CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

MOUNTAIN RIGHT TO LIFE, INC., dba PREGNANCY & FAMILY RESOURCE CENTER, BIRTH CHOICE OF THE DESERT, HIS NESTING PLACE,

Petitioners

v.

XAVIER BECERRA, Attorney General of the State of California, in his official capacity,

Respondent

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

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PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
PO Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org

Mary E. McAlister
Daniel J. Schmid
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

QUESTIONS PRESENTED

The State of California, in concert with NARAL Pro-Choice California, enacted Assembly Bill 775 ("AB775"), which compels Petitioners, non-profit, faith-based and pro-life crisis pregnancy centers to disseminate state-mandated advertisements for free and low cost abortions, or face cumulative fines. Under the law, the first message that people entering Petitioners' pregnancy centers must see is a state-mandated notice telling them that there are free and low cost abortions available by calling a certain telephone number. Before Petitioners' staff can say a word about Petitioners' life-affirming message and mission, visitors are told that they need only pick up the phone to get free or low cost abortions. AB775 forces Petitioners to speak a message that is profoundly at odds with their religious beliefs, and directly contrary to the message Petitioners actually wish to speak. The Ninth Circuit affirmed the denial of injunctive relief, concluding AB775 is merely a regulation of professional speech which passes intermediate First Amendment scrutiny.

The Questions Presented for this Court's review are:

1. Whether a law compelling faith-based nonprofit crisis pregnancy centers to advertise free or low-cost abortions available from the state, a message in direct contradiction to the organizations' sincerely held religious beliefs, is a content-based restriction of speech subject to strict scrutiny under *Reed v. Town of Gilbert*, 125 S. Ct. 2218 (2015).

2. Whether a law compelling faith-based nonprofit crisis pregnancy centers to advertise free or low-cost abortions available from the state, a message in direct contradiction to the organizations' sincerely held religious beliefs, conflicts with *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988), and other precedents of this Court and the Courts of Appeal.

3. Whether a law compelling faith-based nonprofit crisis pregnancy centers to advertise free or low-cost abortions available from the state, a message in direct contradiction to the organizations' sincerely held religious beliefs, conflicts with *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and other precedents of this Court and the Courts of Appeal.

PARTIES

Petitioners are Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center; Birth Choice of the Desert and His Nesting Place.

Respondent is the Attorney General for the State of California, Xavier Becerra.

CORPORATE DISCLOSURE STATEMENT

Petitioners, Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center; Birth Choice of the Desert and His Nesting Place are California nonprofit corporations. None of the Petitioners have a parent corporation or are publicly held.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

DECISIONS BELOW

The Ninth Circuit's decision affirming the district court's denial of a preliminary injunction (App. 1a) is unpublished and available at *Mountain Right To Life, Inc., dba Pregnancy and Family Resource Center; Birth Choice of the Desert; His Nesting Place, Plaintiffs-Appellants, v. Xavier Becerra, Attorney General of the State of California, in his official capacity, Defendant-Appellee*, No. 16-56130, 2017 WL 2655865 (9th Cir. June 19, 2017).

The district court's decision denying Petitioners' motion for a preliminary injunction (App. 5a) is unpublished and available at *Mountain Right To Life, et al., Plaintiffs, v. California Attorney General Kamala Harris, et al., Defendants*, CV 16-00119 TJH (SPx), 2016 WL 3883923 (9th Cir. July 8, 2016).

In the decision below, the Ninth Circuit relied on its decision in *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("NIFLA"), reprinted at App. 21a.

JURISDICTION

The Ninth Circuit issued its decision on June 19, 2017. 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 text of AB775 is set forth in the Appendix to this Petition, at 74a.

INTRODUCTION

In a thinly disguised effort to shut down messengers who will not advocate for abortion, California, acting in concert with NARAL Pro-Choice California, enacted Assembly Bill 775 ("AB775"), which compels non-profit crisis pregnancy centers to disseminate state-mandated advertisements for free and low cost abortions, or face cumulative fines. Under the law, the first message that people entering crisis pregnancy centers must see is a state-mandated notice telling them that there are free and low cost abortions available from the State. Before center staff can say a word, visitors are told that they need only pick up the phone to get free or low cost abortions. The centers' pro-life message is diluted, and in some cases lost entirely.

AB775 sabotages the free speech and free exercise rights of Petitioners and other nonprofit crisis pregnancy centers, undermining the First Amendment rights that lie at the heart of liberty and cannot be restricted unless the state can satisfy the most exacting scrutiny. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). Acting contrary to that unequivocal directive, the Ninth Circuit has determined that content-based compelled speech is more acceptable when it relates to promoting abortion, and so it need only satisfy a diluted version of intermediate scrutiny. As a result, faith-based pro-life pregnancy centers must promote the state's pro-abortion message on the pain of debilitating fines.

AB775 also penalizes faith-based organizations for exercising their sincerely held religious beliefs by requiring that they promote abortion, which is profoundly contrary to their core beliefs.

Because the Ninth Circuit's decision contravenes this Court's precedents and conflicts with decisions from other circuits addressing substantially similar content-based laws, this Court should grant review.

The need for this Court's review is further evidenced by the fact that the Ninth Circuit's validation of the content-based

compelled speech requirements for pro-life pregnancy centers has spawned similar laws affecting the free speech and free exercise rights of faith-based pregnancy care centers. On July 12, 2017, Hawaii's governor signed into law SB501, which is virtually identical to AB775.[1] On July 26, 2016, Illinois' governor signed into law SB1564, which imposes on pro-life pregnancy centers abortion advertising requirements similar to AB775's.[2] On July 19, 2017, the Northern District of Illinois issued a preliminary injunction halting the enforcement of SB1564, on the ground that plaintiffs are likely to prevail in challenging its constitutionality.[3] This proliferation of "copycat" laws points to the urgent need for this Court's review.

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[1] Senate Bill 501, 29th Legislative Session (2017) *available at* http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=501&year=2017 (last visited July 25, 2017).

[2] SB 1564, Public Act 99-690, codified at 745 Ill. Stat. §§70/6-70/6.2.

[3] Order granting Preliminary Injunction, *NIFLA, et. al. v. Rauner,* No. 16 C 50310 (N.D. Ill. July 19, 2017).

STATEMENT OF THE CASE

Petitioners' Pro-Life Ministries

Petitioners are non-profit, faith-based, pro-life pregnancy counseling centers that provide free, confidential information and services to women facing unplanned pregnancies. (App. 159a-173a). Petitioners were founded upon and operate according to Christian principles–including that human life begins at conception and abortion destroys human life–which permeate all aspects of their services. (*Id.*). The organizations are founded upon the tenets that human life is sacred and that both the mother and her unborn child must be loved and supported throughout the pregnancy and beyond as the mother chooses parenting or adoption. (*Id.*).

Petitioners receive no state or federal funds. (*Id.*). Instead, they are funded through donations from organizations and individuals who share Petitioners' sincerely held religious beliefs about the sanctity of life. (*Id.*). Petitioners cannot in any way support, provide for, refer or otherwise promote abortion. (*Id.*). To do otherwise would violate their sincerely held religious beliefs and jeopardize the support from their donors and supporters. (*Id.*).

Petitioner Mountain Right to Life, Inc., doing business as Pregnancy & Family Resource Center ("PRC"), is licensed to provide limited non-diagnostic ultrasound services, as well as free pregnancy tests, relationship counseling, medical care referrals, information regarding maternity homes, and counseling regarding employment and education options. (App. 160a).

Petitioner Birth Choice of the Desert ("BCD") provides pregnancy tests, counseling and medical referrals. (App. 163a-164a). BCD is not presently licensed to perform limited non-diagnostic ultrasounds, but its board of directors has approved purchasing an ultrasound unit that would enable it to seek licensing to offer those services. (*Id*).

Petitioner His Nesting Place ("HNP"), operates a maternity home for women facing unplanned pregnancies and a crisis pregnancy center that offers free pregnancy tests, food, baby items, counseling, job training and other services to support mothers and their unborn children. (App. 169a).

AB775 and Its Effects

Under AB775 Petitioners and other operators of non-profit pro-life pregnancy care centers must post and disseminate one of two

government-prescribed messages in a government-prescribed manner, or be fined $500 for the first violation and $1,000 for each subsequent violation with no cap. (App. 82a).

Petitioner PRC, and if BCD obtains a license to perform limited non-diagnostic ultrasounds, then BCD, must post the following advertisement in at least 22-point type in a conspicuous place at the entrance to the facility, or in at least 14-point in a printed notice handed to visitors, "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." (App. 79a-80a).

> 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]. (App. 80a).

Petitioner HNP and, until it obtains a license to do limited non-diagnostic

ultrasounds, BCD, must post the following statement in at least two conspicuous places at their facilities in at least **48-point type** in multiple languages and in "conspicuous" type in multiple languages in **all** print **and** digital advertising:

> This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

(App. 81a).

The multiple language requirement in AB775 means that HNP, as a resident of Los Angeles County, has to provide two copies of **11 versions** of the 29-word notices in 48-point type.[4] BCD, as a resident of Riverside County,

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[4] Arabic, Armenian, Cambodian, Chinese, English, Farsi, Korean, Russian, Spanish, Tagalog and Vietnamese. *See* California Department of Health Care Services, *Threshold and Concentration Languages For Two Plan, GMC, and COHS Counties as of July 2016,* http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2017/APL17-011.pdf (last visited July 26, 2017).

has to provide two copies of **two versions** in 48-point type.[5] PRC, which is located in San Bernardino County, has to provide **two versions** of its required disclosure.[6]

The legislative purpose of the bill purports to be "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." (App. 77a). However, AB775 carves out exemptions from the notice requirements:

> (c) This article shall not apply to either of the following:
> (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
> (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

(App. 79a).

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5 Spanish and English. *Id.*

6 Spanish and English. *Id.*

The bill's sponsors claimed that the exemptions were justified because of pre-emption concerns as to the federally affiliated clinics. (App. 124a). As for the Medi-Cal and FPACT Program clinics, the sponsors claimed that the exemption was justified because those facilities provide "the entire spectrum of services," *i.e.* abortions, contraceptives and other pregnancy related services. (App. 125a). In other words, according to the sponsors, if a clinic provides abortions it automatically provides notice to clients about the availability of free and low-cost abortions (apparently irrespective of the fact that such free and low cost abortions would adversely affect the clinic's income). *Id*.

In fact, the legislative history shows that the true purpose of the legislation is to chill and quash the speech of organizations which have sincerely held religious beliefs against referring for or performing abortions. (App. 91a). This is apparent from the co-sponsor of the bill, NARAL Pro-Choice California, and from the words of the legislative sponsor, Assemblyman David Chiu:

> The author contends that, **unfortunately**, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is

> to **interfere with women's ability to be fully informed** and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.

(App. 91a) (emphasis added).

AB775 was signed into law on October 9, 2015, codified as California Health and Safety Code §§123470-123473 and became effective on January 1, 2016. (App. 74a).

PROCEDURAL HISTORY

This is the fourth petition asking this Court to review the Ninth Circuit's improper validation of AB775. **The other three are presently before this Court awaiting conference review on September 25, 2017**.[7]

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[7] *National Institute Of Family and Life Advocates, dba NIFLA, et al., Petitioners, v. Xavier Becerra, Attorney General of California,*

Petitioners filed a Complaint and Motion for Preliminary Injunction in the Central District of California on January 21, 2016. Petitioners challenged AB775, both on its face and as applied, as violative of their free speech and free exercise rights under the First and Fourteenth Amendments to the U.S. Constitution.

The district court took Petitioners' motion for a preliminary injunction under submission after the briefing was completed, and on July 11, 2016, entered its order denying the motion. (App. 5a). With regard to the notice requirement for licensed facilities, the court applied intermediate scrutiny and concluded that AB775 "is a constitutionally permissive regulation of professional speech." (App. 16a). As for the notice requirement for unlicensed facilities, the court applied strict scrutiny and concluded that the provision "advances California's compelling interest in ensuring

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et al., Respondents, No. 16-1140; *Livingwell Medical Clinic, Inc., et al, Petitioners, v. Xavier Becerra, Attorney General of the State of California, in his official capacity, et al., Respondents,* No. 16-1153; *A Woman's Friend Pregnancy Resource Clinic and Alternative Women's Center, Petitioners, v. Xavier Becerra, Attorney General of the State of California, Respondent*, No. 16-1146.

that people know when they are receiving medical care from licensed professionals and when they are not," and "is narrowly tailored because it merely discloses the licensing status of the medical facility's employees." (App. 16a-17a). On that basis, the court concluded that Petitioners failed to demonstrate a likelihood of success that AB775 violates Petitioners' free speech rights. (App. 17a). Similarly, the district court concluded that Petitioners failed to demonstrate a likelihood of success on the merits of their free exercise claim because AB775 is neutral and generally applicable, and satisfies rational basis. (App. 19a).

Petitioners filed a preliminary injunction appeal. On June 19, 2017, a three-judge panel of the Ninth Circuit affirmed the district court's denial of injunctive relief. (App. 1a). The panel concluded that the case was controlled by the Ninth Circuit's earlier opinion in *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("*NIFLA*"), which affirmed denials of preliminary injunctive relief in similar challenges to AB775. (App. 3a).

In *NIFLA*, the Ninth Circuit concluded that AB775 is a content-based restriction on speech, but that it need not meet the exacting standards of *Reed v. Town of Gilbert*, 125 S. Ct. 2218 (2015), because circuit courts have applied less rigorous scrutiny to content-based speech

restrictions related to abortion. (App. 48a). The court also concluded that AB775 regulates professional speech and therefore need only satisfy intermediate scrutiny under the Ninth Circuit's free speech "continuum" announced in *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2013) (App. 53a). The court found that, with regard to the notice for licensed facilities, AB775 survived intermediate scrutiny. (App. 59a). With regard to the notice requirement for unlicensed facilities, the court found that it would survive any level of constitutional scrutiny. (App. 65a). Finally, with regard to the free exercise claim, the Ninth Circuit concluded that AB775 is neutral and generally applicable and therefore need only satisfy, and does satisfy, rational basis review. (App. 68a).

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY APPLICABLE TO CONTENT-BASED SPEECH RESTRICTIONS.

A. The Ninth Circuit's Application of

Intermediate Scrutiny To A Content-based Law Conflicts With This Court's Adoption of Strict Scrutiny Review in Reed and Earlier Precedents.

Where, as the Ninth Circuit admits is true about AB775, a statute imposes content-based restrictions on speech, "those provisions can stand only if they survive strict scrutiny." *Reed*, 125 S.Ct. at 2231. This Court was unequivocal in its conclusion that content-based speech restrictions must undergo the highest level of scrutiny to prevent overt and covert government censorship of disfavored topics. *See id.* at 2233 (Alito, J., concurring).

> Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified *only* if the government proves that they are narrowly tailored to serve compelling state interests.

Id. at 2226 (emphasis added).

A law is content-based if it applies to particular speech because of the topic discussed or the idea or message expressed, *i.e.,* it draws distinctions based on the message the speaker

conveys. *Id.* at 2227. "Some facial distinctions based on message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. *Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny*." *Id.* at 2227 (emphasis added).

In *Reed*, this Court handed down a firm rule: laws that are content-based on their face must satisfy strict scrutiny. *Id.*; *see also id.* at 2233 ("As the Court holds, what we have termed 'content-based' laws *must satisfy strict scrutiny*.") (Alito, J., concurring)(emphasis added). If there was any doubt, the concurrences also note that, under *Reed*, content discrimination is "an *automatic* strict scrutiny trigger, leading to almost certain legal condemnation." *Id.* at 2234 (Breyer, J., concurring) (emphasis added); *id.* at 2236 ("Says the majority: When laws single out specific subject matter, they are 'facially content based'; and when they are facially content based, *they are automatically subject to strict scrutiny*." (Kagan, J., concurring) (emphasis added)).

In addition, laws that appear to be facially neutral can be content based if they cannot be justified without reference to the content of the regulated speech, or were

adopted because of disagreement with the message the speech conveys. *Id.* at 2227. All such laws must be subject to strict scrutiny. *Id.*

Of particular relevance is this Court's explanation of why content-based restrictions are suspect: "'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.'" *Id.* at 2229 (quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J. dissenting)). Similarly, the *Reed* Court reiterated that the state cannot use the guise of "regulation of professional speech" to escape strict scrutiny review. *Id.* "'[I]t 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.* (quoting *NAACP v. Button*, 371 U.S. 415, 438-39 (1963)). "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*." *Id.* at 2228 (emphasis added). Indeed, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such

statutes to suppress disfavored speech." *Id.* at 2229.

Reed reinforces this Court's longstanding rejection of speech controls disguised as regulations. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez,* 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). The Constitution "'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.'" *Id.* at 717 (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)). Content-based restrictions pose "substantial and expansive threats to free expression." *Id.* Consequently, content-based restrictions on speech have been permitted only in very limited circumstances, *i.e.*, incitement to lawless action, obscenity, defamation, child pornography, speech integral to criminal conduct, "fighting words," fraud and true threats. *Id.* Adhering to those limited exceptions protects the free exchange of ideas inherent in the free speech clause. *Id.* at 718.

Absent from that list, or from this Court's precedents, is the exception for speech related

to abortion upon which the Ninth Circuit relied for its departure from strict scrutiny review. The *NIFLA* panel affirmed that *Reed* "expressly stated that '[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests,' *Id.* at 2226." (App. 46a). However, the panel brazenly concluded that *Reed* "does not require us to apply strict scrutiny in this case," because "*we* have recognized that not all content-based regulations merit strict scrutiny." (App. 46a) (emphasis added) (citing *United States v. Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc)). By "we," of course, the Ninth Circuit meant itself, as if it could somehow overrule this Court.

Notably the case cited by the Ninth Circuit for the proposition that *Reed* does not require strict scrutiny review, *Swisher*, recognized the limited exceptions to strict scrutiny described in *Alvarez* and found that the law under review could not survive strict scrutiny. *Swisher,* 811 F.3d at 317-18. The en banc court in *Swisher* specifically declined to add to the list of exceptions set forth in *Alvarez*, and therefore does not support the *NIFLA* panel's conclusion that *Reed*'s strict scrutiny analysis is not controlling.

B. The Ninth Circuit's Decision Conflicts With McCullen.

The *NIFLA* panel's attempt to create a new abortion exception to strict scrutiny review of content-based speech restrictions also contradicts this Court's invalidation of an abortion-related speech restriction in *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). While this Court determined that the Massachusetts abortion buffer zone statute in *McCullen* was content-neutral, it also stated that, if it were content-based, it would have to survive strict scrutiny. *Id.* at 2530.

In *McCullen*, the petitioners argued that the abortion clinic buffer zone law was content-based because it discriminated only against abortion-related speech and, by exempting clinic workers from the provisions, favored one viewpoint about abortion over another. *Id.* "If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest." *Id.* (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Contrary to the Ninth Circuit's opinion, a content-based restriction on speech related to abortion, like other content-based restrictions, is always subject to strict scrutiny. *See id.*

Nevertheless, the *NIFLA* panel said that it was not required to apply strict scrutiny to AB775 because "courts have routinely applied a lower level of scrutiny when states have compelled speech concerning abortion-related disclosures." (App. 48a) (citing *Stuart v. Camnitz*, 774 F.3d 238, 246, 248 (4th Cir. 2014); *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)). However, as the panel recognized, those circuit court decisions were themselves based on misinterpretations of 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). The circuit courts used *Casey* and *Gonzales* to justify more deferential standards of review. (App. 48a). However, as the *NIFLA* panel acknowledged, neither *Casey* nor *Gonzales* announced a level of scrutiny to apply in abortion-related disclosure cases, but merely reiterated that states can regulate professional speech. (App. 52a). Consequently, neither *Casey* nor *Gonzales* supports the *NIFLA* panel or other circuit courts' contention that strict scrutiny does not apply to abortion regulations.

Therefore, the conclusion that content-based restrictions on speech related to abortion

are not subject to strict scrutiny has no basis in this Court's precedents. In fact, it is directly contradicted by *McCullen*. Therefore, this Court should grant review to resolve the conflict on this issue of great constitutional significance.

C. The Ninth Circuit's Determination That The Act Need Only Satisfy Intermediate Scrutiny As A Regulation Of Commercial Professional Speech Conflicts With This Court's Precedents According Strict Scrutiny Review When Services Are Provided Pro Bono.

The *NIFLA* panel's determination that AB775 regulates commercial professional speech so that it only need satisfy intermediate scrutiny also directly conflicts with this Court's precedents regarding communications by professionals offering information and services pro bono. *NAACP v. Button*, 371 U.S. 415 (1963); *In Re Primus*, 436 U.S. 412 (1978). In *Button*, the Court concluded that the non-profit NAACP's solicitation of people to bring civil rights suits was protected First Amendment activity. 371 U.S. at 428-29. The solicitation was not regarded as regulable "professional

speech" but as a mode of political expression effectuated through group activity falling within the sphere of associational rights guaranteed by the First Amendment. *Id.*

In *Primus*, this Court similarly differentiated between regulating attorney solicitation for pecuniary gain and restricting communications related to the availability of pro bono services to address civil rights violations. *Primus*, 436 U.S. at 434-35. This Court said that, while the state can "proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences," the same is not true for information provided by a non-profit organization relating options for addressing particular issues. *Id.* at 437 (contrasting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978)). In the latter case, the information is not in the nature of a commercial transaction, but is the dissemination of information aimed at helping the recipient make decisions. *Id.* at 437-38. As such, it is akin to political and ideological expression and "must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights.'". *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)).

Here, Petitioners are non-profits providing free services, including non-

diagnostic ultrasounds, pregnancy testing, medical referrals and similar life-affirming information for unplanned pregnancies. (App. 160a-169a). As was true in *Primus*, Petitioners are not seeking to enter into a commercial transaction or otherwise obtain pecuniary gain from their interactions with clients. Instead, as was true in *Primus*, Petitioners are seeking to communicate information to pregnant woman to inform them of their life-affirming options for dealing with the issue of an unplanned pregnancy. (App. 160a-169a).

Under *Primus* and *Button*, Petitioners' activities are protected First Amendment expression, the regulation of which must be subject to strict scrutiny review. The Ninth Circuit's conclusion that it is professional speech subject to only intermediate scrutiny conflicts with this Court's precedents and should be reviewed by this Court.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY APPLICABLE TO LAWS COMPELLING THE CONTENT OF SPEECH.

The *NIFLA* panel's departure from strict scrutiny review also contradicts this Court's precedents holding that laws compelling speech are presumptively unconstitutional unless they can survive strict scrutiny. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("*AID*"). "'At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). Therefore, "'freedom of speech prohibits the government from telling people what they must say.'" *Id.* (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61, (2006)). *See also, West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). When, as is the case with AB775, the state enacts a direct regulation of speech that mandates what the speaker must say, it "plainly" violates the First Amendment. *AID*, 133 S.Ct. at 2327.

Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," this Court considers laws mandating speech to be content-based restrictions. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). While "[t]here is certainly some difference

between compelled speech and compelled silence . . . in the context of protected speech, the difference is without constitutional significance." *Id.* at 796. Indeed, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Id.* (emphasis original). "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Turner Broadcasting*, 512 U.S. at 642; *see also Riley*, 487 U.S. at 798 ("We believe, therefore, that [compelled] content-based regulation is subject to exacting First Amendment scrutiny.").

If "the government were freely able to compel . . . speakers to propound political messages with which they disagree . . . protection of a speaker's freedom would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575–76 (1995). "Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to

autonomy over the message is compromised." *Id.* at 576. The state "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id* at 579.

Here, AB775 is compelling precisely what this Court condemned in *Riley* and *Hurley*. The state is compelling Petitioners to affirm that visitors to their facilities can call to obtain free and low cost abortions in one breath and then express their sincerely held religious beliefs against abortion in the next. As the author of the bill admitted, the state is interfering with Petitioners' speech precisely to discourage the disfavored message against abortion. (App. 91a). Such regulations are unconstitutional unless they can survive the most exacting strict scrutiny. Indeed, AB775 and the panel's decision affirming it are running roughshod over "the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley*, 487 U.S. at 799; *Turner Broadcasting*, 512 U.S. at 642.

Nevertheless, the Ninth Circuit subjected AB775 to only intermediate scrutiny, in direct contravention of this Court's longstanding precedent. This decision is irreconcilable with

this Court's jurisprudence. This Court should grant review.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE PRECEDENTS OF OTHER CIRCUITS CONCERNING THE APPROPRIATE LEVEL OF SCRUTINY APPLICABLE TO CONTENT-BASED AND COMPELLED SPEECH RESTRICTIONS.

A. The Ninth Circuit's Application of Intermediate Scrutiny Conflicts With Decisions of the Second And Fourth Circuits Addressing Substantially Similar Abortion Notification Laws.

The Ninth Circuit's departure from the strict scrutiny review required under *Reed, McCullen*, and *Riley* conflicts with decisions in the Second and Fourth circuits which invalidated content-based abortion notification provisions substantially similar to AB775. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184 (4th Cir. 2013) (en banc); *Greater Baltimore Ctr. for Pregnancy*

Concerns, Inc. v. Mayor & City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012), *reversed on procedural grounds on reh'g en banc*, 721 F.3d 264 (4th Cir. 2013). This inter-circuit split on the critically important issue of the standard of review for content-based speech restrictions should be resolved by this Court.

1. The Panel's Decision Below Conflicts with The Second Circuit's Decision in Evergreen Ass'n Applying Strict Scrutiny.

In *Evergreen Ass'n*, the Second Circuit applied strict scrutiny to invalidate government-mandated disclosures that, like AB775, required pregnancy services centers immediately to accost their visitors with a prescribed message. 740 F.3d at 238. The disclosures did not as explicitly promote abortion as do the disclosures in AB775, but were still found to be subject to strict scrutiny under *Riley* and *Turner Broadcasting*. *Id.* at 249. While AB775 requires that licensed facilities state that California offers free and low cost abortions, the city law in *Evergreen Ass'n* required only that the facilities state whether they provide referrals for abortion and that the state recommends that women see a physician. *Id.* at 238. Still, that law was found to be an impermissible content-based

restriction on the pregnancy centers' free speech rights because it would alter the speech a pregnancy services center would otherwise engage in with clients. *Id.* at 249-50.

The Second Circuit found that the compelled speech involved "a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives." *Id.* at 249. Such "'expression on public issues has always rested on the highest rung on the hierarchy of First Amendment values.'" *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). "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.* at 249 (citing *Riley*, 487 U.S. at 795).

> The Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues of prenatal care, emergency contraception, and abortion. The centers must be free to formulate their own address.

Id. at 249-50.

Regarding the compelled advertising of the state's purported recommendation that pregnant women consult a physician, the Second Circuit said, "the Government Message 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.* at 250. The government cannot mandate that pregnancy service centers affirmatively espouse the government's position on a contested public issue through regulations that threaten to fine, de-fund or forcibly shut down non-compliant entities. *Id.* at 250-51. Therefore, the physician notification provision also could not survive strict scrutiny. *Id.* at 251.

The Ninth Circuit's determination that a mandated message (which much more explicitly promotes abortion than did the disclosure in *Evergreen Ass'n*) is merely a regulation of professional speech subject to intermediate scrutiny conflicts with the Second Circuit's decision which, consistent with *Riley* and *Tuner Broadcasting*, concludes that such compelled speech on important public issues must be subject to strict scrutiny. The conflict should be resolved by this Court.

2. The Panel's Decision Below Conflicts with The Fourth Circuit's Decisions in Centro Tepeyac and Greater Baltimore Ctr. Applying Strict Scrutiny.

The Fourth Circuit applied strict scrutiny to invalidate two regulations that, like AB775, sought to compel pregnancy care centers to disseminate the government's messages. *Centro Tepeyac,* 722 F.3d 184; *Greater Baltimore Ctr. for Pregnancy Concerns,* 683 F.3d 539. In both cases, the court found that the challenged provisions regulated non-commercial, fully protected speech, not, as the Ninth Circuit claims regarding AB775, commercial professional speech.

In *Centro Tepeyac,* the en banc court affirmed the district court's determination that compelling pregnancy care centers to advertise the state's encouragement of pregnant women to see physicians was a content-based speech restriction under *Riley*. 722 F.3d at 189. In addition, while some aspects of the pregnancy centers' speech could be regarded as commercial, "such commercial speech would at least be 'intertwined with [fully protected] speech,' in any event triggering strict scrutiny." *Id.* (citing *Centro Tepeyac v. Montgomery Cnty.*, 779 F.Supp.2d 456, 463-64 (D.Md.2011)). The

court upheld the district court's conclusion that the mandated notice did not satisfy strict scrutiny. *Id.* at 192.

Similarly, in *Greater Baltimore Ctr. for Pregnancy Concerns,* the Fourth Circuit found that a city ordinance that compelled pregnancy centers to post notices disclosing that they do not provide abortions was subject to strict scrutiny because it impeded fully protected, non-commercial speech. 683 F.3d 539, 555–56.[8] "Content-based [speech] regulations are presumptively invalid." *Id.* (quoting *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992)). "The City thus bears the burden of rebutting the presumption of invalidity. Indeed, '[i]t is rare that a regulation restricting speech because of its content will ever be permissible.'" *Id.* (citation omitted). The challenged ordinance did not represent one of the rare occasions, but

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[8] On rehearing en banc, the Fourth Circuit reversed the panel decision and remanded the case to the district court on the other, procedural question raised on appeal, *i.e.*, whether the district court improperly failed to permit discovery before transforming the motion to dismiss to one for summary judgment. 721 F.3d 264 (4th Cir. 2013). The en banc panel did not reverse the panel's affirmation of the finding that the notice was subject to strict scrutiny.

was invalid because it was "not narrowly tailored to promote the City's interest so as to justify its intrusion on the Pregnancy Center's speech." *Id.* at 559. (citing *Riley*, 487 U.S. at 791 for the proposition that the ordinance violates the First Amendment's presumption that "speakers, not the government, know best both what they want to say and how to say it.").

In both cases, the Fourth Circuit, consistent with *Riley*, *Turner Broadcasting* and this Court's other precedents, decided that compelling pro-life pregnancy centers to act as the government's messengers regarding the availability of abortion is antithetical to the First Amendment and must withstand strict scrutiny. The Ninth Circuit's contrary conclusion does not comport with these decisions.

As Judge Wilkinson said, "[b]ecause the dangers of compelled speech are real and grave, courts must be on guard whenever the state seeks to force an individual or private organization to utter a statement at odds with its most fundamental beliefs." *Centro Tepeyac* 722 F.3d at 193 (Wilkinson, J. concurring). The Second and Fourth Circuits appropriately heeded that advice. The Ninth Circuit did not, and has created a conflict on the critically important issue of whether the government can compel speakers to utter the government's

message by labeling it "professional speech" and subjecting it to deferential intermediate scrutiny. This Court should resolve the conflict.

B. The Ninth Circuit's Conclusion That the Act Is A Permissible Regulation of Professional Speech Conflicts With Decisions in the Fourth and Eleventh Circuits.

The Ninth Circuit's decision that AB775 is a constitutionally permissible regulation of professional speech conflicts with Fourth Circuit and Eleventh Circuit decisions invalidating content-based regulations of physician speech. *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc). The Ninth Circuit's decision that the compelled promotion of California's free and low cost abortions is a valid regulation of commercial professional speech conflicts with the other circuits' rulings that comport with *Riley* and *Reed* and find such disclosures constitutionally impermissible.[9]

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[9] Petitioners do not concede that AB775 should be characterized as a regulation of professional speech, but present these cases to further illustrate the conflict between the Ninth

1. The Ninth Circuit's Decision Conflicts With The Fourth Circuit's Decision In Stuart.

In *Stuart,* the Fourth Circuit found that a requirement that physicians perform an ultrasound and describe the physical attributes of the unborn child before performing an abortion was quintessential compelled speech that impermissibly restricted physicians' speech. 774 F.3d at 250. In finding that the provision had to satisfy at least heightened scrutiny, the *Stuart* court said:

> Compelled speech is particularly suspect because it can directly affect listeners as well as speakers. Listeners may have difficulty discerning that the message is the state's, not the speaker's, especially where the "speaker [is] intimately connected with the communication advanced."

Id. at 246 (quoting *Hurley*, 515 U.S. at 576). Compelled speech is particularly suspect when, as in *Stuart* and here, the compelled statement is ideological. *Id.* In Stuart, the state admitted

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Circuit's decision in *NIFLA* and other circuits examining similar speech restrictions.

that the purpose and anticipated effect of the challenged provision was to convince women seeking abortions to change their minds or reassess their decisions. *Id.*

That intended effect on the listener was particularly pertinent to the Fourth Circuit's determination that the provision could not survive under either intermediate or strict scrutiny. *See id.* at 246-48. "The court can and should take into account the effect of the regulation on the intended recipient of the compelled speech, especially where she is a captive listener." *Id.* at 250.

> This statutory provision interferes with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient's psychological health, interfering with the physician's professional judgment, and compromising the doctor-patient relationship. We must therefore find the Display of Real–Time View Requirement unconstitutional.

Id. "The coercive effects of the speech are magnified when the physician is compelled to

deliver the state's preferred message in his or her own voice." *Id.* at 253.

The same captive listener, *i.e.*, a woman facing an unplanned pregnancy, the same effects upon the listener's psychological health, and the same coercive effect of Petitioners having to deliver the state's message "in their own voice" via prominent notifications on site and online, are present in AB775. Women entering Petitioners' faith-based facilities that are committed to alternatives to abortion must be immediately accosted with the message that they can obtain free and low cost abortions. The visitor will be confused before even engaging with Petitioners' staff. Just as the message in *Stuart* was admittedly ideological, *i.e.* seeking to dissuade women from abortion, the message in AB775 is admittedly ideological, *i.e.,* aimed at preventing pro-life organizations from dissuading women to obtain abortions. (App. 90a). As was true of the regulation invalidated in *Stuart*, AB 775 interferes with the relationship between Petitioners' staff and clients by immediately putting staff on the defensive, having to explain the state-mandated message that is antithetical to Petitioners' chosen message.

The Ninth Circuit's failure to acknowledge these same constitutional infirmities in AB775 conflicts with the Fourth

Circuit's decision. Because the effects of compelled speech on the listener and speaker are critically important to protecting the cherished free speech rights of Petitioners and their clients, this Court should accept review and resolve the conflict.

2. The Ninth Circuit's decision conflicts with the Eleventh Circuit's decision in Wollschlaeger.

Similarly, the Ninth Circuit's decision in *NIFLA* conflicts with the Eleventh Circuit's en banc decision invalidating a content-based speech restriction that was less burdensome on fundamental rights than AB775. *Wollschlaeger,* 848 F.3d at 1318. The statute at issue in *Wollschlaeger* did not, as AB775 does here, compel speakers to utter a state-mandated message antithetical to the foundational tenets of their organizations. *Id.* at 1307. Medical professionals were limited in what they could say or do with regard to their patients' gun ownership, but were not compelled, as Petitioners are here, to disseminate a state-mandated advertisement advocating a position on the issue. *Id.* Nevertheless, in keeping with this Court's decision in *Reed*, the Eleventh Circuit determined that portions of the law limiting what physicians could say were

content-based restrictions on speech that could not withstand either heightened or strict scrutiny. *Id.* at 1311.

As the *Wollschlaeger* court said, review of content-based provisions must be "skeptical of the government's ability to calibrate the propriety and utility of speech on certain topics." *Id.* at 1308. The state must present sufficient evidence to demonstrate that the harm it is seeking to alleviate through the speech restriction is real, not conjectural, and that the restriction is narrowly tailored to alleviate the problem. *Id.* at 1312. Florida offered anecdotal evidence from six citizens whose rights were interfered with by intrusive questioning from physicians. *Id.* The en banc court found that was not enough to justify limiting physicians' ability to speak about gun ownership and invalidated the provisions. *Id.*

Here, California had no evidence of women's rights being infringed by pro-life pregnancy centers not espousing the state's pro-abortion message. (App. 89a-113a). Instead, the State offered opinions regarding the nature of Petitioners' and other organizations' pro-life resource centers, saying that it is "unfortunate" that they exist. (App. 90a). California also offered surveys about how informed women are about abortion availability in the state, but did not tie the levels of information or lack of

information to the existence of pro-life pregnancy centers. (App. 89a-113a). Nevertheless, the *NIFLA* panel found that the state presented sufficient evidence to not merely limit the speech of pro-life pregnancy centers (as did the provision in *Wollschlaeger*) but to compel them to utter the state's message that advertises free and low cost abortions, procedures that are antithetical to the centers' raison d'etre. (App. 60a). That determination that AB775 is narrowly tailored to advance a significant state interest directly conflicts with the Eleventh Circuit's determination.

The *NIFLA* court's decision directly conflicts with the *Wollschlaeger* court's determination utilizing this Court's decision in *Reed*. Because the conflict affects the critical question of when a state can compel speech without violating the First Amendment, this Court should grant review and resolve the conflict.

IV. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY APPLICABLE TO LAWS SINGLING OUT RELIGIOUS

SPEECH FOR DISFAVORED TREATMENT.

The *NIFLA* court's determination that AB775 need only satisfy rational basis review for purposes of Petitioners' Free Exercise claim directly conflicts with this Court's longstanding precedents, just affirmed in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), which hold that laws which punish those exercising their sincerely held religious beliefs are presumed unconstitutional and must satisfy strict scrutiny. It also conflicts with decisions in the Third Circuit which found that apparently neutral laws that evince a discriminatory intent must satisfy strict scrutiny. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002).

A. The Ninth Circuit *NIFLA* Decision Conflicts With This Court's Free Exercise Precedents As Affirmed in *Trinity Lutheran.*

Laws, like AB775, through which the government seeks to coerce individuals or organizations to violate their sincerely held religious beliefs, are particularly suspect since

they strike at the heart of the Free Exercise clause, *i.e.,* protecting religious exercise from interference by the state. *Bowen v. Roy*, 476 U.S. 693, 700 (1986) (citing *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). This Court has consistently re-affirmed that the Free Exercise Clause guards against the government's imposition of "special disabilities on the basis of religious views or religious status." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). *See also*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). Laws which so penalize religious free exercise are subject to the most exacting scrutiny. *Lukumi*, 508 U.S. at 546.

Consequently, while *Smith* announced more deferential treatment for laws in which religious adherents were seeking special dispensation from an otherwise general criminal law, it did not alter this Court's longstanding application of strict scrutiny to laws that impose special penalties on religious exercise. 494 U.S., at 877.

In *Lukumi*, this Court looked beyond apparent facial neutrality and uncovered an improper discriminatory purpose of prohibiting sacrificial rituals integral to the plaintiffs' Santeria religion. 508 U.S. at 533. This Court

reiterated that, even after *Smith*, laws which explicitly or implicitly discriminate against religious practices or place special disabilities on religious exercise are invalid unless they can survive strict scrutiny. *Id.* As this Court explained:

> [I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, *see Employment Div., Dept. of Human Resources of Oregon v. Smith, supra*, 494 U.S., at 878–879, 110 S.Ct., at 1599–1600; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Id.

This Court explained that the Free Exercise Clause extends beyond facial discrimination to forbid "subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Id.* at 534 (citations omitted).

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise

> Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

Id. (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

The Ninth Circuit eschewed these precedents when it failed to look beyond the provisions of AB775 before declaring it neutral and generally applicable, and therefore subject only to rational basis review. (App. 66a-68a). As was true of the statutes invalidated in *Lukumi*, looking below the surface of AB775 reveals a thinly masked hostility toward faith-based pregnancy centers which operate according to sincerely held religious beliefs that forbid them from performing or referring for abortions. (App. 90a).

> The author contends that, **unfortunately**, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose **goal is to interfere** with women's ability to be fully informed and exercise

> their reproductive rights, and that CPCs pose as full-service Women's health clinics, but aim to discourage and prevent women from seeking abortions.

(App. 90a)(emphasis added).

The state also exempted from the notice requirements facilities that already provide or refer for abortions, under the guise that it is not necessary for those operations to provide the notice to clients. (App. 123a-125a). However, if the state intended that AB775 would be neutral and generally applicable, then it would not exempt facilities that provide abortions from informing clients of the availability of **free and low cost** abortions.

Just because a facility offers abortions or referrals does not mean that its clients know about free and low cost services or have any less entitlement to immediate notification of the availability of such subsidies. In fact, centers which charge for these services have an incentive to **not** tell clients about free and low cost services, which would cut into their income. Consequently, the need for women contemplating abortion to be informed of free or low cost abortions would arguably be greater than would the need for women seeking the services of pro-life pregnancy centers. The

exemption for facilities already providing abortions, therefore, does not arise from a concern about women being ill-informed about state abortion services. Instead of demonstrating that AB775 is neutral and generally applicable, the exemptions demonstrate that the state's true aim is to punish those centers that cannot as a matter of sincere religious belief advertise for free and low cost abortions. As was true of the exemptions struck down in *Lukumi*, the exemptions here demonstrate that the purported facial neutrality of AB775 is a thin façade masking hostility toward faith-based organizations that will not perform or refer their clients for abortions.

The *NIFLA* panel's determination that AB775 is neutral and generally applicable and therefore subject only to rational basis review directly conflicts with this Court's decisions in *Smith* and *Lukumi*, as well as this Court's affirmation of *Smith* and *Lukumi* in *Trinity Lutheran*. The conflict is exceptionally important as it undermines fundamental free exercise rights by condoning covert religious gerrymandering that punishes organizations and individuals who do not adhere to the state's ideology. This Court should accept review to resolve the conflict.

B. The Ninth Circuit's Decision in *NIFLA* Conflicts With Free Exercise Decisions In The Third Circuit.

The *NIFLA* court's determination that AB 775 is neutral and generally applicable and therefore need only satisfy rational basis also conflicts with decisions in the Third Circuit that, in keeping with *Lukumi*, looked beyond apparent facial neutrality to uncover impermissible religious discrimination.

In *Fraternal Order of Police*, the Third Circuit applied this Court's reasoning in *Lukumi* to strike down a police department decision that denied religious exemptions to its "no beard" policy. 170 F.3d at 367. The court found that the Department's claim that the "no beard" policy was necessary to foster a uniform appearance was undermined by the available exemption for medical reasons. *Id.* at 366. That exemption "raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* When the government makes such a value judgment, then the law is not neutral and

generally applicable and must survive strict scrutiny. *Id.*

Similarly, in this case, the state's argument that the notification regarding free and low cost abortions is necessary to ensure that all women are informed of their availability is undermined by exemptions for facilities that provide abortions. If it is critical that all women know that they can call a certain number and obtain information about free and low cost abortions, then the notice requirement should apply to all facilities that pregnant women might visit. Singling out for exemption those that provide abortions indicates that the state has made a value judgment that facilities which do not have religious objections to abortion are more valued than those who do have such objections. Under *Lukumi* and *Fraternal Order of Police*, that should trigger strict scrutiny review. The Ninth Circuit's contrary decision is in direct conflict.

In *Tenafly*, the Third Circuit followed *Lukumi* and *Fraternal Order of Police* and found that, despite being facially neutral, the challenged ordinance was not neutral and generally applicable and therefore had to satisfy strict scrutiny. 309 F.3d at 158-59.

> On its face, Ordinance 691 is neutral and generally applicable.

> But "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded [from constitutional challenge] by mere compliance with the requirement of facial neutrality." *Lukumi,* 508 U.S. at 534, 113 S.Ct. 2217. We must look beyond the text of the ordinance and examine whether the Borough enforces it on a religion-neutral basis, as "the effect of a law in its real operation is strong evidence of its object."

Id. at 167.

That extra-textual review revealed that beneath the neutral façade was religiously motivated discrimination as the borough permitted exemptions from the Ordinance for secular and even non-Orthodox Jewish religious symbols. *Id*. at 167-68.

> Just as the exemptions for secularly motivated killings in *Lukumi* indicated that the city was discriminating against Santeria animal sacrifice, and just as the medical exemption in *Fraternal Order of Police* indicated that the police department was discriminating against religiously

> motivated requests to grow beards, the Borough's invocation of the often-dormant Ordinance 691 against conduct motivated by Orthodox Jewish beliefs is "sufficiently suggestive of discriminatory intent," *Fraternal Order of Police*, 170 F.3d at 365, that we must apply strict scrutiny.

Id. at 168.

Likewise, in this case, the state's adoption of exemptions for facilities that provide abortions but do not necessarily notify clients of the free and low cost abortions which the state says is so critical for women to know is sufficiently suggestive of discriminatory intent to require strict scrutiny review. The individualized exemptions mean that AB775 is not neutral and generally applicable under *Lukumi* and therefore not entitled to deferential rational basis review.

The Ninth Circuit's contrary conclusion and application of rational basis to AB775 conflicts with *Fraternal Order of Police*, *Tenafly* and *Lukumi* on the critically important issue of what level of scrutiny must be applied to a facially neutral but operationally religiously biased statute. Because of the importance of the issue, this Court should grant review.

CONCLUSION

The Ninth Circuit's decision in *NIFLA*, under which the district court's decision in this case was affirmed, conflicts with the free speech and free exercise precedents of this Court and the Courts of Appeals. Because these issues involve the extraordinarily important question of the proper standard of review for violations of cherished First Amendment rights, this Court should grant this Petition to resolve the conflicts.

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Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
PO Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org

Mary E. McAlister
Daniel J. Schmid
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org