NO. 16-1140

IN THE
Supreme Court of the United States

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

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case presents an ideal opportunity for the Court to address a circuit conflict regarding the proper test for determining whether a compelled speech regulation on pro-life pregnancy centers survives First Amendment scrutiny.

The Ninth Circuit determined that the California Reproductive FACT Act (the "Act") is a neutral regulation of professional activity. However, in addition to it not being neutral, the Act impermissibly compels Petitioners to speak a government message and to promote government programs contrary to their pro-life beliefs. This conflicts with this Court's precedent, as well as rulings of other Circuits.

ARGUMENT

I. The Ninth Circuit decision upholding the compelled disclosures applicable to non-medical pregnancy centers conflicts with decisions of this Court.

The Ninth Circuit ruled that California may force non-medical facilities to recite extensive unwanted messages even under strict scrutiny, which Respondents concede applies to non-professionals. App. 36a–39a, Opp. 15. But this Court's decision in *Riley v. National Federation of the Blind,* 487 U.S. 781 (1988), struck down compelled disclosures by paid charitable solicitors under the First Amendment. The Act fails the strict scrutiny required by *Riley*.

Respondents have not explained how the Ninth Circuit decision regarding non-medical centers comports with *Riley*. The only argument Respondents have made is based on a mischaracterization of dicta in that case: they wrongly contend *Riley* noted that a requirement that paid solicitors disclose their professional affiliation might be narrowly tailored. Opp. 25 (citing *Riley*, 487 U.S. at 799; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 248 (2d Cir. 2014)). This Court only mentioned that provision to show the state's interest in "full disclosure" is "not as weighty as the State asserts." 487 U.S. at 798. It was not included in the Court's list of potential regulations that are narrowly tailored. *Id.* at 799. *Riley*'s core holding is that the state could not require professional charitable solicitors to make unwanted disclosures prior to requesting donations because they would "almost certainly hamper the[ir] legitimate efforts" to advance a cause because an initial disclaimer might cause the listener to halt the conversation. 487 U.S. at 796–98, 800. Such is the case here.

Riley's mere dicta suggesting that a disclosure of professional status undermined the State's asserted interest does not mandate the conclusion that the Act's regulation of unlicensed centers is narrowly tailored. On the contrary, the burdensome nature of the Act effectively silences the unlicensed pregnancy centers' pro-life message. The Act requires a twenty-nine word disclosure to appear in myriad languages, and subject to strict font, size, and color

requirements. *See* Pet. for Cert. at 32–33. The Act imposes these burdensome requirements on all advertising, and renders it nearly impossible for unlicensed enters to engage in advocacy through advertisement. The Ninth Circuit ruled that California may force unlicensed facilities to recite extensive unwanted messages even under strict scrutiny, which Respondents concede applies to non-professionals' speech.[1] No limiting principle to this broad power to compel speech was provided by the Ninth Circuit. The Act cannot be narrowly tailored when its burdensome disclosures effectively silence the unlicensed centers' speech.

II. This Court and other Courts of Appeals apply strict scrutiny to professional advocacy speech.

Respondents argue that intermediate scrutiny is applicable to the licensed centers because the Act regulates professional speech or, alternatively, regulates commercial speech. Opp. 20–21. But this

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[1] Respondents allege that Petitioners have not preserved arguments concerning the Act's language, font, size, and color requirements. Petitioners' Complaint clearly cites the Act in its entirety as violative of the First Amendment, including the burdensome language, font, and size requirements. App. 81a–82a, 96a, 99a. Petitioners also made these arguments at the Ninth Circuit with no objection from Respondents. App. Br. 14, 54, 9th Cir. Case No. 16-55249, ECF No. 7. Petitioners' arguments are therefore preserved.

argument, and the Ninth Circuit's decision to apply intermediate scrutiny to the Act, directly conflicts with precedent of this Court and other Courts of Appeals regarding content and viewpoint based discrimination, as well as the regulation of pro bono professional speech.

a. The Act is content and viewpoint based, contrary to principles established in *Reed*.

Respondents effectively concede Petitioners' arguments that the Act is content and viewpoint discriminatory by not responding to them. The Act is unquestionably content discriminatory, as the Ninth Circuit itself recognized, *see* App. 22a, and Respondents admit, *see* Opp. 11, and therefore subject to strict scrutiny. Its requirements apply only to facilities that provide particular pregnancy information. Licensed pro-life pregnancy centers must post a disclaimer that states: "California has public programs that provide immediate free or low cost . . . contraception . . . and abortion," and to, "contact the county social services office at [insert telephone number]." App. 80a. *Reed v. Town of Gilbert*, which requires that content-based laws be "subject to strict scrutiny," 135 S. Ct. 2218, 2228 (2015), compelled the Ninth Circuit to apply strict scrutiny here. But the Ninth Circuit refused and applied intermediate scrutiny. App. 28a–36a.

The Act is also viewpoint based because it targets the pro-life viewpoint of pregnancy centers. Respondents have conceded that the "purpose and justification" of the Act is to target "crisis pregnancy

centers," that is, centers whose "principal aim is to discourage or prevent women from seeking abortions." App. 7a. Respondents further admit that the California legislature targeted "so-called 'crisis pregnancy centers'" because it believes "that they frequently provide women with medically inaccurate information, and that such clinics allegedly "present misleading information to women about reproductive medial services." Opp. 5, 13 (citing App. 37a). But no evidence that pregnancy centers had mislead anyone was presented to the legislature. The only evidence underlying the Act is biased, unscientific "reports" supplied by advocacy organizations that champion abortion, such as NARAL Pro-Choice California. *See* App. Br. 47, 9th Cir. Case No. 16-55249, ECF No. 7. The University of California, Hastings College of Law also issued a similar "report" that specifically explored strategies to restrict pro-life pregnancy centers. *Id*. It is little wonder then that the State imposed a broad prophylactic speech restriction only on licensed pro-life pregnancy centers. This Act was designed to target Petitioners' pro-life viewpoint. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (heightened scrutiny required when government regulates speech because it disagrees with the message).

Respondents allege that the purpose of the Act is to enroll citizens in Family PACT and Medi-Cal programs. *See* Opp. 2. But licensed medical pregnancy centers that participate in the Medi-Cal program may enroll participants in the Medi-Cal program and still be subject to the requirements of the Act. Petitioners object to participation in the Family PACT program because participating organizations must directly

provide abortifacient contraceptives. Again, the Act targets the Petitioners' pro-life viewpoint in conflict with *Reed.*

b. Strict scrutiny applies to the regulation of professionals' pro bono speech of licensed centers.

The Ninth Circuit's decision conflicts with this Court's decisions in *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963), which held that restrictions on pro bono speech in a regulated profession trigger strict scrutiny. The State claims that *In re Primus* and *Button* are inapplicable, Opp. 18–19, because the centers here deal with confidential medical services and not advocacy. Both of these points are incorrect. This Court applied strict scrutiny in both *In re Primus* and *Button*, even though both cases dealt with confidential legal services.

In re Primus held that regulations of attorney speech are subject to strict scrutiny where the attorney is offering services free of charge for public interest purposes. 436 U.S. at 437–38 & n. 2. This Court acknowledged that any regulation of pro bono advocacy speech must be done with "significantly greater precision" than regulations of the speech of licensed professionals for pecuniary gain. *Id.* at 438. Likewise, *Button*—which also dealt with the regulation of pro bono attorney speech—held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 371 U.S. 415, 438 (1963). Here, licensed centers are engaging in speech for the advancement

of their pro-life viewpoint, offering their services for free. The central holding of both *In re Primus* and *Button* are therefore squarely on point.

Respondents attempt to distinguish this line of cases by alleging that the licensed centers provide confidential medical services, and therefore advocacy is not involved. Opp. 19 & n. 12. But the organizations in *In re Primus* and *Button* also provided confidential services, and the fundamental purpose of the pregnancy centers is to advocate a pro-life viewpoint by administering confidential services, just as in those precedents.

Respondents allege that *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013), is inapplicable because the "recognition that States have greater latitude to regulate . . . a person's advice to a 'paying client' does not imply converse restrictions on the States' ability to regulate the pro bono services of professionals such as doctors and lawyers." Opp. 20. But *In re Primus* and *Button* state explicitly that there are more limitations on the state's ability to restrict the pro bono activities of licensed professionals when such activity is undertaken as a form of advocacy. *See In re Primus*, 436 U.S. at 432–33; *Button*, 371 U.S. at 429, 437–38. The Court in *Moore-King* held "the relevant inquiry to determine whether to apply the professional speech doctrine" is based on "whether the speaker is providing personalized advice in a private setting to a paying client." 708 F.3d at 569. The Ninth Circuit's refusal to apply this standard, and complete disregard for this Court's holding in *In re Primus* and

Button, conflicts with the precedent of this Court and the Fourth Circuit.

c. *Planned Parenthood v. Casey* does not compel a lower standard of review.

As Respondents agree, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), has been applied inconsistently by the Courts of Appeals. *See* Opp. 12. Resolving that conflict is an additional reason why the Court should grant this petition.

Casey allowed states to require physicians to disclose certain items to women before an abortion, but only as part of the process of obtaining their informed consent prior to conducting a medical procedure, and pursuant to the state's interest in protecting unborn life. 505 U.S. at 881–83. However, the Act compels speech long before any procedure is even contemplated by requiring a disclosure the moment a client walks in the door. This disclosure is not tied to any sort of procedure or treatment, and must be given even when no treatment or procedure is ever done. In these circumstances, *Casey*'s rule simply does not apply.

Moreover, Respondents concede that the Ninth Circuit admitted "some courts have applied [rational basis] review with respect to regulations of medical professionals' speech" pursuant to *Casey*. Opp. 18 & n. 11. But the Ninth Circuit "rejected the rational basis standard in favor of intermediate scrutiny." Opp. 15 & n. 11 (citing App. 25a–28a). This ruling

conflicts with the Eleventh Circuit's holding in *Wollschlaeger v. Governor of Florida*, which Respondents admit applied heightened scrutiny. *See* 848 F.3d 1293, 1301 (11th Cir. 2017). The court found that it "need not decide whether strict scrutiny applies" where the law failed even heightened scrutiny, though the court acknowledged that strict scrutiny would normally apply to such content-based regulations. *Id.* at 1308. Such an inconsistent application of *Casey* further warrants this Court's review.

d. The commercial speech doctrine is not applicable.

Respondents argue the commercial speech doctrine as an independent basis for declining review. However, the commercial speech doctrine is inapplicable to the speech of the licensed or unlicensed pregnancy centers, and the Ninth Circuit quickly—and correctly—dismissed Respondents' commercial speech argument. *See* App. 18a–19a & n. 11.

The District Court found, as a factual matter, that Petitioners "offer free information and services." App. 49a. But this court defines commercial speech as expression that "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). No such speech is at issue here. Moreover, even commercial speech regulations were struck down under heightened scrutiny in *Sorrell v. IMS Health*, 564 U.S. 552, 557 (2011). *See also Riley*, 487 U.S. at 796 ("[W]e do not believe that the speech

retains its commercial character when it is inextricably intertwined with otherwise fully protected speech"). The viewpoint discriminatory measures at issue here demand an even higher level of scrutiny.

III. The Ninth Circuit's holding that the Act survives First Amendment scrutiny creates a circuit conflict.

The Act clearly targets pro-life pregnancy center's speech just as the regulations did in *Evergreen Association v. City of New York*, 740 F.3d 233 (2d Cir 2012). Yet Respondents claim that case is distinguishable because the regulations "went beyond merely supplying information in a neutral manner," Opp. 13, while the Act "does not use . . . language that suggests the California Legislature's preferences for prenatal care." *Id*. (citing App. 36a). But this is simply wrong.

In fact, the Second Circuit invalidated a requirement that pregnancy centers, like Petitioners, post a disclosure stating whether or not a facility provides referrals for abortion, emergency contraception or prenatal care (the "Services Disclosure"), *id*. at 238, because it implicated "a public debate over the morality and efficacy of contraception and abortion." *Id.* at 249. It held that the "Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues," contrary to the First Amendment. *Id*. at 249–50. The *Evergreen* Court noted that the Services Disclosure failed under either intermediate or strict scrutiny. *Id*. at 249. The Court further struck down a separate

mandatory notification that the City encourages women to consult with a licensed medical professional (the "Government Message"). *Id*. at 238.

The Act in this case lists the same items contained in *Evergreen's* Services Disclosure: abortion, contraception, and prenatal care. But it also states that California offers subsidies for those services, and tells women where to get them. App. 80a. The Act is therefore more constitutionally burdensome than the Services Disclosure struck down in *Evergreen* because it "requir[es] pregnancy services centers to advertise on behalf of" the government. 740 F.3d at 250. The circuit conflict is clear.

IV. The Ninth Circuit's decision holding that the Act does not violate the Free Exercise Clause conflicts with this Court's precedent.

Respondents allege that the Act does not violate the Free Exercise Clause because it is neutral and generally applicable pursuant to *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). Opp. 28–31. But the Act is neither neutral nor generally applicable because it exempts broad segments of the medical community that engage in the same exact activities as Petitioners. Indeed, the Act is targeted only to entities, such as Petitioners, whose moral and religious beliefs compel them to oppose abortion.

Respondents contend that the Act does not violate the Free Exercise Clause because the Act applies to "all unlicensed facilities that primarily

provide pregnancy-related services," and to licensed facilities based on neutral criteria." *See* Opp. 29–30. However, the Act applies only to facilities which primarily provide pregnancy-related services, thus excluding myriad hospitals and clinics which provide the same or similar services, and further exempts providers who participate in both Medi-Cal and Family Planning, Access, Care, and Treatment Program ("Family PACT"). App. 78a–79a. Any center can avoid the Act's compelled speech requirements by joining both programs. But participation in the Family PACT program requires a center to provide "family planning services" that include "all FDA approved contraceptive methods and supplies." *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

Licensed Petitioners cannot participate in the Family PACT program due to their religious beliefs, because doing so would require them to supply contraceptives that may cause abortions. Because the Act ties its exemption from the compelled speech to dispensing abortifacients, the Act's compelled speech requirements end up applying only to those centers that oppose abortion, many of which do so on religious grounds. The Act is therefore not neutral.

Moreover, the Act is not generally applicable as many medical facilities are exempted from its scope, including a variety of facilities that provide pregnancy-related services. App 80a. Respondents allege that the exemptions do not amount to a "gerrymander" under *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), because "the exemption for licensed clinics that are already

'enrolled as a Medi-Cal provider and a provider in the Family [PACT] Program,' § 123471(c)(2), recognizes that there is no reason to mandate notice of a phone number for accessing free or low-cost public services at facilities that are able to (and have the incentive to) enroll eligible patients in those very programs themselves." Opp. 30. By definition, the existence of an exemption means that the Act is not generally applicable.

Furthermore, the Act is gerrymandered under *Lukumi* because it applies exclusively to pro-life pregnancy centers, a majority of which are religious organizations that advocate against abortion in advance of their religious views. Strict scrutiny is required for this reason as well.

V. This Petition is an appropriate vehicle for this Court's review.

Respondents allege that review is inappropriate because discovery has not yet occurred. But, as the Ninth Circuit recognized, this case presents only issues of law, and there is no need for further fact finding. App. 16a ("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."). Accordingly, no further factual development is required, particularly when the Act clearly compels speech in a content and viewpoint discriminatory fashion. All facts necessary to assess the legality of the statute are contained in the Complaint, and no further factual development is required.

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should grant review.

Respectfully submitted.

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