No. 17-211

In the Supreme Court of the United States

MOUNTAIN RIGHT TO LIFE, INC., ET AL.,
Petitioners,

v.

XAVIER BECERRA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in deciding not to preliminarily enjoin, before discovery and before any record of enforcement, the implementation of a California statute that requires licensed medical clinics to notify patients that information about state-funded prenatal care, family planning, and abortion services may be accessed by calling a county health department phone number.

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This case concerns disclosures mandated by California's Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, 2015 Cal. Stats. ch. 700, codified at Cal. Health & Safety Code §§ 123470 et seq. It raises questions similar to those presented by three other pending petitions: *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140; *A Woman's Friend Pregnancy Resource Clinic v. Becerra*, No. 16-1146; and *Livingwell Medical Clinic, Inc. v. Becerra*, No. 16-1153.[1]

As explained in the brief in opposition filed by the state respondents in those cases, the lower court decisions denying preliminary relief in these matters create no conflict either with this Court's precedents or with decisions of other courts. Nothing in the present petition changes that analysis. Particularly given the preliminary stage of these (and other) proceedings, there is no reason for review by this Court.

STATEMENT

1. Some 700,000 California women become pregnant each year, and one-half of those pregnancies are unintended. Pet. App. 76a. The FACT Act addresses two problems that pregnant Californians can face.

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[1] The combined opposition brief filed by the state respondents in those cases is cited here as the State *NIFLA* Opp. Citations to other filings in those cases include the relevant petitioner's name, abbreviating National Institute for Family and Life Advocates as NIFLA. Unless otherwise indicated, statutory references are to the California Health & Safety Code.

a. First, many women cannot afford medical care on their own, and are unaware of the public programs that are available to them. Pet. App. 75a-76a. Medi-Cal and the Medi-Cal Access Program provide low-cost prenatal care, delivery care, and newborn pediatric care.[2] The Medi-Cal Family Planning, Access, Care, and Treatment (Family PACT) Program provides family planning services, including contraception, preconception counseling, limited infertility services, sexually transmitted infection testing and treatment, and cancer screening.[3] And Medi-Cal covers abortion services.[4] "[C]are early in pregnancy is important," and "pregnancy decisions are time sensitive." Pet. App. 76a. The state Legislature concluded that "[t]he most effective way to ensure that women quickly obtain the information and services they need" is to require licensed health care facilities that are unable to immediately enroll patients into state-funded programs to advise each patient at the time of her visit that the programs exist and give information on how they may be accessed. *Id.* at 76a-77a.

As a result, the Act imposes a notice requirement on "licensed covered facilit[ies]." A "licensed covered facility" is a clinic licensed under California Health & Safety Code Section 1204 (covering "primary care" clinics, "community" clinics, "free" clinics, and "specialty" clinics such as "surgical" clinics and "alterna-

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[2] *See* http://mcap.dhcs.ca.gov/My_MCAP/Important_Information_Applicants.aspx.

[3] *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

[4] *See Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252 (1981).

tive birth center[s]"), whose "primary purpose is providing family planning or pregnancy-related services" and that satisfies two of six enumerated criteria. § 123471(a). The enumerated criteria are that the facility (1) "offers obstetric ultrasounds, obstetric sonograms, or prenatal care," (2) "provides, or offers counseling about, contraception or contraceptive methods," (3) "offers pregnancy testing or pregnancy diagnosis," (4) "advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling," (5) "offers abortion services," and (6) "has staff or volunteers who collect health information from clients." § 123471(a).[5]

The definition's cross-reference to section 1204 means that licensed covered facilities provide "[d]iagnostic, therapeutic, radiological, laboratory [or] other services for the care and treatment of patients for whom the clinic accepts responsibility," Cal. Code. Regs. tit. 22, § 75026, and that they must have "a licensed physician designated as the professional director" and have a physician, physician's assistant, or registered nurse present whenever medical services are provided, *id.* § 75027. The Act excludes from coverage clinics that are operated by the federal government. § 123471(c)(1). The Act also excludes Medi-Cal Family PACT providers, § 123471(c)(2), which are already capable of enrolling pregnant women in state-sponsored programs on the spot, Pet. App. 76a.

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[5] An off-site, limited-hour "intermittent" clinic affiliated with a licensed primary care clinic is also a licensed covered facility if it has the primary purpose of providing family planning or pregnancy-related services and meets two of these criteria. §§ 123471(a), 1206(h).

The Act requires licensed covered facilities to provide clients with a notice stating that:

> 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).

Clinics may choose how to provide this information: by handing patients a printed notice in 14-point or larger type, providing a digital notice at the time of check-in or arrival, or posting a notice in the waiting room. § 123472(a)(2). Clinics may issue the notice separately, or combined with other disclosures. § 123472(a)(3). However provided, the notice must be in English and in the county's primary threshold languages for Medi-Cal beneficiaries. § 123472(a). For clinics that choose to comply with the requirement by posting the notice in the waiting room, the posting must be at least 8.5 inches by 11 inches and written in 22-point or larger font. § 123472(a)(2)(A).

Violations are punishable by a civil fine of $500 for a first offense or $1,000 for subsequent offenses. § 123473(a). No enforcement proceeding may occur unless the government attorney has previously notified the facility of noncompliance and given it 30 days to correct the violation. *Id.*

b. The second problem the FACT Act responds to is confusion among some women as to whether the care and advice they receive comes from medical professionals. The Legislature concluded that it is vital for pregnant women to know if they are receiving pregnancy-related services from a facility or individual that is not licensed to provide actual medical care. Pet. App. 77a. As a result, the Act imposes a separate notice requirement on "unlicensed covered facilit[ies]," which are not licensed by the State and where no licensed medical provider provides or supervises the clinic's services. § 123471(b). Such a facility must provide to clients, on site and in any print and digital advertising materials, a notice stating that:

> 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.

§ 123472(b). MRTL's petition does not request review of the notice requirement that applies to unlicensed covered facilities. *See* Pet. ii.[6]

2. Shortly after the FACT Act's January 2016 effective date, petitioners filed suit in the U.S. District Court for the Central District of California, contending that the Act violates the United States Constitution and the California Constitution. Pet. App. 142a.

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[6] MRTL refers collectively to the petitioners in this case. The FACT Act's provisions regarding unlicensed clinics are discussed in more detail at State *NIFLA* Opp. 4-6.

According to the complaint, petitioner Mountain Right to Life, Inc., which does business under the name Pregnancy & Family Resource Center, provides pregnant women with ultrasounds, pregnancy tests, medical care referrals, counseling, and classes, and would be treated as a licensed covered facility under the Act. Pet. App. 155a-157a. Petitioner Birth Choice of the Desert, which provides pregnancy testing and refers clients to licensed providers for ultrasound services, currently would be treated as an unlicensed covered facility under the Act but is seeking a license that would result in its being treated as a covered licensed facility. *Id.* at 159a-160a, 162a. Petitioner His Nesting Place provides pregnancy tests, food, baby items, and counseling to women facing unplanned pregnancies, and would be treated as an unlicensed covered facility under the Act. *Id.* at 165a, 167a. The complaint asserts that enforcement of the Act would violate the plaintiffs' rights to free speech and the free exercise of religion under both the United States Constitution and the California Constitution. *See* Pet. App. 169a-171a (federal free speech claim); *id.* at 172a-175a (federal free exercise claim); *id.* at 171a-172a (liberty of speech claim under Cal. Const. art I, § 2); *id.* at 175a-176a (free exercise and enjoyment of religion claim under Cal. Const. art. I, § 4).

The plaintiffs' motion for a preliminary injunction relied on the complaint alone without any supporting declarations. *See* D.C. Docs. 19, 26. It briefly mentioned the plaintiffs' state constitutional claims but contained arguments concerning only their federal Free Speech and Free Exercise claims. *Id.* The district court denied the preliminary injunction, con-

cluding that the plaintiffs were unlikely to succeed on the merits of their federal claims. Pet. App. 5a-20a.

The court concluded that the Act's licensed facility provisions regulate a licensed professional's speech in the private setting of "treatment to patients" within a clinic, rather than the professional's "public dialogue," and were therefore subject to intermediate scrutiny. Pet. App. 13a-14a. The court reviewed a number of state interests that were advanced by the law, including the interest in regulating "the practice of medical professionals" within state borders, *id.* at 14a (citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)), the interest in "protecting a woman's freedom to seek medical and counseling services in connection with her pregnancy," *id.* (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994)), and the State's "compelling interest of ensuring that its residents know their reproductive rights and the health care resources available to them when they make personal reproductive health care decisions," *id.* The court concluded that the Act's notice provision for licensed facilities was appropriately drawn to achieve these goals: the Legislature sought to provide information about available services to those who were unaware of that information despite other public-sector publicity efforts and despite providers' preexisting professional obligations to share information with their patients. *Id.* at 15a.

The court also upheld the Act's regulation of unlicensed covered facilities, applying strict scrutiny and concluding that the free speech challenge to those provisions was also unlikely to succeed. Pet. App. 16a-17a.

With respect to the plaintiffs' Free Exercise claims, the court observed that the Act is "facially neutral," "operationally neutral," and "generally applicable," in that it "does not, in a selective manner, impose burdens on conduct that is motivated by religious belief." Pet. App. 18a (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). As a result, rational-basis review was appropriate, and the plaintiffs' challenges were unlikely to succeed on the merits because the FACT Act served the purpose of "ensur[ing] that women are able to quickly obtain the information and services they need to make and implement timely reproductive decisions." *Id.* at 19a.

3. The court of appeals affirmed. Pet. App. 1a-4a. In an unpublished memorandum disposition, the court applied its recent published decision in *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), *petition for cert. pending*, No. 16-1140. Pet. App. 1a-4a; *see generally* State *NIFLA* Opp. 11-14 (summarizing *National Institute*). Based on *National Institute*, the court held that the FACT Act's regulation of licensed covered facilities is a regulation of professional speech, applied intermediate scrutiny, and concluded that the plaintiffs were not likely to succeed on their First Amendment challenge. Pet. App. 3a (citing *National Institute*, 839 F.3d at 838-842). The court held that the notice requirement for unlicensed covered facilities would survive even strict scrutiny if that standard applied. *Id.* (citing *National Institute*, 839 F.3d at 843-844). And the court concluded that the plaintiffs' Free Exercise claim failed because "the Act is a neutral law of general applicability that survives rational basis

review." *Id.* (citing *National Institute*, 839 F.3d at 844-845).

ARGUMENT

The brief in opposition filed by the state respondents in the *NIFLA* cases explains (at 14-31) that the court of appeals' decisions affirming the denial of preliminary relief in those cases do not conflict with decisions of this or any other Court. MRTL's petition provides nothing to change that conclusion. Discovery has completed in two challenges to the FACT Act, and presumably could in this case as well; and a state court has scheduled a hearing on a state constitutional challenge to the FACT Act for October 13. Particularly given the preliminary posture of all these proceedings, there is no reason for review by this Court.

1. MRTL's arguments under the Free Speech Clause of the First Amendment, Pet. 14-41, exclusively challenge the lower courts' decision to apply intermediate scrutiny, rather than strict scrutiny, to the FACT Act provisions that apply to licensed clinics. *See id.* at ii (Questions Presented, addressing only the licensed-clinic provisions); *id.* at iv-vii (arguments concerning the "level of scrutiny").

This Court has recognized that, for First Amendment purposes, the questions raised by requirements imposed on a licensed professional's speech in the course of professional practice are substantially different from those raised by requirements imposed on a non-professional. *See generally* State *NIFLA* Opp. 15-18 (discussing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion), and *Lowe v. SEC*, 472 U.S. 181 (1985)).

Petitioners argue that precedents concerning professional speech are irrelevant here because all content-based speech regulation is subject to strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and all compelled speech is subject to strict scrutiny under *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013). Pet. 14-19, 24-27. But nothing in *Reed* or *Agency for International Development* suggests that the decisions in those cases were intended to change the categorically lower levels of scrutiny that have long applied to certain kinds of speech, such as commercial speech, speech in the context of a professional relationship, and disclosures required to help prevent deception. Indeed, recent actions by this Court presuppose that prior precedents applying standards lower than strict scrutiny remain effective in such contexts. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (remanding for consideration of whether a statute governing retail price disclosures should be reviewed as a commercial speech regulation under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), or "upheld as a valid disclosure requirement" under *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985) (allowing disclosure requirements that are "reasonably related" to the State's interest in preventing deception of consumers)); State *NIFLA* Opp. 20-21.

Petitioners also argue that, regardless of the review that would apply in other settings, regulation of professional speech must be subjected to strict scrutiny when professionals provide care free of charge. Pet. 22-24 (citing *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978)). That

is incorrect. The cases on which petitioners rely protect something unaffected by the FACT Act: a nonprofit organization's right to attract members and allies to undertake collective action. *See United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (*Button* concerned the "right to group legal action"). We are unaware of any precedent holding that, for example, attorneys who appear pro bono are constitutionally exempt from ordinary ethical duties to their clients and the court, or that medical professionals enjoy immunity from regulation of the medical advice they give to an indigent patient. *See generally* State *NIFLA* Opp. 18-19.

Petitioners contend that the court of appeals' decision in *National Institute* contradicts *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), by "creat[ing] a new abortion exception to strict scrutiny review." Pet. 20-22. That argument misunderstands the court's decision. The court observed that some circuits had applied a "'reasonableness'" test when evaluating speech requirements imposed on abortion providers. *National Institute*, 839 F.3d at 837 (discussing *Texas Medical Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012), and *Planned Parenthood of Minnesota v. Rounds*, 530 F.3d 724 (8th Cir. 2008)). The court rejected that approach, holding instead that abortion-related speech receives the same protection as speech on other topics. *Id.* at 838 (stating that "*Casey* did not establish a level of scrutiny to apply in abortion-related disclosure cases," "[n]or did it render inapplicable other frameworks for assessing free speech claims when the speech at issue concerns abortion"). The court applied intermediate scrutiny to the FACT Act's licensed-facility provisions not because the Act touches on abortion, but because that is the standard of re-

view that applies to the regulation of speech by licensed medical professionals providing care to individual patients at a licensed medical facility. *See id.* at 839-840.

Petitioners argue that the court of appeals' application of intermediate scrutiny under the professional speech doctrine conflicts with decisions by the Second and Fourth Circuits in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), and *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (en banc), because those cases applied strict scrutiny to laws that required pregnancy centers to make disclosures. Pet. 29-35. But those cases concerned disclosure requirements that were imposed on persons who were not regulated as professionals. *See Evergreen*, 740 F.3d at 239 (New York City ordinance applied only to centers that were not "'licensed … to provide medical or pharmaceutical services'" and that did not "have a licensed medical provider on staff"); *Centro Tepeyac*, 722 F.3d at 186 (considering ordinance that applied only to facilities that "'do[] not have a licensed medical professional on staff'"). Neither case considered or addressed the questions concerning professional speech regulation that the Ninth Circuit considered here or in *National Institute.*[7]

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[7] MRTL also argues that the Ninth Circuit's application of intermediate scrutiny conflicts with a Fourth Circuit panel opinion's application of strict scrutiny to a "city ordinance that compelled pregnancy centers to post notices that they do not provide abortion" in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539 (2012). Pet. 32-34. That opinion, however, was superseded by an en banc decision vacating the injunction at issue "without comment on how this matter ultimately should be resolved," (continued…)

Finally, petitioners argue that the court of appeals' resolution of the professional speech issue in this case conflicts with the decisions in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), and *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc). Pet. 35-41. But the Ninth Circuit's decision to apply intermediate rather than strict scrutiny does not conflict with either of those cases. *Compare Stuart*, 774 F.3d at 248, 250 (applying the "heightened intermediate scrutiny standard used in certain commercial speech cases" and citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011)), and *Wollschlaeger*, 848 F.3d at 1301 ("applying heightened scrutiny as articulated in *Sorrell*"), *with National Institute*, 839 F.3d at 841 (applying the intermediate scrutiny test stated in *Sorrell*).

Application of any test will lead to different results based on the facts of each case. Here, California law allows a licensed covered facility to meet its disclosure obligations by its choice of posting a notice in the waiting room, distributing a printed notice on-

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(…continued)
because the appropriate standard of review could not be determined without discovery. *Greater Baltimore Ctr. For Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 271, 277, 283-287 (4th Cir. 2013) (en banc). The Fourth Circuit's ultimate resolution of *Greater Baltimore* thus poses no conflict with the lower court's decision to deny pre-discovery injunctive relief here. In any event, even the superseded panel opinion in *Greater Baltimore* did not foreclose the availability of intermediate scrutiny to review a regulation of purely professional speech. The regulation at issue in *Greater Baltimore* applied to *all* persons or organizations providing pregnancy-related services—not just clinics staffed by licensed medical professionals. *See id.* at 271.

site to clients when the clinic deems best, or providing a digital notice at check-in. § 123472(a)(2). It imposes no restriction on what else a clinic chooses to say. It does not resemble the "unusual" law at issue in *Stuart*, which required a physician to make disclosures to a partly naked patient during an intrusive physical examination. *Stuart*, 774 F.3d at 254-255. Nor does it resemble the law reviewed in *Wollshlaeger*, which barred physicians from asking questions about certain topics or recording certain information except in precise circumstances. *Wollschlaeger*, 848 F.3d at 1302-1303.[8]

2. Petitioners also contend that the courts below erred in denying their request for an injunction under the Free Exercise Clause. Pet. 41-51. As explained, however, in the State's *NIFLA* opposition, that contention fails because the FACT Act is a neutral law of general applicability. *See* State *NIFLA* Opp. 28-31.

Petitioners argue that this position conflicts with the Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), "which hold[s] that laws which punish those exercising their sincerely held religious beliefs are presumed unconstitutional and must satisfy strict scrutiny." Pet. 42. *Trinity Lutheran* concerned a state policy that made entities controlled by a church or religious

[8] As in the *NIFLA* cases, the State argued below in this case that at least some of the activities of the licensed-facility plaintiffs were commercial speech and could be regulated as such. *See* D.C. Doc. 23, at 11-14; State *NIFLA* Opp. 23. Although the court of appeals rejected that argument in *National Institute*, 839 F.3d at 834 n.5, it would provide an independent basis for sustaining the judgment below if the Court were to grant review in this case.

organization categorically ineligible for a state program that otherwise reimbursed schools, daycare centers, and other nonprofits for the cost of playground resurfacing. 137 S. Ct. at 2017. The policy "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021. *Trinity Lutheran* holds that providing different benefits to otherwise identical entities based solely on religious affiliation "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* But the FACT Act makes no distinction based on a particular licensed or unlicensed facility's religious affiliation or beliefs. *See* State *NIFLA* Opp. 29-30.

Petitioners also contend that the court of appeals' decision conflicts with the decisions in *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), and *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), which applied strict scrutiny after "look[ing] beyond apparent facial neutrality to uncover impermissible religious discrimination." Pet. 48-51. Petitioners misunderstand those cases.

Fraternal Order of Police concerned a police department policy that prohibited officers from growing beards in general but provided exceptions for those who grew beards to go undercover or who had a medical reason for not shaving. *Fraternal Order of Police*, 170 F.3d at 360. Muslim officers challenged the ban, arguing that allowing exemptions for those nonreligious exemptions but not for religious reasons constituted discrimination against their religion. *Id.* at 360, 366. The department's stated reason for forbidding officers from wearing beards was its interest

in presenting a uniform appearance to the public. *Id.* at 366. The court of appeal reasoned that the policy's exemption for undercover officers would not have triggered heightened scrutiny on its own, because it did not "undermine the [d]epartment's interest in uniformity." *Id.* (noting that undercover officers are not held out to the public as law enforcement personnel). In contrast, the existence of a medical exemption did undermine the department's stated goal of maintaining a uniform appearance, because an officer who wears a beard for medical reasons will be recognized by the public as an officer whose appearance differs from that of other officers. *Id.* By allowing officers to undercut the department's goal for a secular reason but not for religious reasons, the department had "made a value judgment that secular … motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* Even then, the court determined only that such a distinction required the application of at least intermediate scrutiny—it did not decide whether strict scrutiny would apply. *Id.* at 366 n.7.

That reasoning has no bearing on this case. The FACT Act's exemption for clinics already "enrolled as a Medi-Cal provider and a provider in the Family [PACT] program," § 123471(c)(2), does not undermine the State's interest in ensuring that women are informed of the public programs available to them; the Legislature understood that such providers already can and will enroll eligible patients in those programs themselves, without women needing to be informed that they could get information about the programs by calling a county number. *See* Pet. App. 76a. The Act's exemption for clinics operated by the federal government does not undermine the State's

goals either; it simply recognizes possible jurisdictional limits on California's authority. The State has not judged secular reasons worthy of overcoming its interest in ensuring that vulnerable women have access to information about available care.

Tenafly Eruv is similarly off-point. In that case, Orthodox Jews who wished to hang small plastic strips on utility poles to create a religious *eruv* challenged the Borough of Tenafly's enforcement against them of an ordinance banning the placement of "'matter'" on any "'pole'" on a public street. *Tenafly Eruv,* 309 F.3d at 151-152. Although the ordinance was facially neutral, the court looked "beyond the text of the ordinance" to "examine whether the Borough enforces it on a religion-neutral basis." *Id.* at 167. It turned out that the ordinance was enforced selectively. Homeowners posted permanent house numbers on utility poles, churches posted permanent directional signs, private parties posted signs about lost animals, partisans in a dispute over school reorganization posted symbolic orange ribbons, and the Chamber of Commerce posted annual holiday displays—all without any enforcement action by the Borough. *Id.* at 151-152, 167. Exemptions thus were tacitly or expressly granted for various secular purposes and even for religious purposes—just not for Orthodox Jews. *Id.* at 167. That record led the court to conclude that "[t]he Borough's invocation of the often-dormant Ordinance … against conduct motivated by Orthodox Jewish beliefs [was] 'sufficiently suggestive of discriminatory intent'" that strict scrutiny was required. *Id.* at 168.

Tenafly Eruv's reasoning in no way conflicts with the Ninth Circuit's resolution of challenges to the FACT Act. *Tenafly Eruv*'s use of strict scrutiny re-

sulted from evidence of discriminatory enforcement. *Tenafly Eruv*, 309 F.3d at 154-155 (recounting that the parties conducted discovery and the court held a four-day evidentiary hearing). Nothing similar exists here, where petitioners requested preliminary relief without any record of enforcement and based on nothing beyond the assertions in their complaint. *See* p. 6, *supra*.

3. This petition, like those in the *NIFLA* cases, involves denial of a motion for preliminary injunctive relief, litigated (by petitioners' choice) before discovery. As the cases proceed, nothing bars petitioners in this and the other cases from renewing their arguments in the lower courts on a full record. *See* State *NIFLA* Opp. 31 (noting that discovery has been completed in *Livingwell*); *National Institute of Family & Life Advocates v. Becerra*, No. 15-2277, Doc. 62 (S.D. Cal. Sep. 29, 2017) (dismissing the Governor from the case but denying the Attorney General's motion to dismiss, and ordering that answer be filed within 45 days). In the meantime, a California state court is proceeding to decision on state constitutional challenges to the FACT Act, with discovery completed and a trial (mostly on the papers) scheduled for October 13. *See Scharpen Foundation, Inc. v. Becerra*, No. RIC1514022 (Riverside Cty.) Particularly in light of the preliminary and evolving nature of these proceedings, there is no reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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