No. _____

In the Supreme Court of the United States

LIVINGWELL MEDICAL CLINIC, INC., *et al.*,
Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California, in his official capacity, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

FRANCIS J. MANION
GEOFFREY R. SURTEES
American Center for Law & Justice
[redacted]

EDWARD L. WHITE III
ERIK M. ZIMMERMAN
American Center for Law & Justice
[redacted]

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
ANDREW J. EKONOMOU
JORDAN SEKULOW
WALTER M. WEBER
American Center for Law & Justice
[redacted]

ROBERT H. TYLER
Tyler & Bursch, LLP
[redacted]

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · [redacted]

QUESTIONS PRESENTED

California law compels certain licensed facilities that offer pregnancy-related services to notify all clients, no matter the reason for their visit, that they might be eligible for free or low cost abortions, even if these facilities do not provide abortion services, and even if those facilities object to abortion. The exact wording of that notice and the manner of its dissemination are dictated by the law.

Petitioners are pro-life, faith-based, non-profit clinics that offer free goods and services to women who are, or might be, pregnant. Pursuant to their moral and religious principles, Petitioners do not refer their clients for abortion. Petitioners sought a preliminary injunction based on their free speech/compelled speech claim, which the district court denied. The Ninth Circuit affirmed that decision, holding that although the law compels speech and is content-based, it is a regulation of "professional speech" and therefore need not satisfy strict scrutiny. The questions presented are:

1. Did the Ninth Circuit err, in conflict with the Second and Fourth Circuits, in holding that Petitioners can be compelled to advertise free or low cost abortion services to all clients?

2. Did the Ninth Circuit err in not applying strict scrutiny to a law that compels speech and is content-based, in conflict with decisional law of this Court?

PARTIES TO THE PROCEEDINGS

Petitioners are LivingWell Medical Clinic, Inc., Pregnancy Care Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc.

Respondents are the Attorney General for the State of California, Xavier Becerra, sued in his official capacity;[1] Alison Barratt-Green, County Counsel of Nevada County, California, sued in her official capacity; Christopher A. Callihan, City Attorney of City of Salinas, California, sued in his official capacity; and Charles J. McKee, County Counsel of Monterey County, California, sued in his official capacity.[2]

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[1] Kamala Harris, the previous Attorney General for the State of California, and Karen Smith, Director of the California Department of Public Health, were both sued in their official capacities in the district court, but Xavier Becerra has replaced Kamala Harris as the California Attorney General, and Karen Smith has been dismissed from this action by a joint stipulation of the parties.

[2] Defendants, Cindy Day-Wilson, City Attorney of Eureka, California, sued in her official capacity; Jeffrey S. Blanck, County Counsel of Humboldt County, California, sued in his official capacity; and Michael Colantuono, City Attorney of Grass Valley, California, sued in his official capacity, have been dismissed from this action by a joint stipulation of the parties.

CORPORATE DISCLOSURE STATEMENT

Petitioners, LivingWell Medical Clinic, Inc., Pregnancy Care Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc., are California non-profit corporations. None of the Petitioners have a parent corporation or are publicly held.

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INTRODUCTION

Despite decades of case law establishing the principle that one cannot be conscripted into acting as a ventriloquist's dummy for a governmental message—especially a message addressing a topic of enormous controversy and public concern—the Ninth Circuit has upheld such a speech regulation here. It held that the State of California can compel non-profit, faith-based, pro-life licensed medical facilities, against their religious convictions and identity, to advertise a government program that provides free or low cost abortions.

That decision runs contrary to decisions of this Court that uniformly hold that (1) government compelled speech is highly disfavored under the First Amendment, and (2) facially content-based regulations of speech typically warrant strict scrutiny. *See*, *e.g.*, *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781 (1988); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

Notwithstanding the clarity of this Court's relevant precedents, the Ninth Circuit held that Petitioners—charitable organizations that serve women in need and their families—can be compelled to speak under the rubric of a doctrine never fully articulated by this Court, *viz.*, "professional speech." By giving California the green light to coerce charities to utter a message that undermines a significant reason for their very existence, the Ninth Circuit has vitiated a bedrock protection afforded by the First Amendment: the autonomy to choose the content of one's own speech.

In so doing, the Ninth Circuit has placed itself at odds with decisions of the Second and Fourth Circuits and well-established First Amendment jurisprudence of this Court.

This Court should grant certiorari to resolve the circuit split and repudiate the Ninth Circuit's dramatic curtailment of First Amendment freedoms.

DECISIONS BELOW

The Ninth Circuit's decision affirming the district court's denial of a preliminary injunction (App. 1-4) is unpublished and available at *LivingWell Med. Clinic, Inc. v. Harris*, No. 15-17497, 2016 U.S. App. LEXIS 18532 (9th Cir. Oct. 14, 2016). The Ninth Circuit's denial of Petitioners' motion for an injunction pending appeal (App. 5-6) is unpublished. The Ninth Circuit's denial of Petitioners' petition for rehearing en banc on December 20, 2016 (App. 41-42) is unpublished. The district court's decision denying Petitioners' motion for a preliminary injunction (App. 7-40) is unpublished and available at *LivingWell Med. Clinic, Inc. v. Harris*, 4:15-cv-04939, 2015 U.S. Dist. LEXIS 183230 (N.D. Cal. Dec. 18, 2015).

In the decision below, the Ninth Circuit relied on its contemporaneous decision in *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("*NIFLA*"), reprinted at App. 118-158. *NIFLA* was argued before and decided by the same panel that issued the decision below.

JURISDICTION

The Ninth Circuit issued its decision on October 14, 2016, and denied Petitioners' motion for rehearing en banc on December 20, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

Relevant statutory provisions are set forth in the Appendix to this Petition, at App. 43-50.

STATEMENT OF THE CASE

1. *Petitioners' Mission and Activities*

Petitioners are three pro-life, faith-based, non-profit organizations that serve women in need of pregnancy counseling and resources: LivingWell Medical Clinic, Inc., Pregnancy Care Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc.

LivingWell, located in Grass Valley, California, is a non-profit corporation under IRC § 501(c)(3) and is licensed by the California Department of Public Health as a Free Clinic. The primary purpose of LivingWell is to offer pregnancy-related services to its clients free of

charge and consistent with its religious values and mission. App. 53.

LivingWell helps women with unplanned pregnancies meet and accept the stresses and challenges that come with an unplanned pregnancy. It does this by presenting all the facts necessary to determine the best course of action for each individual. LivingWell addresses every area of concern regarding the pregnancy, including physical, emotional, economic, social, practical, and spiritual needs. App. 53.

LivingWell's services include pregnancy options education and consultation; pregnancy testing and verification; limited obstetrical ultrasounds; STI/STD testing, education, and treatment; past abortion healing retreats; community education presentations; and material support. Since pregnancy may directly or indirectly affect others, LivingWell's services extend to partners and family members as well. LivingWell personnel provide support both during and after pregnancy, helping to ensure the comfort of all who are involved. App. 53.

LivingWell provides services for approximately 600 first-time clinic clients per year. All services are free to clients and LivingWell never asks a client for a donation. App. 53-54.

Based on its religious tenets and principles, LivingWell has never referred for abortion, nor will it ever do so. LivingWell discloses verbally that it does not perform or refer for abortion services during any phone inquiry, as well as on the "Services Provided" document that clients sign before any services are offered. App. 54.

LivingWell believes that providing the message contained in the notice required by the Act would violate its core beliefs as a faith-based organization because it promotes abortion. LivingWell further believes that the Act's notice is tantamount to a referral for abortion, giving its patients the impression that LivingWell approves of and recommends abortion as an appropriate course of action—something that it does not and will not do. LivingWell's Statement of Principles states it "never advises, provides, or refers for abortion or abortifacients." App. 54.

Pregnancy Care Center, Inc. is a California non-profit corporation under IRC § 501(c)(3) that owns and operates a clinic, J. Rophe Medical, licensed by the California Department of Public Health as a Free Clinic. The primary purpose of Pregnancy Care Center is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission. App. 57.

Pregnancy Care Center, which is morally and religiously opposed to abortion, encourages, through education and outreach, the recognition of human life from the moment of conception. It ministers in the name of Jesus Christ to women and men facing unplanned pregnancies by providing support and medical services to them that will empower them to make healthy life choices. App. 57.

In 2015, Pregnancy Care Center saw over 880 clients and had over 3,400 client visits. Pregnancy Care Center provided over 610 ultrasounds and 290 pregnancy tests, along with ongoing support services. App. 57.

Like LivingWell, Pregnancy Care Center never charges fees or asks its clients for donations. And, also like LivingWell, based on its religious beliefs and mission, Pregnancy Care Center does not and will not encourage, facilitate, or refer for abortions. App. 57-58.

The third Petitioner, Confidence Pregnancy Center, located in Salinas, California, is a California non-profit corporation under IRC § 501(c)(3) and is licensed by the California Department of Public Health as a Community Clinic. The mission and purpose of Confidence Pregnancy Center are similar to those of the other Petitioners: helping women deal with unplanned pregnancies by offering, free of charge, a variety of educational, medical, and material resources, including ultrasounds, counseling and emotional support, and maternity and baby items. Confidence Pregnancy Center serves about 1,200 clients per year. Confidence Pregnancy Center also opposes abortion and will not refer for, recommend, encourage or facilitate the provision of abortions. App. 61-62.

2. *California's FACT Act*

Petitioners challenge provisions of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act, Cal. Health & Safety Code § 123470, *et seq*. (the "FACT Act" or the "Act") (App. 43-50), signed into law by Governor Edmund G. Brown on October 9, 2015, that compel them to speak a message whose content and manner of dissemination are dictated by the statute. The Act applies to two different types of clinics that offer pregnancy services: licensed and unlicensed covered facilities.

A clinic is deemed a "licensed covered facility" for purposes of the Act if it is "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.

§ 123471(a); App. 46-47.

Petitioners, which are "licensed covered facilities" as defined by the Act, must disseminate the following language to its clients:

> **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].

§ 123472(a)(1); App. 48 (emphasis added).[3]

The Act's mandated speech must be communicated by the licensed facility in one of three ways: (1) a public notice posted in a conspicuous place where it can be easily read by individuals seeking services from that facility; (2) a printed notice distributed to all clients; or (3) a digital notice distributed to all clients that can be read at the time of check-in or arrival. § 123472(a)(2); App. 48.

Failure to comply with the Act's speech mandate carries a financial penalty: five hundred dollars for a first offense and one thousand dollars for each subsequent offense. The Act empowers the Attorney General, city attorneys, and county counsel to bring a civil action against noncompliant facilities after a "reasonable notice" of noncompliance. § 123473(a); App. 49-50.

The Act specifically exempts two entities from having to comply with its mandated disclosures:

> (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

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[3] Unlicensed facilities must also disseminate a message crafted by the government. § 123472(b)(1); App. 49. Petitioners do not challenge that provision of the Act as it does not apply to them.

> Family Planning, Access, Care, and Treatment Program ["FPACT"].

§ 123471(c); App. 47.

Abortion is a covered benefit under Medi-Cal[4] and FPACT "covers all FDA-approved contraceptive methods, fertility awareness methods and, sterilization procedures."[5]

The Act—co-sponsored by the abortion advocacy group NARAL, App. 74—is purportedly meant to advance California's "proud legacy of respecting reproductive freedom" and its "forward-thinking" programs that provide "reproductive health assistance to low income women." App. 71. Its stated purpose is "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Assem. Bill No. 775 § 2; App. 46.

According to the Act's legislative findings, over 700,000 women in California become pregnant every year, and approximately 50% of those pregnancies are unintended. Of these 700,000 women, "thousands" of them are unaware, "at the moment they learn they are pregnant," of state-funded programs that provide family planning services, including abortion and contraception. Assem. Bill No. 775 § 1(b); App. 44-45.

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[4] *See* "Abortions," https://files.medi-cal.ca.gov/pubsdoco/hipaa/icd9_policy_holding_library/part2/abort_m00o03.pdf.

[5] *See* FPACT "Program Standards," http://files.medi-cal.ca.gov/pubsdoco/publications/masters-mtp/fpact/progstand_f00.doc.

The legislative background states that approximately 200 "crisis pregnancy centers" in California allegedly "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." App. 114.

3. *Lower Court Proceedings: District Court*

Petitioners filed suit against state and local officials charged with enforcing the law on October 27, 2015. Petitioners alleged that the Act violates, *inter alia*, their free speech and free exercise rights under the First Amendment. Soon thereafter, and before the Act went into effect on January 1, 2016, they sought a preliminary injunction based on their free speech claim.

The district court denied Petitioners' motion for a preliminary injunction. App. 40. It held that though the Act's mandated notice "was a quintessentially compelled, content-based speech" requirement, App. 26, it satisfied the levels of judicial scrutiny for commercial and professional speech regulations. App. 26-38. The district court also declined to issue an injunction pending appeal. App. 39-40.

4. *Lower Court Proceedings: Ninth Circuit*

The Ninth Circuit affirmed the judgment of the district court in an unpublished memorandum. App. 1-4.[6] In disposing of Petitioners' free speech claim, however, the Ninth Circuit panel relied exclusively on its decision in the parallel case of *NIFLA*, 839 F.3d 823, App. 3, issued on the same day.[7]

In *NIFLA*, the Ninth Circuit affirmed the decision of the district court which denied a preliminary injunction. The *NIFLA* appellants included both licensed and unlicensed facilities that sought a preliminary injunction against the Act based on both free speech and free exercise grounds. App. 127-129.

After concluding that appellants had Article III standing to press their First Amendment claims, and finding that those claims were ripe for adjudication, App. 129-133, the *NIFLA* panel turned to the Act's speech mandate governing licensed facilities, holding that appellants were not likely to succeed on the merits of their free speech claim.

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[6] Prior to its decision affirming the district court, a panel of the Ninth Circuit denied Petitioners' emergency motion for an injunction pending appeal. App. 5-6. The panel denied the motion based, in part, on *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), even though Petitioners did not seek a preliminary injunction or an injunction pending appeal based on their free exercise claim. *Id*.

[7] On the same day, the panel also decided a third parallel case, *Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 15-17517, 2016 U.S. App. LEXIS 18534 (9th Cir. Oct. 14, 2016) (affirming denial of preliminary injunction against the Act sought by licensed facilities).

First, the court rejected the argument that the Act is viewpoint-based. According to the panel, licensed facilities must provide the notice no matter their opinion on abortion or contraception. App. 136. The court did not cite any authority for the proposition that a law compelling utterance of the government's perspective is viewpoint-neutral so long as a broad class of speakers are so compelled. The court seems to have misapprehended this Court's precedents to make viewpoint bias hinge exclusively on whether the speaker's viewpoint is being targeted, and not to include government imposition of its own viewpoint upon unwilling speakers. Under this bizarre interpretation, a law that compels only gun advocates to declare that "Handguns are harmful," is viewpoint-based, while a law that compels all gun merchants (or all retailers) to say so is viewpoint-neutral.

Also according to the panel, the two statutory exemptions for (1) clinics run by the federal government and (2) clinics that are enrolled as both Medi-Cal and FPACT providers do not evidence any viewpoint-bias. The exemption for federal clinics is merely to avoid any federal preemption issues, and clinics enrolled as Medi-Cal and FPACT providers "already provide all of the publicly-funded health services outlined in the Licensed Notice." App. 136-37.

Second, the panel held that though the FACT Act is content-based, strict scrutiny was not appropriate under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (holding that facially content-based laws warrant strict scrutiny). The panel noted that the Ninth Circuit previously "recognized that not all content-based regulations merit strict scrutiny" under *Reed*, and

other federal courts of appeals have not applied strict scrutiny to abortion-related disclosures. App. 139-40.

Relying on a prior decision of the Ninth Circuit, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), the panel held that the mandated speech is "professional speech." App. 143-444. Borrowing *Pickup*'s "continuum" for adjudging professional speech—a continuum that runs from non-protected conduct at one end to fully protected speech at the other—the panel held that the speech mandated by the Act falls at the midpoint of this continuum and is subject to intermediate scrutiny.[8] *Id*.

The court held that it did not matter, for purposes of its professional speech analysis, that the Act applies to licensed *facilities*, as opposed to individually licensed medical *professionals*. App. 146.

Finally, the court held that the regulation satisfies intermediate scrutiny with respect to licensed facilities. It stated that the Act's notice "does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services." App. 150. The panel concluded that the Act furthers the substantial interest of "safeguarding public health and fully informing Californians of the existence of publicly-funded medical services," and is "an effective means of informing women" about those services. App. 150.

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[8] The panel found "unpersuasive" the state's argument that "the Act regulates commercial speech subject to rational basis review." App. 135, n.5.

Petitioners filed a petition for rehearing en banc on October 28, 2016, which was denied on December 20, 2016. App. 41-42.

Proceedings in the district court have been stayed pending disposition of this petition. *LivingWell Med. Clinic, Inc. v. Harris*, 4:15-cv-04939 (E.D. Cal. Nov. 29, 2016) (ECF Doc. 105).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with Decisions of the Second and Fourth Circuits Regarding Abortion-Related Speech Mandates.

The panel's decision conflicts with the Second Circuit's decision in *Evergreen Association v. City of New York*, 740 F.3d 233 (2d Cir. 2014), and the Fourth Circuit's decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), on the issue of compelling speech in the context of abortion-related disclosures. Both these decisions invalidated such measures.

A. *Evergreen Ass'n v. City of New York*

In *Evergreen*, New York City compelled pregnancy services centers to make three types of disclosures: (1) "whether or not they 'have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center'" (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"). *Id* at 238.

Though it declined to preliminarily enjoin the Status Disclosure, holding that it passed strict scrutiny, *id*. at 246-49, the Second Circuit held unconstitutional both the Government Message and the Services Disclosure.

With respect to the Services Disclosure, the court found that it "overly burdens Plaintiffs' speech." *Id*. at 249. Evaluating the context in which the compelled speech was to be made, per this Court's decision in *Riley*, 487 U.S. at 796-97, the Second Circuit found that "the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the ordinance] provide alternatives." *Id.* Noting that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," *id*. (quoting *Riley*, 487 U.S. at 795), the court observed that "[a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins." *Id.*

In "mandat[ing] the discussion of controversial political topics," this provision of New York City's ordinance failed to satisfy either strict or intermediate scrutiny. *Id.* at 250.

Concerning the "Government Message," the court held that "'mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue,' deprives Plaintiffs of their right to communicate

freely on matters of public concern." *Id*. (quoting *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev*., 651 F.3d 218, 236 (2d Cir. 2011), *aff'd*, 133 S. Ct. 2321 (2013)). The court ruled that "[w]hile the government may incidentally encourage certain speech through its power to '[choose] to fund one activity to the exclusion of the other,' it may not directly 'mandat[e] that Plaintiffs affirmatively espouse the government's position on a contested public issue' through regulations, like [New York City's ordinance], that threaten not only to fine or de-fund but also to forcibly shut down non-compliant entities." *Id*. at 250-51 (citations omitted).

The *Evergreen* decision stands in stark contrast to the *NIFLA* opinion on several grounds. First, noticeably absent in the *NIFLA* opinion is any recognition of the context, much less inherent controversy, of the speech the FACT Act compels pro-life organizations like Petitioners to speak. The *NIFLA* panel's suggestion that the Act's mandated speech does not "encourage, suggest, or imply that women should use those state-funded services" simply does not comport with common sense. App. 150.

A government regulation requiring gas stations to inform their customers that they might be eligible for free or low cost fuel elsewhere would not need to say anything further to encourage customers to pursue this offer. The notice is enough. A mortgage company advertising its refinancing services with the words, "our customers save an average $132 per month, call us to find out if you are eligible," would not have to include any further words of encouragement. The invitation is enough.

Moreover, forcing Petitioners to tell their clients where they might be able to obtain free abortions involves something much more—morally, religiously, and politically speaking—than simply advising them of the existence of a government program. It requires them to undermine the very nature of who they are and what they do. Indeed, any suggestion that the compelled recitation of fact cannot be charged with moral or religious implications depending on its context flies in the face of reality.[9] A Catholic priest counseling a parishioner facing an unexpected pregnancy understands that saying she might be eligible for a free or low cost abortion is doing more than merely stating a fact.

In sum, the fact that the Act's mandated notice "does not use the word 'encourage,'" as did New York City's Government Message, is of no consequence. App. at 151-52 (citing *Evergreen*, 740 F.3d at 250). As in *Evergreen*, the Act does *not* regulate "purely factual and uncontroversial information." 740 F.3d at 245, n.6. It "requires pregnancy services centers to state the [State's] preferred message," and "to *mention* controversial services that some pregnancy services centers, such as Plaintiffs in this case, oppose." *Id*. (emphasis added).

Indeed, the FACT Act imposes a more egregious burden on speech than New York City's Services

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[9] Surely, a hypothetical California law requiring elder care physicians to inform their patients that they have a statutory right to assisted suicide under that state's recently enacted law could not be viewed by any fair minded person as merely mandating a statement of fact.

Disclosure and Government Message. It does not just compel Petitioners to speak in a way that may stigmatize their own services, but goes so far as to force them expressly to advertise the availability of free abortions, procedures which are contrary to Petitioners' religious and moral beliefs. The Act thus "change[s] the way in which a pregnancy services center, if it so chooses, discusses the issues of prenatal care, emergency contraception, and abortion . . . [which] must be free to formulate [its] own address." *Id.* at 249-50. Whereas the Services Disclosure required pregnancy centers to indicate whether they provide abortions or referrals for abortion, the FACT Act positively and affirmatively requires pregnancy centers to point clients elsewhere for potentially free abortion services.

Like New York City's Government Message, the FACT Act compels Petitioners "to advertise on behalf of the [State]." *Id.* at 250. While the State of California is certainly free to advance its own "forward thinking" concerning free and low cost access to abortion and pregnancy related services *through its own actions*, mandating that pro-life pregnancy resource centers do so unlawfully commandeers Petitioners into speaking a message contrary to their identities and viewpoints. The government may have the right to form and fashion *its own speech*, but it does not have a right to form and fashion the speech *of its citizens*, especially on a contested public issue like abortion. *See Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring) ("The issue of abortion is one of the most contentious and controversial in contemporary American society."); *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal.App.4th 322, 358 (2004)

("[A]bortion is one of the most controversial political issues in our nation.").

NIFLA does not just conflict with *Evergreen* on its rationale, but in its application of judicial scrutiny.

In discussing the appropriate level of scrutiny to apply to the Act's compulsion of speech by licensed facilities, *NIFLA* says that the Second Circuit in *Evergreen* applied strict scrutiny. App. 151. This is inaccurate. While *Evergreen* did apply strict scrutiny to the Status Disclosure, *i.e.*, whether the center has a licensed professional on staff, it did not decide whether to apply strict or intermediate scrutiny to the Services Disclosure or Government Message because those disclosures failed "under either level of review." *Evergreen*, 740 F.3d at 245.

This is important to note, as it compounds the circuit conflict. In *NIFLA*, the court held that the Act survived intermediate scrutiny; in *Evergreen*, the Second Circuit held that two of the three disclosures did not. While in *Evergreen*, the court held that New York City could "communicate [the Government] message through an advertising campaign" as a way of furthering its interests, *id*. at 250, the Ninth Circuit rejected this notion. App. 150-51.

The Ninth Circuit stated that the Act is an "effective means of informing women about publicly-funded pregnancy services," App. 150, but as this Court held in *McCullen v. Coakley* (applying intermediate scrutiny to a state abortion buffer zone law), "by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency." 134 S.

Ct. 2518, 2535-36 (2014) (quoting *Riley*, 487 U.S. at 795). Indeed, the "prime objective of the First Amendment is not efficiency." *Id*. at 2540.

While intermediate scrutiny does not require the government to adopt "the least restrictive means," it must still be "no more extensive than necessary." *Evergreen*, 740 F.3d at 250; *see also Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2669 (2011) ("[T]he State offers no explanation why remedies other than content-based rules would be inadequate."); *Thompson v. W. States Med. Ctr*., 535 U.S. 357, 373, (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.").

The Act positively requires Petitioners to advertise a potentially free abortion. And it forces Petitioners to share this information (contrary to their religious beliefs) when the government has ample means to disseminate its message itself.

B. *Stuart v. Camnitz*

In *Stuart*, the Fourth Circuit upheld a preliminary injunction against a North Carolina law requiring physicians to perform an ultrasound, display the sonogram, and describe the fetus to a woman seeking an abortion. 774 F.3d at 242-43. Physicians and abortion providers filed suit against the state alleging, *inter alia*, that the statute—compelling speech under pain of financial penalties—violated their freedom of speech.

Like the Second Circuit in *Evergreen*, the Fourth Circuit understood that the mandated "factual" statements imposed on doctors could not be properly understood in the absence of context: "[t]hough the

information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage." *Id*. at 253. It understood, contrary to *NIFLA*, that the "factual" nature of the compelled speech at issue does "not divorce the speech from its moral or ideological implications." *Id*. at 247.

As in *Evergreen*, *Stuart* did not have to decide whether the compelled speech required strict scrutiny because the court held that the law failed lesser, intermediate scrutiny. *Id.* at 248. In applying that level of review, the Fourth Circuit held that the compelled speech requirement "interfere[d] with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession." *Id*. at 250. It interfered, moreover, with the professional judgment of physicians and compromised the doctor-patient relationship. *Id*. In sum, according to the Fourth Circuit, "[w]hile the state itself may promote through various means childbirth over abortion, it may not coerce doctors into voicing that message on behalf of the state in the particular manner and setting attempted here." *Id*. at 256.

NIFLA and *Stuart* are in conflict. *Stuart* struck down a law compelling physicians to tell an individual patient facts relating to the gestation and condition of her unborn child. *NIFLA* upholds a statute requiring licensed pregnancy centers, *i.e*., not physicians, to advise *all* clients, whether seeking information related to abortion or not,[10] of the existence of a program

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[10] A man, for example, visiting one of Petitioners' clinics for a reason wholly unrelated to pregnancy services, such as for

whereby they might be able to obtain a free or low cost abortion. While the law in *Stuart* was closely tethered to the individual patient and facts relating to her particular pregnancy, the FACT Act is a sweeping prophylactic speech mandate, requiring dissemination of the mandated speech to every client no matter the reason for their visit. The FACT Act therefore burdens more speech than the provisions invalidated in *Stuart*. *Cf. Edenfield v. Fane*, 507 U.S. 761 (1993) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

The Act—co-sponsored by the abortion advocacy group, NARAL, App. 74—purports to advance California's "proud legacy of respecting reproductive freedom" and its "forward-thinking" programs that provide "reproductive health assistance to low income women." App. 71. While California is free to further that "legacy" and pursue its "forward-thinking" programs that subsidize abortion services—just as North Carolina is free to pursue the "'important and legitimate interest' in preserving, promoting, and protecting fetal life," *Stuart*, 774 F.3d at 250 (citations omitted)—the State may not hide the obvious ideologically-based nature of the mandated speech under the guise that it entails mere statements of fact.

The viewpoint bias behind the Act is further revealed by its total exemption for those licensed

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emotional support for his wife's unexpected pregnancy, must be informed of California's family-planning programs.

facilities that have enrolled as Medi-Cal and FPACT providers.[11] The State has declined to mandate that these facilities make clients aware that entities, such as Petitioners, provide alternatives to abortion, which undercuts the State's claim that it merely seeks to ensure that California residents know about all of "the health care services available to them." App. 46. "In its practical operation," therefore, the Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Sorrell*, 131 S. Ct. at 2663 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

The panel held that the compelled speech is viewpoint neutral because "it does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker." App. 136. This is nonsense. *See supra* p. 12. Government policy requiring a third party to speak a viewpoint-based message is impermissible whether some or all have to speak it. In *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), for example, all noncommercial vehicles in New Hampshire had to bear the words, "Live Free or Die," on a license plate. In *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), all teachers and students were required to recite the Pledge of Allegiance.

In short, the Act requires Petitioners "to speak . . . the very information on a volatile subject that the state would like to convey." *Stuart*, 774 F.3d at 253. Had the panel not departed from the approach of the courts in *Evergreen* and *Stuart*, it would have seen the Act for

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[11] Planned Parenthood, as a Medi-Cal and FPACT provider, *see Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1113-14 (9th Cir. 2014), is exempt from the Act. *See supra* pp. 8-9.

what it is: an effort by the State to force private entities to advance its "forward thinking" ideology of offering free abortion services, regardless of whether those entities object to doing so on moral or free speech grounds.[12]

II. The Decision Below Conflicts with this Court's Decisions Regarding Compelled and Content-Based Regulations of Speech.

A. *NIFLA* Conflicts with Compelled Speech Precedents.

NIFLA directly conflicts with relevant decisions of this Court. In upholding the compelled speech requirement of the Act, the decision clashes with this Court's decision in *Riley* and other decisions rejecting compelled speech requirements. In upholding a facially content-based regulation of speech, the decision is inconsistent with this Court's decisions reaffirmed in *Reed*.

There can be no doubt that laws compelling the expression of a government crafted message are constitutionally suspect. *See*, *e.g.*, *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("It is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must

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[12] As the legislative history reveals, an impetus for the Act was "crisis pregnancy centers" that allegedly "aim to discourage and prevent women from seeking abortions." App. 114. It is clear that the State has intentionally discriminated against that viewpoint with the requirement that licensed facilities advertise government programs *enabling* women to secure abortions.

say.'") (citation omitted); *Hurley v. Irish-American GLB Grp.*, 515 U.S. 557, 573 (1995) ("[A] speaker has the autonomy to choose the content of his own message.").

This teaching is firmly established. *See*, *e.g.*, *Barnette*, 319 U.S. 624 (invalidating mandatory recitation of Pledge of Allegiance, observing that "involuntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence"); *Wooley*, 430 U.S. 705 (holding individual could not be compelled to display "Live Free or Die" on a license plate, noting 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"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (invalidating state statute that compelled a newspaper to print an editorial reply, and thus, exacted "a penalty on the basis of the content of [the] newspaper"); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 16 (1986) (plurality) (holding unconstitutional a requirement that a utility company include speech from an opposing group in its newsletters).

For these reasons, laws that compel speech are "subject to exacting First Amendment scrutiny." *Riley*, 487 U.S. at 798 (1988) (the government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."); *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642, (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as content-based laws) (citing *Riley*, 487 U.S. at 798).

In *Riley*, this Court applied strict scrutiny in holding that three challenged portions of a law regulating the solicitation of charitable donations by professional fundraisers violated the First Amendment. 487 U.S. at 784. One of the challenged requirements provided that, before asking for funds, a professional fundraiser must disclose to potential donors the average percentage of gross receipts that the fundraiser turned over to charities in the state within the previous twelve months. *Id*. at 786. The government asserted a need to inform potential donors how the money they donate is spent in order to clear up possible misperceptions. *Id*. at 798.

The Court held that the "content-based regulation is subject to exacting First Amendment scrutiny," *id*., stating, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners," *id*. at 790-91. To illustrate this point, the Court stated:

> we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener . . . a law compelling its disclosure would clearly and substantially burden the protected speech.

Id. at 798.

NIFLA is irreconcilable with *Riley*. *Riley* applied strict scrutiny to a statute compelling speech by professionals; the *NIFLA* panel did not. *NIFLA* upheld the Act's compelled speech mandate in light of a number of women being "unaware of the state-funded programs that offer an array of services, such as health education and planning, prenatal care, and abortion." App. 149-50. *Riley* provides that compelled speech, even if helpful to the listener or furthering well-intentioned interests of the government, nonetheless impermissibly burdens speech. While *NIFLA* rejected the notion that the State of California should more directly address the problem of women being unaware of state pregnancy services programs by advertising these services itself, *Riley* indicated that the government could have itself published information concerning professional fundraisers to help educate the public. *Id*. at 800; *see also id*. ("In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available.").

Moreover, just as individuals in North Carolina were "free to inquire how much of the contribution will be turned over to the charity," *id*. at 799, individuals in California are free to inquire about the availability of state services by contacting the State or doing an Internet search (just as individuals are free to inquire about the services that Petitioners provide by calling them or visiting their websites).

No one could doubt that the First Amendment would bar the State of California, in an effort to limit public spending, from *prohibiting* non-profit licensed

facilities from telling their clients of the existence of government programs that provide free or low cost family-planning services. *Compelling* these same facilities to inform their clients of the existence of these programs is improper on the same grounds. *Riley* teaches that compelling speech and prohibiting speech are two sides of the same coin:

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say.

Id. at 796-97.

The fact that thousands of women each year might be unaware of their state's pregnancy-related programs is the fault of their state, not Petitioners. The State of California has no more right to force Petitioners to advertise its programs than Petitioners have the right to make the State advertise their faith-based charitable services. The government's interest in ensuring that "a wide variety of views reach the public" was not enough to justify Florida's "right to reply" statute in *Tornillo*, 418 U.S. at 248. Nor is it likely that the result in *Riley* would have been different if the law required fundraisers to notify their audience about state programs that serve the blind and which therefore do not require donor support.

Also irreconcilable with *Riley* is the panel's reliance on what it perceived to be the merely factual nature of the Act's speech mandate. App. 138 ("[T]he Act does not

convey any opinion. . . . [T]he Licensed Notice merely states the existence of publicly-funded family-planning services."). *Riley* held that any distinction between "compelled statements of opinion" and "compelled statements of 'fact'" is irrelevant—"either form of compulsion burdens protected speech." *Id*. at 797-98; *see also Hurley*, 515 U.S. at 573-74 (citation omitted) ("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."). With few exceptions, the government can speak for itself on any topic, however it wants, and whenever it so desires. *Sorrell*, 131 S. Ct. at 2671 (the government "can express [its] view through its own speech."). But imposing content-based compulsions of speech (even of a purely factual nature) on individuals creates "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641.

Thus, even assuming that the Act regulates "professional speech," as the Ninth Circuit held, there is no reason under *Riley* not to apply strict scrutiny. Indeed, there is nothing "professional" about the Act's compelled speech other than the fact that it must be disseminated by a facility licensed by the state. The mandated notice does not address how a specific medical treatment or therapy is to be administered. It does not, for example, instruct covered facilities on how ultrasounds are to be performed or how pregnancy tests are to be carried out. The Act does not prohibit the use of any medical procedures or mandate that

certain procedures be used, nor does it require that clients seeking a specific procedure be advised of facts related to that procedure. Rather, the Act dictates that non-exempt facilities speak the message of the government to every one of their clients even before the clients have been evaluated by a licensed medical professional regarding his or her specific needs. Moreover, as previously noted, the Act does not apply to *individual medical professionals*.

In support of its holding that only intermediate scrutiny should apply under a "professional speech" rubric, the panel noted that the "Licensed Notice regulates the clinics' speech in the *context* of medical treatment, counseling, or advertising." App. 147 (emphasis added). Under this principle, however, no regulation addressing the medical profession would have to undergo strict scrutiny, so long as it is adopted in the "context" of what it is the medical profession does. Doctors could be compelled to recommend that any child with Down's Syndrome be aborted, or they could be prohibited from suggesting abortion alternatives to women seeking an abortion. Medical personnel could be prohibited from asking patients "whether they own firearms or have firearms in their homes, or from recording answers to such questions." *Wollschlaeger v. Governor*, No. 12-14009, 2017 U.S. App. LEXIS 2747, *14 (11th Cir. Feb. 16, 2017) (en banc).[13]

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[13] In *Wollschlaeger*, the Eleventh Circuit struck down a Florida law that did just that. Recognizing that "[c]ontent-based restrictions on speech normally trigger strict scrutiny," the court did not have to decide whether to apply strict scrutiny to the law's regulation of "professional speech" because it found that the provisions of the

For these reasons, the panel's reliance on lower court decisions that "have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based," do not support the panel's rejection of strict scrutiny. App. 140 (citing *Stuart*, 774 F.3d 238; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008)). These cases involved informed consent statutes requiring physicians to disclose certain facts to patients seeking an abortion in order to ensure that they were fully advised of the choice they were making.[14] The Act, however, has nothing to do with obtaining informed consent regarding any specific procedure for any particular client. It compels licensed facilities, *i.e.*, not physicians, to inform *all clients* about California's abortion subsidy programs, *no matter the reason for their visit*.

Far from being an instance of "professional speech"—an individualized one-on-one communication

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Florida law did not satisfy "heightened scrutiny" under this Court's decision in *Sorrell*. *Id*. at *25-26. In a concurrence, Judge Wilson observed that, in light of this Court's decision in *Reed v. Gilbert*, strict scrutiny was the only appropriate level of review to apply, notwithstanding the fact that the law applied only to medical professionals. *Id*. at *67 (Wilson, J., concurring).

[14] In *Rounds*, the law required "the performing physician to provide certain information to the patient as part of obtaining informed consent prior to an abortion procedure." 530 F.3d at 726. In *Lakey*, the law required "the physician 'who is to perform an abortion' to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure." 667 F.3d at 573.

between patient and provider regarding that patient's needs—the Act's compelled speech is best described as a generalized public service announcement, albeit an ideologically driven one, designed to advertise services offered and promoted by the State. It requires Petitioners to advertise a service that they themselves do not provide—in fact, a service to which they are religiously opposed—in case their clients might be interested in obtaining that service *elsewhere* at low or no cost.

Even though *Riley* says that there is no constitutional difference between government compulsion of fact and opinion, this Court should not turn a blind eye, as did the court below, to the context in which Petitioners must speak the government's message. Even if one were to accept the panel's erroneous conclusion that the Act is viewpoint-neutral because it must be spoken by clinics no matter their views on abortion or contraception, there can be little doubt that the compelled speech itself promotes the viewpoint of the government, and on a subject of enormous controversy. For this reason, the Act more heavily encumbers speech than the compelled speech at issue in *Riley*.

Finally, contrary to the panel opinion, the non-profit, charitable status of Petitioners and their pro-life mission further underlines the egregiousness of the First Amendment violation in this case. In *In re Primus*, 436 U.S. 412 (1978), this Court held that free legal services for the purpose of the "advancement" of a pro bono attorney's "beliefs and ideas" were entitled to a greater degree of First Amendment protection than that afforded attorneys engaged in legal practice for

pecuniary gain. *Id.* at 438 n.32. While "a showing of potential danger may suffice" in regulating solicitations by attorneys in the commercial context, that did not hold true for the pro bono attorney acting on behalf of the ACLU and its mission. *Id*. at 434. Instead, this Court required the government to show a "compelling" interest and "close" tailoring. *Id*. at 432.[15]

NIFLA concluded that Petitioners' non-profit status does not transform them into an organization that engages in "political expression and association," akin to a public interest lawyer. App. 148-49. This misses the gravamen of this Court's decision in *Primus* and mischaracterizes Petitioners' nature and mission.

Petitioners have not simply "positioned themselves in the marketplace as pregnancy centers," App. 148, in order to generate income and to be governed by nothing more than applicable rules of ethics governing such clinics. Like pro-bono attorneys who advance a moral, religious, or social cause through the regulated and licensed practice of law, Petitioners pursue a cause—to advance their moral, religious, and social message through the regulated and licensed practice of medicine. In an effort to further that cause, Petitioners—like pro bono, civil liberty attorneys—do not charge their clients for the services they provide. In short, Petitioners are the pregnancy care analogues of public interest law firms, warranting a more rigorous

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[15] While in *In re Primus*, this Court invalidated a state anti-solicitation rule as applied to an ACLU attorney, in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 468 (1978), it upheld a state anti-solicitation rule as applied to a lawyer seeking clients injured in an auto accident.

level of constitutional scrutiny of the Act than that applied to laws regulating those who engage in medicine for paying clients and monetary gain.[16]

This, of course, does not mean that non-profit licensed clinics, such as Petitioners, are not subject to reasonable regulations. *See Primus*, 436 U.S. at 439. It only means that when the government, as California has done here, compels them to speak a content or viewpoint-based message contrary to their religious and moral beliefs, that compulsion—like the compulsion of professional fundraisers in *Riley*—must satisfy strict scrutiny.

In sum, the Act compels speech in violation of *Riley* and decades of this Court's decisions regarding compelled speech.

B. *NIFLA* Conflicts with Precedents on Content-Based Restrictions.

Decisional law of this Court is unmistakably clear: "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner*, 512 U.S. at 641-42. Such laws must satisfy strict scrutiny. *See*, *e.g.*, *McCullen*, 134 S. Ct. at 2530 (laws that are content or

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[16] As *NIFLA* observes, its decision on this point conflicts with that of the Fourth Circuit in *Moore-King v. Cnty. 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). App. 148, n.8.

viewpoint-based "must satisfy strict scrutiny") (citing *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000)). They "are presumptively invalid," *R.A.V.*, 505 U.S. at 382, and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy Entm't Grp.*, 529 U.S. at 818.

Most recently, in *Reed v. Gilbert*, this Court unequivocally reaffirmed that "[a] law that is content based *on its face* is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2222 (emphasis added) (citation omitted). In other words, regardless of the government's alleged purpose in enacting the law, if that law is content-based on its face, strict scrutiny follows. *Id.* at 2227.

Importantly, *Reed* did not identify any exceptions to this rule. It did not say or suggest that this rule was limited to sign regulations, nor did it imply that certain types of facially content-based laws would fall outside the rule's scope, or that certain types of speech were exempted.

Despite acknowledging that the FACT Act is a content-based regulation of speech that compels third-parties to speak a government message, the *NIFLA* panel declined to apply strict scrutiny. Relying on its previous decision in *United States v. Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc), the panel stated that, "[s]ince *Reed*, we have recognized that not all content-based regulations merit strict scrutiny." App. 139.

Swisher, however, simply acknowledged that traditional categories of unprotected speech do not receive full First Amendment protection. 811 F.3d at 313. The Act here governs *protected* speech of obvious public concern and controversy. *See Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'") (citation omitted).

Also beside the point are this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart,* 550 U.S. 124, 157 (2007), which the court below cited for the proposition that this Court "has recognized a state's right to regulate physicians' speech concerning abortion." App. 139. As the panel itself recognized, *Casey* did not clearly articulate what level of scrutiny to apply to abortion-related disclosures. App. 141-43. And *Gonzales*—not a free speech case—merely states that "the State has a significant role to play in regulating the medical profession." App. 140 (quoting 550 U.S. at 157). *Gonzales* did not hold that this "significant role" includes a broad license to compel speech, especially over the vigorous ideological opposition of the speaker.

Rather than applying *Reed* and its predecessors, the panel applied its previous decision in *Pickup* and held that the Act's compelled speech is "professional speech" that is subject to intermediate scrutiny. App. 147. The critical problem with this conclusion is that this Court has "never formally endorsed the professional speech doctrine," much less addressed what level of scrutiny to

apply to that speech. *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016).

In fact, this Court acknowledged in *Reed* that the state's power to regulate professionals does not give it *carte blanche* to circumscribe First Amendment rights.

> Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the regulation of professional conduct rendered the statute consistent with the First Amendment, observing that it is no answer to say that the purpose of these regulations was *merely to insure high professional standards and not to curtail free expression*.

Id. (citing *Button*, 371 U.S. at 438-39) (emphasis added). As *Button* made clear, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. at 439.

In light of the lower court's ruling in this case that, under the rubric of so-called "professional speech," non-profit, pro-life facilities must utter the state's abortion advertisement, this Court must intervene. What *Reed* said of the evils of content-based laws can apply as much in the medical arena as any other, as it certainly does in this case: "The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." 135 S. Ct. at 2229 (quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)).

NIFLA upheld a content-based law based on intermediate, rather than strict, scrutiny. That conflicts with this Court's precedents and thus warrants review.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
ANDREW J. EKONOMOU
JORDAN SEKULOW
WALTER M. WEBER
American Center for Law & Justice
[redacted]

FRANCIS J. MANION
GEOFFREY R. SURTEES
American Center for Law & Justice
[redacted]

EDWARD L. WHITE III
ERIK M. ZIMMERMAN
American Center for Law & Justice
[redacted]

ROBERT H. TYLER
Tyler & Bursch, LLP
[redacted]

Counsel for Petitioners