CASE NO. 17-211

IN THE SUPREME COURT OF THE UNITED STATES

MOUNTAIN RIGHT TO LIFE, INC., et. al.,

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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REPLY IN SUPPORT OF 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

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Are content-based compelled speech restrictions constitutionally permissible if they merely satisfy rational basis review or intermediate scrutiny? According to this Court, the answer is "No." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). According to the Ninth Circuit, the answer is "Yes, if they are abortion-related compelled speech restrictions." (*National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("*NIFLA*") App. 46a). Even though this Court has held that content-based compelled speech must satisfy strict scrutiny, even in the abortion context, *McCullen v. Coakley*, 134 S.Ct. 2518 (2014), the Ninth Circuit maintains that it is not required to follow *Reed* because **it** has applied a lower level of scrutiny in certain cases.

Respondent claims that the Ninth Circuit properly applied intermediate scrutiny because Petitioners' pro bono faith-based counseling is commercial and/or professional speech. (Brief in Opposition, p. 11). However, re-labeling Petitioners' activities does not justify the panel's radical departure from precedent, because the new labels do not change the fact that the Act is a content-based compelled speech restriction subject to strict scrutiny

under *Reed* and *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). The Ninth Circuit's decision directly contradicts this Court's precedents requiring strict scrutiny for content-based compelled speech restrictions.

The extent of the conflict between the *NIFLA* panel's determination and established precedent is also seen in a Ninth Circuit case decided after this Petition was filed in which the panel invalidated a mandated disclosure in the commercial speech context. *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 871 F.3d 884, 894 (9th Cir. 2017). In *American Beverage,* the panel struck down a city ordinance mandating warning labels stating that sugar-sweetened drinks contribute to obesity, diabetes and tooth decay. *Id.* at 888. The panel said:

> A compelled disclosure that requires speakers to use their own property to convey an antagonistic ideological message, or to respond to a hostile message when they would prefer to remain silent, or to be publicly identified or associated with another's message, cannot withstand First Amendment scrutiny.

Id. at 894. (citations omitted). If that is true for commercial speech, than it must be true for

non-commercial speech advocating for a politically controversial topic such as abortion. The fact that the panel found otherwise illustrates why this Court should grant the Petition to address the conflict.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S FAILURE TO APPLY STRICT SCRUTINY CONFLICTS WITH NUMEROUS FREE SPEECH PRECEDENTS FROM THIS COURT.

A. The Ninth Circuit Panel Acknowledges The Conflict Between Its Use Of Intermediate Scrutiny and *Reed*.

The *NIFLA* panel admits that it is acting contrary to this Court's precedent in *Reed*, but proclaims 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). Respondent affirms the panel's disregard for precedent by claiming that *Reed* did not address content-based commercial, professional or deceptive speech restrictions which are still subject to

intermediate scrutiny. (Brief in Opposition, p. 10). Nothing in *Reed* nor the other cases cited by Respondent supports that conclusion.

More importantly, no authorities cited by Respondent justify the *NIFLA* panel's eschewing of *Reed*'s explicit holding requiring strict scrutiny review for content-based restrictions. In *Expressions Hair Design v. Schneiderman,* 137 S. Ct. 1144, 1151 (2017) (cited in Brief in Opposition, p. 10), this Court did not discuss the proper standard of review for the challenged statute, but merely remanded the case to the Second Circuit to address that question after this Court found, contrary to the Second Circuit, that the statute regulated speech. *Id.* Most notably, *Expressions Hair Design* did not involve a content-based restriction, and, therefore, is not relevant to whether the Ninth Circuit could reject the strict scrutiny standard announced in *Reed*. *Id.* at 1151.

Consequently, neither Respondent nor the *NIFLA* panel can defend the panel's admitted departure from this Court's unequivocal conclusion that:

> 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.

Reed, 135 S.Ct. at 2226. (emphasis added) The panel's acknowledged, indefensible departure from this Court's precedent regarding the substantially important question of the constitutionality of content-based speech restrictions should be reviewed by this Court.

B. The Ninth Circuit's Application of Intermediate Scrutiny To An Abortion Related Content-Based Restriction Conflicts With *McCullen*.

This Court was as unequivocal in *McCullen* regarding content-based speech restrictions related to abortion as it was in *Reed* regarding content-based speech restrictions in general. The Massachusetts abortion buffer zone statute in *McCullen* was content-neutral and therefore subject only to intermediate scrutiny. *Id.* at 2530. However, if the statute were content-based, then it would have to survive strict scrutiny. *Id.* Also, as the *NIFLA* panel acknowledged, neither *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), nor *Gonzales v. Carhart*, 550 U.S. 124 (2007), established a

different level of scrutiny for abortion-related speech cases. (App. 40a, 47a-48a).

Nevertheless, the Ninth Circuit insists that strict scrutiny is not the proper standard for AB775 because:

> In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based. *See Stuart [v. Camnitz]*, 774 F.3d [238] at 248–49 [(4th Cir. 2014)] (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (applying a reasonableness test); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (applying a reasonableness test).

(App. 47a). Instead of acting in accordance with this Court's precedents, the panel relied upon its own precedent to arrive at its contrary conclusion, stating that it was unpersuaded by the argument that strict scrutiny should apply, and preferring to follow its "continuum" theory and intermediate scrutiny from *Pickup v.*

Brown, 740 F.3d 1208, 1229 (9th Cir. 2013). (App. 40a, 50a).

Respondent embraces the panel's disregard of this Court's precedent. (Brief in Opposition, pp. 11-12). Respondent's assertion is repudiated by the terms of AB775, which provide that the mandated government messages must be prominently posted and distributed in multiple languages prior to and regardless of whether the recipient seeks or obtains services. (App. 79a-81a). Anyone entering a crisis pregnancy center for any reason must be accosted by the state-mandated message that free and low cost abortions are available. (*Id.*). There is no prerequisite that a professional relationship be sought or established. (*Id.*).

The *NIFLA* panel's application of intermediate scrutiny contrary to *Reed* and *McCullen* is an example of the state trying to use the guise of "regulation of professional speech" to escape strict scrutiny review. *Reed*, 135 S.Ct. at 2229. The Ninth Circuit's thinly veiled attempt to escape the strict scrutiny review required by this Court creates a conflict that this Court should resolve.

C. The Ninth Circuit's Application of Intermediate Scrutiny Conflicts With *Riley*,

Hurley and *Turner Broadcasting*.

The Ninth Circuit's insistence that AB775, an admittedly content-based speech provision, need only satisfy intermediate scrutiny also contradicts this Court's precedents requiring that strict scrutiny be applied to content-based compelled speech laws. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Riley,* 487 U.S. at 798; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston,* 515 U.S. 557, 575–76 (1995).

The state's attempt to compel Petitioners to propound politically charged messages with which they disagree renders Petitioners' free speech rights little more than empty promises. *Hurley*, 515 U.S. at 576. Petitioners are being compelled to affirm that clients can get free and low cost abortions in one breath while encouraging them to seek alternatives to abortion in the next. 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.

As the author of AB775 admitted, the state is interfering with Petitioners' speech precisely to discourage the disfavored message against abortion. (App. 91a). Such interference

is presumptively unconstitutional and cannot stand unless it can survive strict scrutiny. *Riley*, 487 U.S. at 799; *Turner Broadcasting*, 512 U.S. at 642. The *NIFLA* panel's decision should be reviewed by this Court.

D. The Ninth Circuit's Use of Intermediate Scrutiny To Analyze A Regulation of Pro Bono Advocacy Speech Conflicts With *In re Primus* and *NAACP v. Button*.

As was true of the letter discussed in *In re Primus,* 436 U.S. 412, 437-38 (1978), the free advice offered by Petitioners is not a solicitation for pecuniary gain, but the provision of information aimed at helping the recipients make decisions. As such, it is akin to political and ideological expression, the regulation of which "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)). Similarly, as was true in *NAACP v. Button*, 371 U.S. 415, 428-29 (1963), Petitioners' activities are not regulable "professional speech," but the presentation of free information not for pecuniary gain, which falls squarely within the sphere of associational rights guaranteed by the Free Speech Clause.

Id. When a statute restricts such communications, as does AB775, it is constitutionally invalid unless it can survive strict scrutiny. *Id.*

The *NIFLA* panel's classification of AB775 as a regulation of professional speech subject only to intermediate scrutiny conflicts with these precedents. Respondent cannot dispute the conflict between the panel's decision and this Court's precedents. Instead, Respondent constructs a straw man of factual distinction that is neither accurate nor constitutionally relevant. (Brief in Opposition, pp. 10-11).

II. THE NINTH CIRCUIT'S FAILURE TO APPLY STRICT SCRUTINY TO CONTENT-BASED ABORTION-RELATED COMPELLED SPEECH CONFLICTS WITH OTHER CIRCUITS' INVALIDATION OF SIMILAR REGULATIONS.

The *NIFLA* panel's refusal to follow this Court's precedents requiring strict scrutiny review of content-based compelled speech provisions also creates an irreconcilable conflict with decisions in the Second and Fourth circuits which invalidated substantially similar abortion advertising requirements. *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). Respondent again cannot erase the clear conflict between the Ninth Circuit and these other precedents, and so erects a factual distinction façade that only serves to bring the circuit conflict into sharper focus. (Brief in Opposition, p. 12).

The government mandated disclosures required by AB775, like the disclosures at issue in *Evergreen Ass'n,* implicate the public debate of the politically controversial subject of abortion and change the way that Petitioners and similar pregnancy centers frame their message, forcing them to discuss the issue in a way prescribed by the government, contrary to the First Amendment. 740 F.3d at 249-50. Regardless of whether the provision in *Evergreen Ass'n* regulated "non-medical" providers, as alleged by Respondent, requiring pregnancy centers to advertise a state message contrary to their own violates the First Amendment.

Similarly, the Ninth Circuit's determination that a state-mandated advertisement of free and low cost abortions is consistent with the First Amendment cannot be reconciled with the Fourth Circuit's conclusion that a required disclosure that women consult a doctor violates the First Amendment because it requires a pregnancy center to "say something it might not otherwise say." *Centro Tepeyac,*

722 F.3d at 189. Whether the disclosures apply to "medical" or "non-medical" providers (Brief in Opposition, p. 12) is irrelevant to whether there is a conflict requiring this Court's resolution.

III. THE NINTH CIRCUIT'S DETERMINATION THAT AB775 IS NEUTRAL, GENERALLY APPLICABLE AND SUBJECT ONLY TO RATIONAL BASIS REVIEW CONFLICTS WITH THIS COURT'S PRECEDENTS REQUIRING STRICT SCRUTINY OF LAWS THAT PUNISH FREE EXERCISE.

A. The Ninth Circuit's Decision Conflicts With *Trinity Lutheran*.

Looking beyond the irrelevant factual distinctions raised by Respondent (Brief in Opposition, pp. 14-15), reveals that the *NIFLA* panel's conclusion that AB775 need only satisfy rational basis review is squarely at odds with this Court's long-standing Free Exercise precedents affirmed last term in *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S.Ct. 2012 (2017). In *Trinity Lutheran*, this Court did much more than merely reverse a decision denying a benefit, *i.e.,* a state grant, to a church preschool based solely on religious

affiliation, as Respondent contends. (Brief in Opposition, pp. 14-15). Instead, this Court re-affirmed decades of precedent protecting free exercise rights against laws like AB775 which patently or latently punish organizations which operate according to religious principles. 137 S.Ct. at 2021-22. This Court confirmed that the Free Exercise Clause "guarantees the free exercise of religion, not just the right to inward belief (or status)." *Id.* at 2026 (Gorsuch, J., concurring, citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

> And this Court has long explained that government may not "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion.

Id. While *Trinity Lutheran* involved distribution of a public benefit to a church and this case involves state mandated abortion notifications, that factual distinction is not only

constitutionally insignificant, but actually points to the greater constitutional violation inherent in AB775.

> The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi*, 508 U.S., at 546.

Id. at 2024.

Here, Petitioners are not merely denied a benefit such as a state grant, but are threatened with crippling cumulative fines unless they provide a state-mandated message promoting free and low cost abortions, which are anathema to their sincerely held religious beliefs. (App. 144a, 157a, 158a, 163a, 170a, 172a). While the church in Missouri had to choose between obtaining a state grant to resurface its playground, paying for the resurfacing itself or retaining the existing surface, Petitioners here must choose between exercising their religious beliefs by offering women alternatives to abortion or ceasing

operations after paying thousands of dollars in fines. If the choice placed upon Trinity Lutheran Church was "odious to the Constitution," *id.* at 2025, then the choice imposed by AB775 is even more so, requiring invalidation of the law unless it can withstand strict scrutiny.

B. The Ninth Circuit's Determination That AB775 Is Neutral And Generally Applicable Conflicts with *Smith* and *Lukumi.*

The *NIFLA* panel's conclusion that AB775 need only satisfy rational basis also conflicts with this Court's decisions in *Smith* and *Lukumi*, which require more than a selective and superficial review of the express language of a statute to conclude that it is neutral and generally applicable. While *Smith* provided for less deferential review when religious adherents sought special dispensation from general criminal laws, it did not alter this Court's longstanding tenet that strict scrutiny must be applied to laws that impose special penalties on religious exercise. 494 U.S. at 877. *See also, Lukumi,* 508 U.S. at 546.

Most importantly for this case, the *Lukumi* Court established that courts must look beyond apparent facial neutrality before

concluding that a law is neutral and generally applicable. 508 U.S. at 533.

> 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. at 534 (citation omitted). The *NIFLA* panel failed to scratch below the surface as required before abandoning strict scrutiny. As a result, the panel failed to acknowledge that AB775 imposes the same kind of religious gerrymander that was imposed by the statute in *Lukumi*. (Petition for Certiorari, 45-47, App. 90a, 123-125a). Its validation of AB775 under rational basis review, therefore, directly conflicts with *Smith* and *Lukumi* and should be reviewed by this Court.

IV. THE NINTH CIRCUIT'S REJECTION OF STRICT SCRUTINY REVIEW CONFLICTS WITH THIRD CIRCUIT FREE EXERCISE PRECEDENTS.

The Ninth Circuit's contrary conclusion not only conflicts with this Court's precedents but also with precedents in the Third Circuit, which relied upon *Lukumi* to find that

regulations related to workplace grooming and zoning were not neutral and generally applicable. *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). Respondent cannot deny the inter-circuit conflict and so turns to impugning Petitioners for "misunderstanding" the Third Circuit cases. (Brief in Opposition, pp. 16-17). In fact, it is Respondent who misrepresents the operational nature of AB775 which places it squarely at odds with the Third Circuit decisions.

Respondent claims that AB775 does not contain individualized exemptions as did the regulations in *Fraternal Order of Police* and *Tenafly*, despite the express terms of AB775 which exempt facilities that receive government funds. (Brief in Opposition, pp. 16-17). However, anything less than a blanket requirement for notifying women about free and low cost abortions does not meet the need identified by Respondent and therefore carries the suggestion of discriminatory intent that negates rational basis review, as was the case in the Third Circuit cases.

CONCLUSION

The Ninth Circuit's decision in *NIFLA*, under which the district court's decision in this case was affirmed, conflicts with free speech

and free exercise precedents of this Court and other Courts of Appeals. This Court should grant this Petition to resolve the conflicts.

Dated: October 24, 2017.

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