No. 16-1146

In The
Supreme Court of the United States

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, et al.,

Petitioners,

v.

XAVIER BECERRA,
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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

The most remarkable aspect of the State's Brief in Opposition (BIO) is the degree to which it skirts the Court of Appeals' decision for which review is sought, and instead seeks to redirect this Court to the three district court decisions preceding it, and the State's own notions of what the law should be. The State fails to mention the degree to which the first three opinions conflicted with each other. More importantly, though, the Ninth Circuit has now placed itself at odds with this Court and nearly every other Circuit on First Amendment questions of first order.

The Petition presented three distinct Circuit splits and an additional issue relative to the level of review under the Free Exercise Clause.

In a combined opposition to the three petitions, the State takes the following approach:

1) Posits that the plurality in *Casey* established a floor and not a ceiling for regulation of abortion-related speech;

2) Agrees with the Ninth Circuit that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), cannot possibly mean what it said, at least as to commercial and professional speech;

3) Insists there is no conflict with other Circuits where nearly identical prohibitions have been invalidated, because of slight wording differences;

4) Regurgitates its position that the Free Exercise Clause is feckless; and

5) Now urges that the groundbreaking and conflicting decision of the Ninth Circuit should not be reviewed because it followed a motion for preliminary injunction.

In this Reply, Petitioner A Woman's Friend (AWF) will expose the State's misapprehension of *Reed*; demonstrate how the State misrepresents the directly conflicting decisions of the Second and Fourth Circuits; argue that concurrences and plurality opinions have not established professional or abortion-related speech exceptions in this Court; explain why further proceedings below would not aid the development of the case; and, note the effects of continuing to minimize Free Exercise.

ARGUMENT

I. THE STATE IS UNABLE TO EXPLAIN AWAY THE NINTH CIRCUIT'S DEPARTURE FROM THIS COURT'S DECISION IN *REED V. TOWN OF GILBERT*.

The central, unmistakable message of *Reed* is that 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).

The Petition presents a number of examples from other Circuits that have adjusted their speech jurisprudence in light of *Reed*. The clearest such decisions have come from the Third, Fourth, Sixth, Seventh and D.C. Circuits.

The State's response is to wave off all of these examples as factually distinct. (As will be seen later when discussing compelled speech, this is the State's reflexive approach to nearly identical cases as well.) In so doing, the State either misses the point or attempts to skirt it. Petitioners have not argued that the abortion mandate at issue in this case is just like restrictions on sexually explicit material in *Free Speech Coal., Inc. v. AG United States*, 825 F.3d 149 (3d Cir. 2016); a panhandling ordinance, *Norton v. Springfield*, 806 F.3d 411 (7th Cir. 2015); sign codes, *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016); political signs, *Wagner v. City of Garfield Heights*, No. 13-3474, 2017 U.S. App. LEXIS 718 (6th Cir. Jan. 13, 2017); or other political speech restrictions, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) and *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500 (D.C. Cir. 2016). If anything, the compelled speech now before the Court is worse.

There certainly are parallels in political speech and sign cases in particular, but more pertinently, every one of these circuits recognized that *Reed*

directed them toward more robust protection of expression – one that will not too easily justify content-based discrimination.

The Ninth Circuit – and the State, in defending its position – takes the opposite view. Strikingly, the Ninth Circuit asserts that although the Act regulates content, such does not require the application of strict scrutiny. *National Institute of Family and Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016)[1] (App. at 121). Categorizing the notice as *professional speech*, the appellate court stated that it "is best understood as along a continuum." App. at 130, citing *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).

The State does nothing to dispel this obvious dispute, but only makes things worse by claiming this Court actually has a professional speech doctrine that undercuts *Reed*. More will be said of this in Section IV, *infra*. For now, suffice it to say the split is more pronounced than ever.

II. THE STATE IGNORES THE IMPLICATIONS OF THIS COURT'S COMPELLED SPEECH JURISPRUDENCE, AND THE CIRCUIT SPLIT OCCASIONED BY IT.

In a related vein, the rejection by the State and the court below of *Reed* as authoritative in the present case

[1] The lead opinion is noted in the Appendix to the AWF Petition.

makes it unsurprising that they also reject the relevance of this Court's compelled speech jurisprudence. The Ninth Circuit accepted that the Act compels speech, but it deemed that finding of little importance since it was focusing on what it described as the professional and abortion-related aspects of the mandate. App. at 121-22. The State, for its part, almost entirely ignores this Court's compelled speech doctrine, offering not a word of rebuttal to the ringing pronouncements of decisions such as *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

For the one compelled speech case the State chooses to address, *Riley v. National Federation of the Blind of NC*, 487 U.S. 781 (1988), it skips over the central holding and discusses only dicta it believes reinforces its notion that compelled speech is permissible as long as the State calls it a disclosure. BIO at 25.

Beyond being a monumental oversight, the State's approach leads it to further ignore the central holdings in the Second and Fourth Circuits – based on compelled speech – that are most directly in conflict with the ruling below. *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233 (2d Cir. 2014); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 189-91 (4th Cir. 2013). The Second and Fourth Circuits came to the same conclusion as the Ninth Circuit that the regulations compelled speech. *Evergreen*, 740 F.3d at 249; *Centro Tepeyac*, 722 F.3d at 189-91. And all three cases involve more than one type of disclosure. Like the Ninth, the Second and Fourth Circuits were comfortable with notices that disclosed the absence of professional staff. The State omits – and

would have the Court overlook – the fact that the other portions of these laws that track those AWF challenges were struck down.

In striking down a New York ordinance, the Second Circuit explained that the context of the law "is a public debate over the morality and efficacy of contraception and abortion. . . ." *Evergreen*, 740 F.3d at 249 (citation omitted). The State flatly misstates the outcome of this case in order to downplay the fact that the Second Circuit has reached an opposite conclusion on the same question.

The Fourth Circuit affirmed the issuance of a preliminary injunction against the required posting of a sign reading, "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider." *Centro Tepeyac*, 722 F.3d at 186. The appellate court affirmed the lower court's determination that "'the Resolution requires [Centro Tepeyac] to say something it might not otherwise say' and thus constitutes a content-based regulation of speech." *Centro Tepeyac*, 722 F.3d at 189.

Despite the fact that here the Ninth Circuit understood the signage to compel speech, it analyzed the law under intermediate scrutiny as *professional speech*. In contrast to the other two circuits, the Ninth Circuit upheld similar posting requirements. The State's failure to deal with this contrary, conflicting Circuit authority underscores the need for this Court to grant review.

III. WHERE THE NINTH CIRCUIT IDENTIFIES A CIRCUIT SPLIT ON ABORTION-RELATED SPEECH, THE STATE WOULD GO EVEN FURTHER.

The Ninth Circuit described an additional circuit split resulting from differing interpretations of a paragraph in the plurality opinion in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). "[T]here is currently a circuit split regarding the appropriate level of scrutiny" for abortion related notices. App. at 123. After describing the split from the Fifth (*Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012)) and Eighth Circuits (*Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008)) (*Id*. at 122), 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." *Id*. at 122.

Curiously, the State first minimizes this holding by claiming the identified Circuit split is irrelevant. The State then takes the reasoning even further by declaring that *Casey* did not intend to limit states in the degree to which they can regulate or compel abortion-related speech. BIO at 16-17.

IV. THE STATE TRIES IN VAIN TO AVOID A COLLISION ON PROFESSIONAL SPEECH BY CLAIMING THAT THIS COURT HAS ESTABLISHED A PROFESSIONAL SPEECH DOCTRINE.

The Ninth Circuit was led astray by a view that has never been adopted as a holding of this Court – the concurrence of Justice White in *Lowe v. SEC*, 472 U.S. 181 (1985). While the Court in *Lowe* held that an investor sending out an investment newsletter did not need to register with the SEC, Justice White drew a sharp distinction between public advocacy and personal advice given by professionals. Justice White's view has been contradicted by decisions such as *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (noting that job counseling, tutoring, legal advice and medical consultation were noncommercial, highly protectable speech). This concurrence nevertheless continues to provide the lower courts with a basis on which to construct speech-restrictive doctrines that run counter to this Court's most recent precedents.

The State seeks but does not find an ally in the Eleventh Circuit. Most recently, *Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc), 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*. *Id.* at 1309. 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. *Id*. at 1311.

V. THIS CASE IS WELL SUITED FOR RESOLUTION BY THIS COURT, AND FURTHER PROCEEDINGS BELOW WOULD ONLY CONTINUE IRREPARABLE HARM WITHOUT PROVIDING GREATER CLARITY.

The State ends its brief with a request to deny the petitions because they arrive at the courthouse steps on denials for preliminary injunction. Of note, the State's final point offers no citation to legal authority. The State tersely argues that district courts heard the motions for preliminary injunction before discovery. BIO at 31.

In fact, for decades this Court has granted petitions for writs of certiorari from cases involving preliminary injunctions, e.g., *Doran v. Salem Inn, Inc*., 422 U.S. 922, 931 (1975); *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 664 (2004). Such is proper here.

The Court is well familiar with the four-pronged showing that an applicant must demonstrate to qualify for a preliminary injunction. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008). The crucial showing that is relevant to the AWF Petition concerns irreparable harm. For failing to speak the government's message, AWF faces an initial fine of $500 and a $1,000 fine for every refusal to speak thereafter. As

small nonprofits receiving support from the community (E.R. 341, 344, 346), a typical crisis pregnancy center, such as AWF could not financially sustain the State's punishment.

But insolvency is not the worst harm. Directing a pregnant woman to a government entity whose purpose is to facilitate an abortion poses an existential threat to a life-affirming ministry. AWF's conscience will not permit it to engage in such conduct.

The harm is also irreparable because it forces AWF to speak a message that violates the conscience. This is the gravest of constitutional harms. It is now a axiomatic that loss of constitutional liberties for even a short span of time – particularly those freedoms delineated in the First Amendment – constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In a case compelling school children to recite the pledge of allegiance against their families' religious convictions, Justice Jackson explained that officially disciplined uniformity has historically resulted in a "disappointing and disastrous end." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Wisely, Justice Jackson did not parse out the free exercise of religion and the free speech clauses. Yet under modern jurisprudence, *Barnette* may well have had a result where the compulsion to salute the flag was found wanting as compelled speech but would survive free exercise because the law is facially neutral and generally applicable. (The latter is the State's position. BIO at 28-31).

The *Barnette* Court understood the overarching import of the Bill of Rights. *Id*. at 636-37. "[F]reedoms of speech and of press, of assembly, and of worship may not be infringed" on a mere rational basis. *Id*. at 639. Government compulsion in any of these expressive rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *Id*.

AWF's Reply is not a merits brief. The discussion above merely goes to the point that the law being challenged poses grave harm to AWF – as well as the other Petitioners and all crisis pregnancy centers. As such, this Petition fits well within those types of cases whose procedural posture comes to the Court through a denial of a preliminary injunction and in which review is clearly warranted.

Finally, AWF turns to the State's position that discovery should first be completed in the district court. BIO at 31. This stance ignores the imposition of irreparable harm – absent a preliminary injunction – discussed above. Moreover, the State's argument fails to reflect the filings in the trial court. In the district court, AWF filed the entire legislative record (E.R. 201-269) and three detailed declarations of thirty-five pages (E.R. 271-305). These declarations led the district court to find that AWF would suffer irreparable harm absent an injunction. *A Woman's Friend*, 153 F. Supp. 3d 1168, 1215 (E.D. Cal. 2015). Further, the State filed three exhibits consisting of twenty-six pages (E.R. 161-186). Despite the solid record put forward by AWF, the differences in factual development among the three cases

did not matter to the Ninth Circuit; it treated them all the same. In short, the legal issues – and significant doctrinal questions – predominate. Be that as it may, the filings relating to the AWF Petition provides more than a sufficient record for the Court to have a firm foundation for meaningful review.

VI. THE COMMERCIAL SPEECH DOCTRINE HAS NOT BEEN PROPERLY RAISED BY THE STATE.

The State asserts that *commercial speech* could serve as an independent basis for sustaining the judgment below, should the Court grant review. BIO at 23. AWF agrees with the reasons set forth in the district court's opinion (*A Woman's Friend*, 153 F. Supp. 3d at 1195-99) and in the Ninth Circuit (App. 116, fn. 5) that the Act does not fall under *commercial speech*. Those discussions will not be repeated here. In any event, this Court can indeed grant review to affirm the holding of the lower courts regarding *commercial speech*.

VII. THE PETITION SHOULD BE GRANTED ON WHETHER THE STANDARD OF RATIONAL BASIS IS ALWAYS THE PROPER LEVEL OF REVIEW UNDER FREE EXERCISE CLAIMS INVOLVING A NEUTRAL LAW OF GENERAL APPLICABILITY.

As discussed in AWF's Petition, review should be granted on the issue of whether a neutral law of general applicability should *always* be weighed under the

lowest standard of judicial review on a free exercise claim. Of course, the State disagrees, holding to the standard notion that such laws be given minimal scrutiny so long as they do not *solely* target religious practice in the text of the legislation. BIO at 28-31.

The Act works to stifle "pro-life (largely Christian belief-based) organizations." *A Woman's Friend*, 153 F. Supp. 3d at 1182. The State makes no attempt to dispute this. The Ninth Circuit hangs on to the position that without a textual "reference to any religious practice, conduct, belief, or motivation" the Act is "facially neutral" as a matter of law. App. at 138-39 citing *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015).

AWF argues that the Ninth Circuit's position is flawed, creating the conditions for dangerous government intrusion into the liberty interest in conscience that the First Amendment protects. In *Barnette* this Court did not attempt to pry apart this bundle of rights that preserves expression and conscience. A natural and common sense reading of the First Amendment is that each stick in this bundle should be subject to the highest level of protection that civil law affords. *Id*. at 639. Note that the West Virginia statute requiring a pledge of allegiance to the U.S. flag was textually a neutral law of general applicability. *Id.* at 629. (Indeed, the version used at the time did not contain the phrase "one nation, under God.") In truth, a law requiring pupils to salute the flag by compulsion would withstand a Free Exercise challenge under the rule that a neutral

law of general applicability is reviewed using the lowest level of scrutiny. AWF's position is that such reasoning is unsound and review of the Petition should be granted to rectify this longstanding error.

CONCLUSION

In view of the foregoing, AWF requests that the Court grant its Petition.

Date: June 2, 2017

Respectfully submitted,

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