulations are always subject to strict scrutiny, Appellants cite the Supreme Court's recent decision in *Reed*. In *Reed*, the Supreme Court held that a town's regulation of the manner in which outdoor signs were displayed was content-based and unable to satisfy strict scrutiny. 135 S. Ct. at 2227, 2231. In reaching this conclusion, the Court expressly stated that "[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.

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

challenged restriction is content-based, it is not necessarily subject to strict scrutiny").

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

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State* . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

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

In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based. *See Stuart*, 774 F.3d at 248-49 (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012)

(applying a reasonableness test); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (applying a reasonableness test).

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

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

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

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

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

profession in the context of an abortion procedure." *Id.* at 249.

We agree with the Fourth Circuit that *Casey* did not establish a level of scrutiny to apply in abortion-related disclosure cases. *Casey*'s short discussion of a physician's First Amendment rights in the context of abortion means only what it says – that there was no violation of the physicians' First Amendment rights given the particular facts of *Casey*. *See* 505 U.S. at 884 ("We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*." (emphasis added)). We need not "read too much," *Stuart*, 774 F.3d at 249, into *Casey*'s statement that physicians are "subject to reasonable licensing and regulation by the State." 505 U.S. at 884. *Casey* did not announce an entirely new rule with this limited statement. *See Stuart*, 774 F.3d at 249 ("That particularized finding [in *Casey*] hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion."). Nor did it render inapplicable other frameworks for assessing free speech claims when the speech at issue concerns abortion. Instead, what *Casey* did was merely confirm what we have always known, which is that professionals are subject to reasonable licensing by the state. *See, e.g.*, *Dent v. Va.*, 129 U.S. 114, 122, 9 S. Ct. 231, 32 L. Ed. 623 (1889) (examining a law regulating the medical profession and writing that "[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against

the consequences of ignorance and incapacity, as well as of deception and fraud").

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

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

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

In *Pickup*, we assessed the level of scrutiny to apply to Senate Bill 1172, a California law that banned mental health therapists from conducting on minor patients any practice that purported to change a patient's sexual orientation. 740 F.3d at 1221. We explained that the level of protection to apply to specific instances of professional speech or conduct is best understood as along a continuum. At one end is a professional's right to engage in a "public dialogue, [where] First Amendment protection is at its greatest." *Id.* at 1227. There, "[professionals] are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection[.]" *Id.* at 1227-28. On the other end lies professional conduct, where the speech

at issue is, for example, a form of treatment. *Id.* at 1229. When regulating conduct, "the state's power is great, even though such regulation may have an incidental effect on speech." *Id.* Because the law in *Pickup* involved the regulation of a specific type of therapy, we held that it regulated professional conduct subject to rational basis review. *Id.* at 1231.

Pickup also delineated professional speech that falls in the middle of the continuum. At the midpoint, "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it" because "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *Id.* at 1228. *Pickup*, however, never discussed the level of scrutiny appropriate for speech that fell at the midpoint.

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

To begin, the Licensed Notice regulates professional speech. Underlying the *Pickup* opinion is the principle that professional speech is speech that occurs between professionals and their clients in the context of their professional relationship. In other words, speech can be appropriately characterized as professional when it occurs within the confines of a professional's practice. *See King v. Governor of N.J.*, 767 F.3d

216, 232 (3d Cir. 2014) ("[W]e conclude that a licensed professional does not enjoy the full protection of the First Amendment when speaking as *part of the practice of her profession*." (emphasis added)). The idea that the speech that occurs between a professional and a client is distinct from other types of speech stems from the belief that professionals, "through their education and training, have access to a corpus of specialized knowledge that their clients usually do not" and that clients put "their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity." *Id.*; *see also Lowe v. SEC*, 472 U.S. 181, 232, 105 S. Ct. 2557, 86 L. Ed. 2d 130 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."). This is why states have the power to regulate professions, *see, e.g.*, *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 449, 74 S. Ct. 650, 98 L. Ed. 829 (1954) ("The state's discretion . . . extends naturally to the regulation of all professions concerned with health."), as well as the power to regulate the speech that occurs within the practice of the profession.

Licensed clinics engage in speech that occurs squarely within the confines of their professional practice. For example, Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services

such as peer counseling and education. Thus, a regular client of Pregnancy Care could easily use many of their services throughout the stages of her pregnancy, such as receiving educational information about best health practices when pregnant, relying upon Pregnancy Care for regular check-ups, or using Pregnancy Care as a resource for counseling. In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family-planning services. There is no question that Pregnancy Care's clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill. Because licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech.

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

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

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

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

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

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

[8] We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech. *But see Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) ("[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a *paying* client or instead engages in public discussion and commentary." (emphasis added)).

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

3. The Licensed Notice Survives Intermediate Scrutiny.

In order to survive intermediate scrutiny, "the State must show . . . that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. Intermediate scrutiny is "demanding" but requires less than strict scrutiny. *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016). "What is required is 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.' " *Id.* at 649 (quoting *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)).

We conclude that the Licensed Notice satisfies intermediate scrutiny. California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like

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

We conclude that the Licensed Notice is narrowly drawn to achieve California's substantial interests. The Notice informs the reader only of the existence of publicly-funded family-planning services. It does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services. The Licensed Notice is closely drawn to achieve California's interests in safeguarding public health and fully informing Californians of the existence of publicly-funded medical services. And given that many of the choices facing pregnant women are time-sensitive, such as a woman's

right to have an abortion before viability, *Casey*, 505 U.S. at 846, we find convincing the AG's argument that because the Licensed Notice is disseminated directly to patients whenever they enter a clinic, it is an effective means of informing women about publicly-funded pregnancy services.

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

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

information through other means, it need not prove that the Act is the least restrictive means possible.[9]

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

4. The Unlicensed Notice Survives Any Level of Review.

We now address the speech regulated by the Unlicensed Notice. While we acknowledge that unlicensed

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

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

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

In order to survive strict scrutiny, a regulation must be "narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665, 191 L. Ed. 2d 570 (2015).

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

We conclude that the Unlicensed Notice is narrowly tailored to this compelling interest. By stating

that the clinic in which it is disseminated is not licensed by the State of California, the Unlicensed Notice helps ensure that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state. The Unlicensed Notice is also only one sentence long. It merely states that the facility in which it appears is not licensed by California and has no state-licensed medical provider. It says nothing about the quality of service women may receive at these clinics, and in no way implies or suggests California's preferences regarding unlicensed clinics.

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

licensed medical professional [was] not on staff, d[id] not require any other specific message, and in neutral language state[d] the truth." 722 F.3d at 190 (internal quotation marks and citation omitted). The surviving portions of the regulations in *Evergreen* and *Centro Tepeyac* merely state whether or not the clinics had licensed providers, which is exactly what the Unlicensed Notice does.

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

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

Courts have long recognized that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Empl't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (quoting *United States v. Lee*, 455 U.S. 252,

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

263 n.3, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment)). A neutral and generally applicable law is subject to only rational basis review. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015).

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

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

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

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

And finally, this action is not a "hybrid-rights" case in which a free exercise plaintiff has made out a "colorable claim that a companion right has been violated." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). Appellants have not shown a likelihood of success on the merits of their free speech claim. Thus, there is no "colorable claim" for "a companion right." *Id.*

We conclude that the Act is a neutral law of general applicability, subject to only rational basis review. *See Stormans*, 794 F.3d at 1075-76. Because the

Licensed Notice survives intermediate scrutiny, and the Unlicensed Notice survives any level of review, the Act necessarily also survives rational basis review.[11]

CONCLUSION

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

We also reject Appellants' arguments that they are entitled to a preliminary injunction based on their free

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[11] We also find that Appellants have not raised "serious questions" going to the merits of their claims; thus, the alternate test set forth in *Alliance for the Wild Rockies* does not apply. The district court's conclusion that there were serious questions going to the merits was harmless error because the district court appropriately denied the motion for a preliminary injunction. Because Appellants cannot show a likelihood of success on the merits or "serious questions" going to the merits of their First Amendment claims, we need not discuss the remaining *Winter* factors.

exercise claims. The Act is a neutral law of general applicability, which survives rational basis review.

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

AFFIRMED.