NO. _____

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of California enacted a law called the "Reproductive FACT Act." The State admits its purpose is targeting "crisis pregnancy centers" based on their viewpoint that "discourag[es]" abortion. The Act forces pro-life religious licensed centers to post notices that encourage women to contact the State to receive information on free or low cost abortions. The Act also burdens pro-life religious unlicensed centers' speech by requiring them to place extensive disclaimers in large fonts and in as many as 13 languages in their ads, which significantly burdens their ability to advertise. But the Act exempts most other licensed medical and unlicensed non-medical facilities, such as abortion providers, hospitals, and other healthcare facilities, as well as federal health care providers. The Ninth Circuit candidly admits that it upheld the Act amidst a "circuit split" with decisions by the Second and Fourth Circuits over how to scrutinize regulations of speech by medical professionals on controversial health issues. The ruling also conflicts with a recent decision by the Eleventh Circuit. The question presented is:

Whether the Free Speech Clause or the Free Exercise Clause of the First Amendment prohibits California from compelling licensed pro-life centers to post information on how to obtain a state-funded abortion and from compelling unlicensed pro-life centers to disseminate a disclaimer to clients on site and in any print and digital advertising.

PARTIES TO THE PROCEEDING

Petitioners are National Institute of Family and Life Advocates, d/b/a NIFLA, a Virginia corporation; Pregnancy Care Center, d/b/a Pregnancy Care Clinic, a California corporation; and Fallbrook Pregnancy Resource Center, a California corporation.

Respondents are Xavier Becerra, in his official capacity as Attorney General for the State of California, Thomas Montgomery, in his official capacity as County Counsel for San Diego County; Morgan Foley, in his official capacity as City Attorney for the City of El Cajon, CA; and Edmund D. Brown, Jr., in his official capacity as Governor of the State of California.

CORPORATE DISCLOSURE STATEMENT

National Institute of Family and Life Advocates, Pregnancy Care Center, and Fallbrook Pregnancy Resource Center, are non-profit corporations with no parent corporations. The corporations have no stock; accordingly, no public corporation owns 10% or more of their stock.

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INTRODUCTION

California enacted the Reproductive FACT Act ("the Act") with the stated purpose of targeting pro-life "crisis pregnancy centers" based on their viewpoint that "discourage[s]" abortion. Appendix ("App.") 7a. Petitioners are religiously-motivated non-profit centers that work to help women make choices other than abortion. The Act forces licensed pro-life medical centers to post notices informing women how to contact the State at a particular phone number for information on how to obtain state-funded abortions, directly contradicting the centers' pro-life message. Those calling the provided number will be referred to Medi-Cal and Family Planning, Access, Care, and Treatment Program ("PACT") providers, including private abortion providers such as Planned Parenthood. *See* www.plannedparenthood.org/health-center/CA); www.familypact.org/provider-search-1. The Act also forces non-medical, unlicensed pro-life organizations to give extensive disclaimers that they are not a licensed medical facility in large font and in as many as 13 languages to clients on site as well as in their ads, both print and digital, including on their own Internet websites. This compelled speech requirement drowns out the centers' pro-life messages and discourages them from speaking through advertisements because California's voluminous required statements make ads cost prohibitive.

The Petitioners come in two categories, both covered by the Act. The first group of Petitioners are licensed medical facilities ("licensed centers") that provide medical services along with pro-life

information and non-medical assistance, including diapers and parenting classes. The second group of Petitioners are not licensed and thus do not provide medical services, but only information and non-medical support to women seeking alternatives to abortion ("unlicensed centers"). Both licensed and unlicensed centers operate according to their religious views opposing abortion.

California imposes this compelled speech only on centers that oppose abortion. The Act does not impose these compelled statements across the board, but uses broad exemptions to exclude health providers that provide or promote abortion or abortifacients. Therefore, the only ones forced by the State to speak these government messages are those who oppose abortion.

The Ninth Circuit's decision conflicts with this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health*, 564 U.S. 552 (2011), by refusing to apply strict scrutiny to content- or viewpoint-based regulations of speech, despite its finding that the Act is content-based. App. 22a. The decision below also conflicts with the central holding of this Court's decisions in *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button,* 371 U.S. 415 (1963), that restrictions on *pro bono* speech in a regulated profession triggers strict scrutiny. In upholding the compelled speech on non-medical centers, the Ninth Circuit's decision also straightforwardly conflicts with *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), and *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

The Ninth Circuit candidly admits that it upheld the Act amidst a "circuit split" over how to scrutinize regulations of speech by medical professionals on controversial health issues. App. 25a. The Ninth Circuit's decision squarely conflicts with a Second Circuit decision that struck down a mandate forcing pro-life pregnancy centers to speak about abortion, *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014); with a Fourth Circuit ruling that invalidated a requirement that doctors provide certain information related to abortion, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); and with an Eleventh Circuit *en banc* decision striking down a content-based restriction on speech of medical providers regarding safety of firearms, *Wollschlaeger v. Governor of Florida*, – F.3d –, No. 12-14009, 2017 WL 632740 (11th Cir. Feb. 16, 2017).

Despite the Ninth Circuit's discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), the Act far exceeds the leeway this Court granted in *Casey* for states to require informed consent before performing an abortion. California imposes these statements outside the context of obtaining informed consent and even when no medical procedure occurs. And, because the law targets pro-life facilities, the compelled statements do not apply neutrally to everyone in the State whether they perform a particular medical procedure, as in *Casey*, or not.

The Act also violates the Petitioners' rights under the Free Exercise Clause, by forcing them to make statements contrary to, or that undermine, their pro-life religious convictions, while exempting other

medical and non-medical providers. This Court should grant review and reverse the decision of the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 839 F.3d 823, and reproduced at App. 1a. The order of the Ninth Circuit denying rehearing and rehearing *en banc* is unreported but appears at App. 72a–73a. The District Court's opinion denying the motion for preliminary injunction is unreported but appears at App. 44a.

JURISDICTION

The Ninth Circuit entered its judgment on October 14, 2016. App. 1a. It denied a timely petition for rehearing *en banc* on December 20, 2016. App. 72a–73a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution is set forth in App. 74a.

The text of California's Reproductive FACT Act is set forth at App. 75a.

STATEMENT OF THE CASE

Factual Background

Petitioners are the National Institute of Family and Life Advocates (NIFLA), an organization with over 110 non-profit pro-life pregnancy center members in California, and two such centers in San Diego County, Pregnancy Care Center ("PCC") and Fallbrook Pregnancy Resource Center. App. 89a–90a. Because of the Petitioners' pro-life viewpoint, they seek to provide help and pro-life information to women in unplanned pregnancies so that they will be supported in choosing to give birth. *Id.* Petitioners, both licensed and unlicensed centers, provide all of their information and services free of charge. *Id.* Petitioners are all incorporated as religious organizations, and they pursue their activities based on their pro-life religious beliefs. *Id.*

Petitioners PCC and many of NIFLA's California member centers are licensed medical facilities that provide medical services, along with pro-life information and non-medical services. PCC provides licensed medical services free of charge and in furtherance of its pro-life religious beliefs. *Id.* About 73 of NIFLA's California member centers are similar to PCC in their medical status and activities. App. 89a. PCC is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory. App. 91a. Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider

consultation, and other clinical services. App. 91a–92a. Non-medical services provided by PCC include: peer counseling and education, emotional support, maternity clothing, baby supplies, support groups, and healthy family support. App. 92a.

Petitioner Fallbrook is an unlicensed center, and a nonprofit corporation that provides non-medical pregnancy-related information and services for free in furtherance of its pro-life religious beliefs. App. 92a. About 38 of NIFLA's California member centers are similar to Fallbrook in their unlicensed status and provision of only non-medical activities. App. 94a. Fallbrook provides free pregnancy test kits that women administer and diagnose themselves, educational programs, resources and community referrals, maternity clothing, and baby items. App.93a. Fallbrook and similar NIFLA centers advertise for their provision of free information and services, including on the Internet. App. 102a–103a.

The California Reproductive FACT Act

The State of California admits that the purpose of the Reproductive FACT Act is to target the speech of pro-life centers, specifically, "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," which "aim to discourage and prevent women from seeking abortions," and that "often confuse [and] misinform" women. App. 7a. The legislative history contains no evidence that "crisis pregnancy centers" like Petitioners, actually "misinform" women. The Act does not require a showing that a center provides incorrect information

before the compelled statements apply. The Act imposes different requirements based on whether a pregnancy center is a licensed medical facility or an unlicensed center.

Licensed Centers – Required Statement

Pursuant to this purpose and justification, the Act requires licensed medical centers, such as PCC and NIFLA's licensed California members, to provide a notice to all clients 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 [phone number].

App. 80a. Those calling the provided number will be referred to Medi-Cal and Family PACT providers, including private abortion providers such as Planned Parenthood. *See* www.plannedparenthood.org/health-center/CA (listing Medi-Cal as a form of accepted insurance); www.familypact.org/provider-search-1 (listing a majority of Planned Parenthood's California clinics as Family PACT providers).

A "licensed covered facility" is defined as a:

> [F]acility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of

> Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy test, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

App. 79a. The Act contains two exemptions: "(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies," and "(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 ["Family PACT"]."App. 80a. Family PACT is the State's program of family planning and comprehensive "reproductive health care" providers. *See* CAL. WELF. & INST. CODE § 14132.

Participation in the Family PACT program is the method by which the State excludes all others but the pro-life centers from the Act's compelled statements. A center can avoid the compelled speech required by the Act if it joins Family PACT. But the Family PACT program provides "family planning services" that include "all FDA approved contraceptive methods and

supplies," which includes abortifacients. *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover. Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program. By tying the Act's exemption from the compelled speech requirements to agreeing to dispense all contraceptives, including abortifacients, the exemption effectively includes only centers that support California's pro-abortion policies. This forces only those centers that oppose abortion to speak the State's message in support of it.

Licensed covered facilities must post the disclosure in one of the following ways:

> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.
>
> (B) A printed notice distributed to all clients in no less than 14-point type.
>
> (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

App. 80a–81a.

The notice must be provided "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. 81a. For San Diego County, where PCC and Fallbrook are located, "threshold" languages include Spanish, Arabic, Vietnamese, Tagalog and Farsi. A center in Los Angeles County would have to publish the government's statement in English and 12 additional languages.[1]

Unlicensed Centers – Required Statements

The Act requires unlicensed non-medical pregnancy centers, such as Fallbrook and similar NIFLA members, to post a notice to all clients that "the 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 Act defines "unlicensed covered facility" as:

> [A] facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or

[1] *See* State of California, Department of Health Care Services, "Frequency of Threshold Language Speakers in the Medi-Cal Population by County for January 2015," dated September 2016, *available at* www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf.

> prenatal care to pregnant women. (2) The facility offers pregnancy testing or diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

App. 79a.

The required notice for unlicensed facilities must be "disseminate[d] to clients on site and in any print and digital advertising material[] including Internet Web sites," "in English and in the primary threshold languages." App. 81a. "The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id*. The notices contained in all advertising material must be "clear and conspicuous," which "means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language." App. 81a–82a.

Covered facilities that violate the law "are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense," and the Act's requirements are enforceable by the Attorney General, city attorney, or county counsel. App. 82a.

Governor Brown signed the Reproductive FACT Act into law on October 9, 2015. It went into effect on January 1, 2016.

Petitioners filed this action on October 13, 2015, alleging violations of the Free Speech and Free Exercise Clauses of the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Coates-Snow Amendment, and 42 U.S.C. § 238n. Petitioners filed their motion for preliminary injunction on October 21, 2015, asking that the Act be enjoined prior to its January 1 effective date. The District Court denied the motion, App. 44a, and the Petitioners appealed to the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit panel, on October 14, 2016, upheld the District Court's ruling denying the motion for a preliminary injunction. *NIFLA v. Harris*, App. 1a.[2] Petitioners argued the Act is content-based. The Court admitted the law was "content-based," App. 22a, but concluded it was not required to apply strict scrutiny, as this Court held recently in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), because the law did not discriminate on the basis of viewpoint. The Ninth Circuit ignored this Court's direct refutation of that concept in *Reed* when it stated "a speech regulation targeted at specific subject matter is content based

[2] The Ninth Circuit decision here also applies to two other lawsuits that challenged the Act's compelled speech provision solely for licensed facilities: *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No 15-17517 (9th Cir. 2016) and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497 (9th Cir 2016).

even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct at 2230. Additionally, the Ninth Circuit cited its own precedent as support for its decision to disregard this Court's opinion in *Reed*, stating "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny." App. 23a.

The Ninth Circuit also rejected Petitioners' arguments that the Act is viewpoint discriminatory because it targets licensed and unlicensed "crisis pregnancy centers" that "discourage and women from seeking abortions." App. 7a. The Act is not viewpoint discriminatory, the Ninth Circuit claimed, because "it does not discriminate on the particular opinion, point of view, or ideology of a certain speaker," App. 20a, and because "the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." *Id.*

The opinion then pointed out that in regard to "abortion-related disclosure cases," App. 25a, "there is currently a circuit split regarding the appropriate level of scrutiny to apply." *Id.* The Ninth Circuit stated that all of the decisions rejected the standard of strict scrutiny for "abortion related disclosure cases," with the Fifth and Eighth Circuits adopting a "reasonableness" standard, and the Fourth Circuit adopting intermediate scrutiny. The Ninth Circuit held that (1) strict scrutiny was not appropriate for the review of this California law, App. 24a, 27a; (2) it could not discern any standard of review from 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 (2007), App. 25a; (3) that it would use intermediate scrutiny to review the requirements imposed on the licensed centers, App. 28a–36a; and (4) the required disclosure imposed on unlicensed centers satisfies any level of scrutiny, App. 36a–39a.

Licensed Centers – Required Statement

The Ninth Circuit upheld the requirement that licensed centers post information explaining how to obtain a state-funded abortion, ruling it a constitutional regulation of professional speech. App. 34a. It found that the State has a substantial interest in "the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." *Id.* It also found that the Act "is closely drawn to achieve California's interest in safeguarding public health and fully informing Californians of the existence of publicly funded medical services." App. 34a–35a.

Unlicensed Centers – Required Statements

As to the unlicensed centers, the Ninth Circuit upheld the Act's requirement that each of them disseminate a notice saying it is not a licensed medical facility, with no licensed medical provider who oversees or directly provides the services at its facility. The Ninth Circuit upheld this compelled speech under any constitutional test. App. 36a.

Although the Ninth Circuit acknowledged that the unlicensed clinics "do not offer many of the medical services available at the licensed clinics," App. 36–37a, they do "offer[] educational programs," and also "give medical referrals for ultrasounds and sonographs." App. 37a. California has a compelling state interest, the Ninth Circuit ruled, "in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state." *Id.* It added that State's interest was "particularly compelling" because of the Legislature's findings that some crisis pregnancy centers "often present misleading information to women about reproductive medical services." *Id.* The opinion did not address the Act's requirement that it disseminate the message in multiple languages.

On December 20, 2016, the Ninth Circuit denied rehearing *en banc*. App. 72a.

REASONS FOR GRANTING THE PETITION

Government compelled speech is a constitutionally suspect enterprise, especially when it occurs in non-commercial contexts, based on viewpoint-discriminatory purposes that interfere with discussions of controversial social issues, such as abortion.

This Court has explained that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly,

the Court has emphasized that the First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995), quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.,* 475 U.S. 1, 16 (1986) (internal citation and quotation marks omitted).

But the State of California now forces licensed centers to communicate the government's message about state-funded abortions to everyone who walks in the door. The State, rather than using countless alternative ways to communicate its message, including its own powerful voice, instead compels only licensed facilities that help women consider alternatives to abortion to express the government's message regarding how to obtain abortions paid for by the State.

For unlicensed centers, California's compelled speech takes a different form. These centers, which offer free of charge to women in need such things as tangible support (e.g., diapers and baby formula) and counseling, now find it cost prohibitive to advertise their services. This is so because the Act requires them to provide the disclaimer that they are not a medical facility to clients on site, and it must also appear on any print or digital advertising, including on Internet websites. The notice must be in up to 13 different languages, placed in at least two locations on site, and the notice in the advertising material must be in a "clear and conspicuous" font. These burdensome requirements make ads so long that it is difficult, if not impossible, for unlicensed centers to

advocate their own pro-life message in most media, like bus or newspaper ads. In addition, these disclaimers force the unlicensed centers to begin their expressive relationship with an immediate unwanted or negative message that crowds out and confuses their intended message. The law effectively suppresses their speech based on its viewpoint opposing abortion.

The Ninth Circuit upheld this law with its speech-compelling requirements regarding licensed centers under an intermediate standard of review, even though the State admitted that the purpose of the law was to target pro-life centers because of their viewpoint opposing abortion. The Ninth Circuit excused this content-based and viewpoint discriminatory law as a permissible regulation of professional speech. This decision directly conflicts with precedent of this Court, as well as that of multiple Courts of Appeals.

I. The Ninth Circuit upheld the California law compelling speech from noncommercial entities that offer their services for free based on their pro-life viewpoint, in conflict with decisions of this Court and other circuits.

The Ninth Circuit's decision conflicts with rulings of this Court and other circuits that have limited governmental authority to compel speech in a content-based or viewpoint discriminatory manner. Compelled speech cannot be justified as regulation of a profession, as the Ninth Circuit ruled, when the licensed and unlicensed centers offer their services to

women for free, and where the compelled statements have nothing to do with informed consent for a medical procedure that the centers perform. Instead, this Act limits its application to those centers that would *not* recommend abortion or would *not* tell women how to obtain a state-funded abortion. Also, the Act discriminates based on viewpoint by targeting pro-life unlicensed centers, requiring them to disclose that they are not medical facilities, thus disparaging their abilities and resources to the very women they desire to help.

The Ninth Circuit's decision conflicts with decisions of this Court and other circuits on these important questions.

A. The Ninth Circuit's opinion conflicts with decisions of this Court on content-based and viewpoint discriminatory laws.

The Ninth Circuit admits the Act is facially "content-based." App. 22a. It requires licensed pro-life pregnancy centers to tell women: "California has public programs that provide immediate free or low-cost . . . contraception . . . and abortion," and to, "contact the county social services office at [insert telephone number]." App. 80a. Because the Act is content-based, the Ninth Circuit should have applied strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny …."). But the Ninth Circuit refused to apply *Reed* to this case, and incorrectly applied intermediate scrutiny instead. App. 28a–36a.

The reason why the Ninth Circuit stated that it did not apply strict scrutiny under *Reed* is that it found the law to be viewpoint neutral, even though it is content-based. App. 19a–20a. But that makes no difference, according to *Reed*. This Court held that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct at 2230. The Ninth Circuit erred by not applying strict scrutiny.

Moreover, the Act is actually viewpoint-based and is therefore subject to strict scrutiny regardless. Yet the Ninth Circuit disregarded *Reed*'s definition of how to judge whether laws are viewpoint-based. *Reed* declares that a law can be content or viewpoint-based either "on its face or when the purpose and justification" are viewpoint-based. 135 S. Ct. at 2228. In addition to the Act being facially viewpoint-based, the State baldly concedes, that the "purpose and justification" of the Act is to target "crisis pregnancy centers," that is, centers whose "principal aim is to discourage or prevent women from seeking abortions." App. 7a. The purpose and justification of the Act, as conceded by the State, is clearly viewpoint-based.

The decision further conflicts with *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–65 (2011), where this Court struck down a Vermont law that prohibited "pharmacies and other regulated entities from selling or disseminating prescriber-identifying information for marketing," 564 U.S. at 562. This Court found, like the California Act here, that the Vermont statute was content-based because the Legislature made findings

targeting pharmaceutical manufacturers who bought this information to help them convince doctors to prescribe their drugs. The *Sorrell* Court stated that "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell v. IMS Health Inc.* 564 U.S. at 566 (2011) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)).

The Ninth Circuit evaded *Sorrell's* clear ruling by claiming that the Act requires a wide range of entities to speak its compelled statements and not "a narrow class of disfavored speakers." App. 21a. But that ignores the significant exemptions and limitations in the Act. It applies only to those entities whose "primary purpose is providing family planning or pregnancy-related services," App. 78a, and contains two large exemptions for clinics operated by the United States, and any "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program ["Family PACT"]." App. 80a. (Family PACT is the State's program of family planning and comprehensive "reproductive health care" providers. *See* CAL. WELF. & INST. CODE § 14132.).

The Family PACT exemption shows that the Act targets centers that oppose abortion. In order to participate in Family PACT and get the compelled speech exemption, a center would have to agree to provide "family planning services" that include "all FDA approved contraceptive methods and supplies,"

including abortifacients."[3] Petitioners here, because of their pro-life religious beliefs, cannot in good conscience provide contraception they believe functions as abortifacients. However, entities who have no objections to these requirements can readily join Family PACT and get the exemption.

For example, virtually all Planned Parenthood centers in California are listed on the Family PACT website, www.familypact.org/Home/home-page, and are Medi-Cal providers, www.plannedparenthood.org /health-center/CA. The Family PACT program's requirements limit eligibility to those who support abortion. They are the only ones who can be exempted from the Act's compelled statements. Consequently, the Act's compelled speech requirements apply only to pro-life licensed centers that oppose the State's pro-abortion message.

Targeting licensed and unlicensed pro-life centers is clear viewpoint discrimination, contrary to what the Ninth Circuit ruled here.

B. The Ninth Circuit's ruling conflicts with decisions by this Court and the Fourth Circuit on whether regulations of pro bono professional speech are subject to strict scrutiny.

The Ninth Circuit decision conflicts with rulings of this Court and the Fourth Circuit: whether professional speech receives the protection of strict scrutiny, rather than intermediate scrutiny, if it is

[3] *See* discussion page 14 *supra*.

conducted on a pro bono basis. App. 32a. Contrary to the Ninth Circuit, both courts have ruled that the regulation of professional speech is subject to strict scrutiny if that speech is offered for free.

In *In re Primus*, 436 U.S. 412 (1978), this Court held that even though the practice of law is a profession licensed by the State, regulations of attorney speech are subject to strict—not intermediate—scrutiny, if the attorney is offering her services pro bono for public interest purposes. *Id*. at 437–38 & n. 32. This holding applies to the licensed centers in this case. The *In re Primus* Court explained that "prophylactic" speech regulations can govern attorney speech made "for pecuniary gain," but "significantly greater precision" is required for regulations of attorneys engaged in public interest advocacy. *Id*. at 434, 438.

Similarly, in *NAACP v. Button*—which also dealt with restrictions on pro bono attorney speech—this Court held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 371 U.S. 415, 438–39 (1963). Consequently, "it is no answer" to First Amendment claims to say "that the purpose of [the law] was merely to insure high professional standards and not to curtail free expression." *Id*. at 439. "[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id*.

Following this Court's precedent, the Fourth Circuit—in a challenge to a professional licensing

ordinance—held that "the relevant inquiry to determine whether to apply the professional speech doctrine" is based on "whether the speaker is providing personalized advice in a private setting to a paying client." *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013). This case involved the challenge to a city licensing scheme for fortune tellers.

The Ninth Circuit cited *In re Primus* and *Moore-King*, but declared "[w]e reject this argument." App. 32a. It stated that pregnancy centers "have positioned themselves in the marketplace as pregnancy clinics." *Id.* But both the licensed and unlicensed centers charge no fee for their services and information, and do so to further their pro-life mission. App. 91a–92a. There is no relevant constitutional distinction between this activity and that of the ACLU's in *In re Primus*. If pro bono public interest services by professionals count as putting oneself in the "marketplace," it negates the holding of *In re Primus*.

In re Primus and *NAACP v. Button* protect the First Amendment rights of the licensed centers here because they offer their professional services for free. This Court should grant review because the Ninth Circuit's ruling on the licensed centers conflicts with *In re Primus* and *NAACP v. Button* that held that speech regulations of professionals offering services free of charge must meet strict scrutiny.

C. The Ninth Circuit's ruling conflicts with that of the Second Circuit on whether the State may compel pregnancy centers to recite specific disclosures promoting abortion.

The Ninth Circuit's ruling directly conflicts with a decision by the Second Circuit in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), regarding whether the government can force pregnancy centers to recite disclosures specifically promoting abortion, even under the intermediate scrutiny test. The Ninth Circuit incorrectly stated that *Evergreen* subjected the disclosures to strict scrutiny, App. 35a, but *Evergreen* did not decide whether strict or intermediate scrutiny applied, and instead held that the regulations struck down there would satisfy neither. 740 F.3d at 245.

The Second Circuit in *Evergreen* considered a New York City law that required pregnancy centers to recite several disclosures. One compelled disclosure stated whether or not the facility had licensed professionals ("the Status Disclosure"), another disclosure said the City encourages women to consult a licensed provider ("the 'Government Message"), and yet another disclosure required centers to say "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care' (the 'Services Disclosure')." *Id*. at 238.

The Second Circuit considered these three disclosures separately, *id*. at 246–51. It upheld the

Status Disclosure,[4] but struck down the other two required disclosures as violating the First Amendment.

The Second Circuit declared unconstitutional the Services Disclosure, reasoning that the "context" precluded it, namely, "a public debate over the morality and efficacy of contraception and abortion." *Id.* at 249. That court held that the "Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues," contrary to the First Amendment. *Id*. at 249–50. Notably, the court reviewed the Services Disclosure under both strict and "intermediate scrutiny," and concluded the disclosure is unconstitutional either way. *Id*. at 245. The court separately struck down the Government Message disclosure for "requir[ing] pregnancy services centers to advertise on behalf of the City." *Id*. at 250.

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[4] The Second Circuit in *Evergreen* upheld the Status Disclosure, which although similar to the provision here in California's Act that requires unlicensed centers to state that they do not have a licensed medical professional on staff and are not supervised by a licensed medical professional, 740 F.3d at 246–49, the New York City provision is distinguishable from the Act because it did not require notices in all advertisements in multiple languages, which renders advertisements cost prohibitive. Also, it is Petitioners' position that the Second Circuit, in upholding the New York City disclosure about medical licensure, did not correctly apply this Court's ruling on similar disclosures in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). See discussion *infra* pp. 37–42. Moreover, this portion of the *Evergreen* decision conflicts with the district court decision in *Centro Tepeyac v. Montgomery County*, 5 F.Supp.3d 745, 748 (D. Md. 2014). *See infra* n.5.

The Ninth Circuit rejected this analysis and, in so doing, created a direct conflict with *Evergreen*. The Act in this case lists the same items contained in *Evergreen's* Services Disclosure: abortion, contraception, and prenatal care. But it also states that California offers subsidies for those services, and tells women where to get them ("contact the county social services office.") App. 80a. Thus, the Act is more constitutionally burdensome than the Services Disclosure struck down by the Second Circuit, adding elements to *Evergreen's* Government Message by "requir[ing] pregnancy services centers to advertise on behalf of" the government. *Evergreen*, 740 F.3d at 250. The Ninth Circuit ruling directly conflicts with *Evergreen's* holding regarding the Services Disclosure, which survived neither intermediate nor strict scrutiny.

Furthermore, the Ninth Circuit mistakenly claimed that when the Second Circuit reviewed the Services Disclosure it "applied strict scrutiny, which is much more stringent than the intermediate scrutiny we apply today." App. 35a. As mentioned above, this is incorrect. *Evergreen* expressly applied both scrutiny levels and held the Services Disclosure unconstitutional even "under intermediate scrutiny." *Evergreen*, 740 F.3d at 250. Notably, this makes it immaterial that the pregnancy centers in *Evergreen* were unlicensed while the medical centers here are both licensed and unlicensed. Both courts explicitly applied intermediate scrutiny. The Ninth Circuit upheld the compelled-speech law, whereas the Second Circuit held that it violated the First Amendment.

D. The Ninth Circuit's decision conflicts with rulings by this Court and the Fourth and Eleventh Circuits on the circumstances in which speech may be compelled or prohibited between physicians and patients.

The Ninth Circuit acknowledges that its ruling takes a position amidst "a circuit split regarding the appropriate level of scrutiny to apply" in "abortion-related disclosure cases." App. 25a.

1. This Court's Decision in *Planned Parenthood v. Casey* does not support the Ninth Circuit's decision.

Although relied upon by the Ninth Circuit, it is important to note that this Court's decision in *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), does not support the ruling here. *Casey* allowed states to require physicians to disclose certain items to women before an abortion, but only as part of the process of obtaining their informed consent regarding surgery, and pursuant to the state's interest in protecting unborn life. 505 U.S. at 881–83. This requirement served a particularized interest in ensuring that "relevant" information is provided to the patient so that a necessary step—informed consent for a surgical procedure—is actually obtained. *Id. Casey* did not give states *carte blanche* authority to force doctors to recite information regarding abortion outside the context of obtaining informed consent before a woman undergoes a surgical abortion. Here,

the Act requires the disclosure in a situation where the recommendation is not to have a medical procedure.

The information that the Act requires licensed centers to communicate has nothing to do with informed consent in the context of a surgical procedure like an abortion, which the centers do not perform, and nothing to do with nonsurgical medical procedures that a licensed center might actually perform, such as an ultrasound. The State mandates the licensed centers to disclose the required information to all patients whether they receive any service in particular, like diapers, pamphlets or baby clothes, or no services at all. In sharp contrast, a law regulating informed consent applies in a limited situation where a patient is considering and consenting to a surgery or some other medical procedure, and the information relates to that procedure.

Second, the Act does not require disclosures before all ultrasounds are performed. The Act exempts many facilities in California where ultrasounds occur, such as hospitals, doctor's offices, abortion clinics, and other places. App. 80a. The Act's definitions gerrymander all of those facilities outside its scope, even if they provide the same pregnancy-related services. *Id.* *Casey* did not empower states to single out facilities advocating a particular viewpoint against abortion that the State opposes, and coercively impose on those facilities compelled statements that tell women where to receive free or low cost state-funded abortions. The Act finds no

support from this Court's decision in *Casey,* because *Casey* is inapplicable.

2. The Ninth Circuit's decision allowing the government to require or ban speech in the context of doctor and patient discussions of controversial topics conflicts with rulings of the Fourth and Eleventh Circuits.

The Ninth Circuit ruling conflicts with those of the Fourth and Eleventh Circuits on what speech the government can impose or forbid in the context of abortion or other controversial issues. The Ninth Circuit's opinion claims to agree with the Fourth Circuit in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), but these two decisions are irreconcilable. *Stuart* struck down an informed consent law that required doctors to show women an ultrasound and describe the fetus before an abortion. *Id.* at 242. *Stuart* held that mere fetal facts have "ideological implications," because they all fall on one side of the abortion debate" and "promote[] a pro-life message." *Id.* at 242, 246. Therefore, the Fourth Circuit held the North Carolina law was unconstitutional.

If facts about fetal development "all fall on one side of the abortion debate," then information on how to obtain a state-funded abortion "fall[s] on one side of the abortion debate." Nonetheless, the Ninth Circuit's ruling here rejects the Fourth Circuit's approach in *Stuart*. The disclosure California requires has an unmistakable advocacy component. It requires pregnancy centers to tell women that

California has programs offering subsidized abortion, and urges them to "contact the county" for the information about them. App. 80a. But the Ninth Circuit improperly called this speech non-ideological, while saying the merely factual disclosure in *Stuart* "convey[ed] a particular opinion." App. 22a (quoting *Stuart*, 774 F.3d at 246). If telling someone how to get a free abortion does not convey a particular viewpoint on abortion, it is difficult to think of what does.

The Ninth Circuit further conflicts with the Eleventh Circuit, which recently rejected *en banc* the application of *Casey* in striking down a content-based restriction on the speech of doctors who desired to speak to patients about firearms. *Wollschlaeger v. Governor of Fla.*, –F.3d –, No. 12-14009, 2017 WL 632740 at *9. (11th Cir. Feb. 16, 2017). The Eleventh Circuit held that "State officials cannot successfully rely on a single paragraph in a plurality opinion of three justices" to justify content-based restrictions on the speech of medical professionals. *Id*.

The Ninth Circuit upheld an Act that requires licensed centers in California to post information on how to contact the county for a free abortion because it considered that requirement non-ideological. Such inconsistency is why this Court insists that "compelled statements of opinion" are constitutionally no different than "compelled statements of 'fact,' since either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797. This Court should grant review to reverse this ruling by the Ninth Circuit.

E. The Ninth Circuit's decision conflicts with decisions of this Court that invalidated efforts to compel speech by non-commercial, non-professional speakers.

The Ninth Circuit ruled that California may force unlicensed facilities to recite extensive messages even under the strict scrutiny test. App. 36a–39a. Under this Court's precedents, the strict scrutiny test should invalidate the Act's required statements for unlicensed centers, because the State has a greatly reduced interest in compelling disclosures from them.

In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), this Court struck down a North Carolina law that required professional fundraisers for charities to make various disclosures before they asked for donations. The Court applied strict scrutiny to declare unconstitutional these provisions. *Id.* at 796-98. One reason was that "the compelled disclosure will almost certainly hamper the legitimate efforts" of the speakers to advance their cause because they have to start the conversation with a disclaimer that may cause the listener to stop the conversation. "[T]he disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id.* at 800.

In Riley, this Court ruled that the First Amendment protected the speech of professional fundraisers. Here, unlike the situation with the professional fundraisers, no money changes hands, because the unlicensed centers offer their services for free. The unlicensed centers provide no medical

services, so it is unnecessary for them to say that no doctor is on hand to give women diapers and baby clothes, teach parenting classes, and talk about how the women can receive social support to give birth.[5]

The Act's regulation of unlicensed centers is incredibly burdensome. The required notice must be displayed in at least two places on site and "in any print and digital advertising material[] including Internet Web sites," not only "in English," but also "in the primary threshold languages." App. 81a. For San Diego County, where PCC and Fallbrook are located, "threshold" languages can include Spanish, Arabic, Vietnamese, Farsi and Tagalog. *See supra* note 1.

Additionally, the notice contained in an advertisement must be "in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language. App. 81a–82a. These language and size requirements make it cost prohibitive for unlicensed centers to run ads. For example, the cost of running an

[5] A federal court invalidated a similar compelled speech law that required non-medical pregnancy centers to post signs stating that the center did not have a licensed medical provider on staff, among other disclaimers. *Centro Tepeyac v. Montgomery Cty*, 5 F. Supp. 3d 745, 748 (D. Md. 2014). The court found that the regulation was content-based and applied strict scrutiny. *Id*. at 754, 762–69. The court held that that "the critical flaw" in the law was the "lack of any evidence that the practices of [pregnancy centers] are causing pregnant women to be misinformed which is negatively affecting their health." *Id*. at 768. The law therefore was not narrowly tailored to a compelling government interest. *Id*. at 769.

advertisement for a non-profit corporation in the San Diego Union-Tribune in the Sunday print edition is $376.00 per column inch. *See* The San Diego Union-Tribune, GENERAL PRINT RATE BOOK, *available at* http://cdn.sandiegouniontrib.com/static/utsd/v1/pdf/general.pdf. Adding a statement that "Fallbrook 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" *in 5 additional languages* could add several inches and hundreds (if not thousands) of dollars to the cost of each ad, a five-fold increase. In Los Angeles County, with 13 threshold languages, the costs would increase thirteen-fold. These burdensome language, font, and size requirements make widespread newspaper, and other, advertising cost prohibitive.

Internet advertising by the unlicensed centers also suffers under this compelled speech rule. It would be burdensomely expensive under this Act to run a small banner ad that states, "Pregnant? Need Help? [phone number]." Assuming the same average number of words for each of these required languages, the unlicensed Petitioners must add 145 words in a "clear and conspicuous" size and font on top of every five-word Google search ad. This would not be possible: as Petitioners testified in their complaint, it would crowd out or eliminate entirely advertising of their expressive enterprise. App. 100a. There is nothing narrowly tailored about this requirement. The Act's compelled speech effectively silences the unlicensed pregnancy centers' pro-life message.

The Ninth Circuit's decision also conflicts with this Court's decision in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), because the State lacked evidence why it needed to compel the unlicensed centers to disclose that they are not medically licensed facilities. *Brown* ruled "[t]he State must specifically identify an actual problem in need of solving … and the curtailment of free speech must be actually necessary to the solution." *Id.* at 799 (internal citations and quotation marks omitted). The State's "evidence is not compelling" if it merely shows a correlation, not a "direct causal link," between the target of its regulation and the alleged harm. *Id.* at 799–800.

California's evidence supporting the Act is weaker than the correlations this Court rejected in *Brown*. It is nonexistent. The Ninth Circuit cited, and the State relies on, no studies showing that women are actually being harmed by unlicensed pregnancy centers. They advance no evidence demonstrating that if Petitioners recite the disclosures the law requires, the alleged harm will be alleviated. In fact, the Ninth Circuit and the State cite nothing but advocacy testimony by pro-choice organizations and the legislature vaguely declaring that pregnancy centers "often present misleading information to women about reproductive medical services." App. 37a. Such bald, unsupported assertions cannot meet this constitutional standard.

Targeting "misleading information" is even more dangerous than targeting "false" speech, because misleading is a term used when statements are not serious enough to be deemed false. Yet this Court

recently struck down even an attempt to punish admittedly false speech, *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). If a narrow ban on false speech failed in *Alvarez*, how much more does it violate the First Amendment for the Act to impose compelled speech on non-medical pro-life centers, innocent even of the "misleading" speech label?

Simply put, there is no compelling evidence that the Act's "curtailment of free speech," namely its required statements, is "actually necessary to the solution" of a real problem. *Brown*, 564 U.S. at 799.

The Act is not tailored (much less narrowly tailored) to eliminate "misleading speech." It applies without regard to whether a pregnancy center speaks anything "misleading." Rather, it applies prophylactically to centers that focus on pregnancy, offer "options counseling," or speak to pregnant women. Cal. Health & Safety Code § 123471. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801. A speech-regulating law must "eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Finally, the Ninth Circuit misapplied strict scrutiny by not applying the least restrictive means prong of that test. In *Riley*, this Court required the government to show it could not achieve its interest in another way:

> For example, as a general rule, the State may itself publish the detailed [information]. This procedure would communicate the desired information to the public without burdening [the] speaker with unwanted speech during the course of a solicitation.

Id. at 800. "Alternatively, the State may vigorously enforce its antifraud laws." *Id*.

Here the same principles apply. If the unlicensed centers are allegedly "misleading" women in some way about whether they are medical facilities, the State can vigorously prosecute the unlawful practice of medicine. *See* Cal Bus. & Prof. Code § 2052. Likewise, the State itself could advocate to women about the option of abortion. The Ninth Circuit did not require the State to disprove these, or any other, less restrictive alternatives. Its decision conflicts with *Brown* and *Riley*.

II. The Ninth Circuit resolved significant questions of free exercise doctrine in conflict with this Court's precedent.

The Ninth Circuit's determination that the Act is neutral under the Free Exercise Clause conflicts with this Court's determination that an ordinance impermissibly targets religion if its practical application affects a religious group and no others. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-37 (1993).

In *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), this Court ruled that a law that is neutral

and generally applicable does not violate the Free Exercise Clause. But this Act is not neutral or generally applicable because it exempts broad segments of the medical community that engage in many of the same activities as Petitioners here. The Act is drafted so as to apply only to entities like the Petitioners whose beliefs require them to oppose abortion. The Ninth Circuit skirts this analysis by stating: "The Act applies to all covered facilities." App. 40a. But it is within the definition of "covered facilities" where the targeting of religion takes place.

The Act defines its scope as applying only to facilities "whose primary purpose is providing pregnancy-related services." App. 78a. Thus, the Act does not apply to hospitals and clinics whose medical services cover a wide range of activities, even if they offer the exact same pregnancy services that pregnancy centers offer. The unlicensed facility definition exempts facilities that have "a licensed medical provider on staff or under contract." App. 80a.

And the Act does not apply to licensed clinics that are both Medi-Cal providers and Family Planning, Access, Care, and Treatment Program ("Family PACT") enrollees. App. 79a. This legislative requirement works to limit the Act's application to pregnancy centers that oppose abortion. Any center can avoid the Act's compelled speech requirements by joining both Medi-Cal and Family PACT. But in order to participate in the Family PACT program, a center must provide "family planning services" that include "all FDA approved contraceptive methods and supplies." *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

Licensed Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program because they would have to supply contraceptives they believe work as abortifacients.[6] Other facilities that have no objection to supplying all forms of contraception, including abortifacients, can escape the Act's compelled disclosures by participating in the Family PACT program, something the Petitioners cannot do consistent with their religious beliefs. Because the Act ties its exemption from the compelled speech to dispensing abortifacients, the Act's compelled speech ends up applying only to those centers that oppose abortion. "[T]he burden of the ordinance, in practical terms, falls on [pro-life pregnancy centers] but almost no others…." *See Lukumi*, 508 U.S. at 536.

As in *Lukumi*, the lack of neutrality is also shown by the "historical background" of the Act. *Id.* at 540. It is viewpoint-based on its face and also has a viewpoint discriminatory legislative purpose and justification targeting crisis pregnancy centers because their religious convictions require them to discourage abortion, which the State characterizes as supposed "[mis]information" with which the State disagrees. Like in *Lukumi*, the Act ends up covering only licensed and unlicensed centers that oppose abortion and seek to counsel women to choose a different path.

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[6] *See* www.familypact.org/provider-search-1.

III. This Case Offers a Clean Vehicle To Examine These First Amendment Issues.

This case presents a clean vehicle to examine these important First Amendment issues. The Ninth Circuit concluded that this case presented only issues of law, and there was no need for further fact finding, stating: "This action turns on a question of law. Appellants seek to enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require no further factual development to address Appellants' challenge." App. 16a. The law challenged in this lawsuit directly affects Petitioners, who asked the District Court and the Ninth Circuit to enjoin its enforcement against them. Returning this case to the lower court for further proceedings would not meaningfully improve the record.

Also, this is the only petition that includes both licensed and unlicensed centers as Petitioners. The Ninth Circuit decision here also applies to two other lawsuits that challenged the Act's compelled speech provision solely for licensed facilities: *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No 15-17517 (9th Cir. 2016) and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497 (9th Cir 2016). Because both portions of the Act apply to Petitioners, granting review would enable this Court to review both categories of compelled speech imposed by the Act.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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