CASE NO. 15-17497

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIVINGWELL MEDICAL CLINIC, INC.; PREGNANCY CARE CENTER OF THE NORTH COAST, INC.; and CONFIDENCE PREGNANCY CENTER, INC.,

Plaintiffs-Appellants,

v.

KAMALA HARRIS, Attorney General of the State of California, in her official capacity; KAREN SMITH, M.D., Director of California Department of Public Health, in her official capacity; MICHAEL COLANTUONO, City Attorney of Grass Valley, California, in his official capacity; ALISON BARRAT-GREEN, County Counsel of Nevada County, California, in her official capacity; CINDY DAY-WILSON, City Attorney of Eureka, California, in her official capacity; JEFFREY S. BLANCK, County Counsel of Humboldt County, California, in his official capacity; CHRISTOPHER A. CALLIHAN, City Attorney of Salinas, California, in his official capacity; CHARLES J. MCKEE, County Counsel of Monterey County, California, in his official capacity,

Defendants-Appellees.

Plaintiffs-Appellants' Emergency Motion Under Circuit Rule 27-3

Robert H. Tyler, CA Bar No. 179572
TYLER & BURSCH, LLP
24910 Las Brisas Road, Suite 110
Murrieta, California 92562
Tel: 951-304-7583
Fax: 951-600-4996
rtyler@tylerbursch.com

Attorneys for Plaintiffs-Appellants

Francis J. Manion
(Lead Counsel)
AMERICAN CENTER FOR LAW & JUSTICE
Post Office Box 60
6375 New Hope Road
New Hope, Kentucky 40052
Tel: 502-549-7020
Fax: 502-549-5252
fmanion@aclj.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. R. 26.1, I hereby certify that Appellants LivingWell Medical Clinic, Inc., Pregnancy Care Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc. are non-profit corporations under § 501(c)(3) of the Internal Revenue Code and do not have parent corporations.

s/ Francis J. Manion
Francis J. Manion
Attorney for Plaintiffs-Appellants

CIRCUIT RULE 27-3 CERTIFICATE

1. Telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties:

PARTIES	COUNSEL OF RECORD
Plaintiffs-Appellants LivingWell Medical Clinic, Inc., Pregnancy Care Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc.	Francis J. Manion AMERICAN CENTER FOR LAW & JUSTICE Post Office Box 60 6375 New Hope Road New Hope, Kentucky 40052 Tel: 502-549-7020 Fax: 502-549-5252 fmanion@aclj.org Robert H. Tyler, CA Bar No. 179572 TYLER & BURSCH, LLP 24910 Las Brisas Road, Suite 110 Murrieta, California 92562 Tel: 951-304-7583 Fax: 951-600-4996 rtyler@tylerbursch.com

Defendants-Appellees Kamala Harris and Karen Smith, in their official capacities	Noreen Patricia Skelly California Department of Justice, Office of the Attorney General 1300 I Street, Suite 125 P.O. Box 944255 Sacramento, CA 94244-2550 Tel: 916-327-0349 Fax: 916-324-8835 Noreen.Skelly@doj.ca.gov
Defendant-Appellee Michael Colantuono, in his official capacity	Pamela K. Graham City Attorney for Grass Valley, California Colantuono, Highsmith & Whatley, PC 420 Sierra College Drive, Suite 140 Grass Valley, CA 95945-5091 Tel: 530-432-7357 Fax: 213-542-5710 mcolantuono@chwlaw.us
Defendant-Appellee Alison Barrat-Green, in her official capacity	Amanda Uhrhammer County of Nevada 950 Maidu Avenue, Suite 240 Nevada City, CA 95959 (*cont. following page*) Tel: 530-265-1319 Fax: 530-265-9840 amanda.uhrhammer@co.nevada.ca.us
Defendant-Appellee Cyndy Day-Wilson, in her official capacity	Cyndy Day-Wilson City Attorney of Eureka, California 531 K Street Eureka, CA 95501 Tel: 707-441-4147 Fax: 707-441-4148 cday-wilson@ci.eureka.ca.gov
Defendant-Appellee Jeffrey S. Blanck, in his official capacity	Mary Blair Angus County Counsel 825 Fifth Street Eureka, CA 95501 Tel: 707-445-7236 Fax: 707-445-6297 bangus@co.humboldt.ca.us

Defendant-Appellee Christopher A. Callihan, in his official capacity	Nathaniel Le Roi Dunn Salinas City Attorney 200 Lincoln Ave Salinas, CA 93901 Tel: 831-758-7256 Fax: 831-758-7257 nathanield@ci.salinas.ca.us
Defendant-Appellee Charles J. McKee, in his official capacity	William Merrill Litt Office of the County Counsel County of Monterey 168 W. Alisal Street, 3rd Floor Salinas, CA 93901-2439 Tel: 831-755-5045 Fax: 831-755-5283 littwm@co.monterey.ca.us

2. Nature of the Emergency

On January 1, 2016, the Reproductive FACT Act, signed by Governor Brown into law on October 9, 2015, will go into full effect and will apply directly to the pro-life and religious activities of Appellants-Plaintiffs as of that date. As described in more detail below, the Act requires, in pertinent part, that "licensed covered facilities," such as Plaintiffs, disseminate a message to their clients that promotes the availability of free or low cost abortions. Plaintiffs are pro-life, faith-based licensed covered facilities that should not be forced to speak the government-mandated message that wholly contradicts their mission and identity. Without preliminary relief by this Court, as of January 1, 2016, Plaintiffs will be chilled in the exercise of their free speech rights, and subject to enforcement actions, simply because they do not wish, consistent with their religious principles,

to be conscripted by the state into speaking a message imposed on them by their government against their will. Plaintiffs ask no more than that the *status quo* be preserved during the course of their appeal, *i.e.*, the relative position of the parties prior to the effective date of the Act.

3. Notification of Counsel

Today, on December 23, 2015, undersigned counsel spoke via telephone with the attorney representing Defendants Harris and Smith, Assistant Attorney General, Noreen Skelly, to advise her of this motion. Ms. Skelly did not consent to the motion. Undersigned counsel also emailed a copy of the motion to counsel for all Defendants immediately prior to filing this motion.

4. Proceedings in the District Court

The court denied Plaintiffs' motion for a preliminary injunction on December 18, 2015. The order of the district court is attached hereto as Ex. A. In that decision, the district court held that a stay of its order, pending appeal, would be inappropriate. *Id*. at 21-22.

s/ Francis J. Manion
Francis J. Manion
Attorney for Plaintiffs-Appellants

I. MOTION FOR INJUNCTION PENDING APPEAL

Pursuant to Fed. R. App. P. 8, Plaintiffs-Appellants move this Court for the entry of an order granting them an injunction pending appeal against Defendants-Appellees, Kamala Harris and Karen Smith, and their enforcement of the Reproductive FACT Act against them.[1] Without such relief, Plaintiffs will be forced by the Act to disseminate a government-mandated message wholly contrary to their religious beliefs, identities, and mission. Contrary to the decision of the district court, which denied Plaintiffs' motion for a preliminary injunction on December 18, 2105, the Act directly violates Plaintiffs' First Amendment free speech rights and Plaintiffs satisfy all relevant factors to warrant immediate and preliminary relief.

II. STATEMENT OF THE CASE

The Act compels pro-life pregnancy centers to tell their clients that they might be able to obtain free abortions. Specifically, the Act requires "licensed covered facilities" to disseminate the following message:

> 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

[1] Plaintiffs do not ask this Court to enjoin preliminarily on appeal the Defendant City and County officials who are responsible for enforcing the Act against Plaintiffs in their respective jurisdictions. These defendants, unlike Defendants Harris and Smith, have stated on the record, at the court below, that they "do not intend to enforce to statute during the pendency of this lawsuit, or until the statute is found constitutional." Civ. Doc. #: 4:15-cv-04939-JSW, ECF Doc. 51, ¶ 1.

> for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

Cal. Health & Safety Code § 123471(a)(1). The text of the Act is attached hereto as Ex. B.

The message must be disseminated in one of three ways: (1) as a public notice posted in a conspicuous place; (2) a printed notice distributed to all clients; or (3) a digital notice distributed to all clients that can be read at the time of check-in or arrival. Ex. B, § 123471(a)(2).

A facility that fails to comply with the Act faces financial penalties in the amount of $500 for the first offense, and $1,000 for each subsequent offense. Ex. B, § 123473(a). Prior to commencing any enforcement action, the Act requires said officials to first provide a covered facility with a notice of noncompliance, informing the facility that it is subject to a civil penalty if it does not correct the violation within thirty days of the notice being delivered. *Id.* Officials must also verify that that violation was not corrected within this thirty-day period. *Id.*

By operation of the California Constitution, the law goes into effect on January 1, 2016. Cal. Const. Art. IV, Sec. 8.

Plaintiffs are three faith-based pregnancy resource centers that challenge the Act's mandated disclosures with respect to "licensed covered facilities": (1) LivingWell Medical Clinic, Inc. ("LivingWell"), (2) Pregnancy Care Center of the North Coast, Inc. ("PCC"), and (3) Confidence Pregnancy Center, Inc. ("CPC").

Each Plaintiff is a "licensed covered facility" as defined by the Act. LivingWell and PCC are licensed by the State of California Department of Public Health to operate a non-profit Free Clinic. Exs. C, ¶ 2 and D, ¶ 2.1 CPC is licensed by the Department to operate a non-profit Community Clinic. Ex. E, ¶ 2. Each Plaintiff offers two or more of the pregnancy-related services set forth in the Act. Exs. C, ¶ 4; D, ¶ 6; E, ¶ 4. The primary purpose of the Plaintiff facilities is to provide pregnancy-related services—medical and non-medical—consistent with their religious values and commitments. Exs. C, ¶¶ 2, 4; D, ¶¶ 2, 4, 6; E, ¶¶ 2 and 4.

Each Plaintiff has religious objections to abortion, Exs. C, ¶ 7; D, ¶¶ 4, 8; E, ¶ 5, and each Plaintiff believes that disseminating the government-mandated message at issue would be contrary to its religiously-based principles and purposes. Exs. C, ¶ 8; D, ¶¶ 8-9; E, ¶ 7. Each Plaintiff has never referred, nor will they ever refer, a client for an abortion. Exs. C, ¶¶ 7- 8; D, ¶ 8; E, ¶ 7.

Each Plaintiff offers their services free of charge and never ask their clients for donations. Exs. C, ¶ 6; D, ¶ 7; E, ¶ 6.

III. ARGUMENT

The standard for an injunction pending appeal is the same as the standard for a preliminary injunction. *See Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859 (9th Cir. 2007):

> The factors regulating issuance of a stay [include]: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

This standard, however, should be applied in light of what this Court has held regarding the nature of a preliminary injunction: it "is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). Its purpose "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

A. Plaintiffs are Likely to Succeed on the Merits of their Free Speech Claim

Government *compelled* speech, which necessarily alters the *content* of speech, is extraordinarily disfavored under the First Amendment. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) ("[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the [most exacting] rigorous scrutiny.") (citations omitted). The government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798, 800 (1988) (law requiring professional fundraisers for charitable

organizations to tell solicited persons what percentage of contributions actually went to such organizations violated the First Amendment).

The district court correctly held that the Act involves a "quintessentially compelled, content-based speech" mandate. Ex. A at 13. The Act is therefore presumptively unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional"); *Wooley v. Maynard*, 420 U.S. 705, 716-17 (1977) (assessing whether the state could justify its speech compulsion).

Instead, however, of applying strict scrutiny to the Act's content-based regulation, as it should have, *see*, *e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2105) ("[a] law that is content based on its face is subject to strict scrutiny"), and setting aside any presumption of unconstitutionality, the district court flipped the burden and held that Plaintiffs did not conclusively[2] negate the possibility that their speech was commercial or professional, and that the Act was therefore subject to a lesser standard of review. Ex. A at 13-21.

1. *The Act does not compel commercial speech*

Despite the undisputed statements made in declarations submitted by

[2] The court even conceded that "discovery is needed" to "substantiate" the (mistaken) proposition that Plaintiffs' speech is commercial. Ex. A at 17.

Plaintiffs in support of their preliminary injunction motion that Plaintiffs (1) are religious non-profit entities, (2) do not charge their clients for any services rendered, and (3) do not ask their clients for donations for any services rendered, the court held this was not enough to demonstrate Plaintiffs are not engaged in commercial speech.

The court below erred on numerous levels. First, because the Act is obviously a content-based regulation, as the court below recognized, the burden is on the government, not Plaintiffs, to show why a lesser standard of review under the commercial speech doctrine should apply. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 816 (2000). Placing the onus on Plaintiffs to show why the Act does *not* involve commercial speech gets the First Amendment analysis backwards, to the obvious detriment of Plaintiffs who are seeking the protection of their free speech rights.

Second, just because goods or services *can* be sold (here, pregnancy related services), does not ineluctably lead to the conclusion that the commercial speech doctrine applies—especially where, as here, there is undisputed testimony that goods or services are not being sold, and clients are not being asked for donations in exchange for these goods and services. Under the district court's analysis, a religious homeless shelter distributing pamphlets on the street to homeless persons

containing information where they could find free shelter could be commercial speech because providing rooms to the public is more often than not a commercial enterprise. Indeed, an advocacy group touting its environmental activities would be "commercial" because lobbying activities are often undertaken for pay ("valuable . . . services," Ex. A at 16). *But see Riley*, *supra*. Moreover, as just explained, under the district court's analysis, it would be the burden of such a homeless shelter or advocacy group to show why it is *not* engaged in commercial speech if it chose to challenge a law restricting pamphleteering in public.

Third, Plaintiffs provided sufficient factual grounds, through undisputed declarations, to demonstrate that the speech activities of Plaintiffs do not "propose[] a commercial transaction" or "relate[] *solely* to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) (emphasis added). Mere potential commercial elements do not change this: even if regulated speech is assumed to be commercial, "it does not retain its commercial character when it is inextricably intertwined with the otherwise fully protected speech involved in charitable solicitations." 487 U.S. at 782. *See also Vill. of Schaumburg,* 444 U.S. at 632 (even "soliciting financial support" for charitable causes does not constitute "purely commercial speech," because it is "characteristically intertwined with informative and perhaps persuasive speech"). Indeed, to hold otherwise would render all non-

profits "commercial" for free speech purposes, as they all need money to survive and promote their activities to garner the necessary financial support. Here, even assuming (counterfactually) that Plaintiffs offer any commercial services, they would be inextricably intertwined with their non-commercial religious identity and mission.

Finally, the specific message the Act commands, and that Plaintiffs must speak, is not commercial in nature. In fact, the very purpose of the message is to direct clients to a phone number where they can access state sponsored pregnancy related services for *free or low cost*—not to direct clients to a place where they obtain pregnancy services for a fee.

In sum, Plaintiffs—non-profit, faith-based ministries, whose religious and charitable mission is to provide women with resources for handling a pregnancy—are most assuredly not engaged in commercial activities or speech that could warrant anything less than strict scrutiny review.

2. *The Act does not compel professional speech*

While it might be true that a licensed entity or person is subject to that state's regulations pertaining to activities for which that entity or person is licensed, it is equally true that "[b]eing a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights . . . To the contrary, professional speech may be entitled to 'the strongest protection

our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995)) (internal citation omitted).

In *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), this Court held that the First Amendment rights of professionals, such as doctors and mental health providers, operate "along a continuum." *Id*. at 1227. On one end of the continuum, where "First Amendment protection is at its greatest," is when the "professional is engaged in a public dialogue." *Id.* At the midpoint of the continuum, where the speech falls "within the confines of a professional relationship, First Amendment protection of a professional's speech is *somewhat* diminished." *Id.* at 1228 (emphasis added). Finally, at the other end of the continuum, is "the regulation of professional conduct, where the state's power is great, even though such regulation may have an incidental effect on speech." *Id*. at 1129.

The court below correctly held that the speech mandated by the Act involves *speech*, not conduct. Hence, at worst, the First Amendment protection here would "somewhat diminished."

Assuming *arguendo* that *Pickup* remains good law in light of the Supreme Court's decision in *Reed*, *supra*,[3] the district court erred in not affording Plaintiffs'

[3] In *Reed*, the Supreme Court stated, without qualification, that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas

full First Amendment protection for their religious and political speech. First, the Act requires Plaintiffs to speak the mandated message even before a client has been seen by a licensed medical professional and thus before any physician-client relationship has been established. Indeed, it requires Plaintiffs to speak the message even if a client is not visiting one of Plaintiffs' clinics for medical services or advice. As the court below correctly recognized, Plaintiffs do not just offer medical services. Ex. A at 16 (noting that Plaintiffs provide such goods as maternity items and baby supplies.) Thus, a client visiting one of Plaintiffs' clinics for nothing more than a baby blanket would have to be informed by that clinic of the government's promotion of abortion services, a message *wholly unrelated* to the client's visit, not to mention antithetical to the clinic's mission.

In addition, the government-mandated message is not simply about, *inter alia*, promoting abortion services, but how clients can potentially obtain abortion services at low or no cost. That is not a message implicating professional speech. It is, for all intents and purposes, a public service announcement, and an ideologically driven one at that, designed to lead clients away from Plaintiffs' clinics and their religious, pro-life message. Forcing Plaintiffs to speak the government's message is tantamount to forcing them to engage in a public

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contained' in the regulated speech." 135 S. Ct. at 2228 (citation omitted). Here, it should be noted, the animus against Plaintiffs is blatant, as illustrated by the terribly biased, hostile legislative findings. Ex. A at 4.

dialogue advocating a message contrary to their very religious identity. It forces Plaintiffs to "pamphleteer" in their own offices using a pamphlet, as it were, whose content has been dictated solely by the government. *See id*. at 1227.

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., *supra*, instructs that, when evaluating a compelled speech regulation, context matters. *See Evergreen Ass'n v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014) (preliminarily enjoining two government-mandated messages pregnancy centers were required to disclose) (citing *Riley*, 487 U.S. at 796-97). The context here is clear and is the same as the one observed by the *Evergreen*: "a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the Act] provide alternatives." *Id*. To call the Act's requirements on licensed covered facilities a mere regulation of professional speech turns a blind eye to the real purpose behind the Act: to skew the public debate over a controversial issue in favor of the government's position, using dissenting voices to communicate that position. "The State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2671 (2011).

For this reason, the compelled speech would be unconstitutional even if applies to clearly commercial or professional entities. A state cannot require grocery stores (which carry pregnancy tests) or physicians to advertise the

availability of abortion over their objections, just as it could not constitutionally require restaurants to advertise the availability of organic food alternatives, or require attorneys to advertise the availability of non-attorney transactional services. *See Sorrell* (applying this doctrine to pharmaceutical sales representatives).

3. *The Act Fails Both Strict and Intermediate Scrutiny*

Because the Act is a content-based regulation of speech and does not involve commercial or professional speech, the Act must satisfy strict scrutiny, which it cannot possibly do. But even if intermediate scrutiny is to be applied, under a professional or commercial speech theory, the Act fails that standard as well. Under intermediate scrutiny, "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Id*. at 2667-68. There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." *Id*. at 2668 (citation omitted).

The alleged purpose of the Act is "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Ex. B at 2, Sec. 2. According to the Act's author, "crisis pregnancy centers" engage in "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health

care." Ex. A at 4 (quoting Act's legislative history). This is sheer political defamation. But even if it were true that *some* centers engaged in misconduct, the Act would fail review.

Assuming *arguendo* that the government's interests here are substantial in nature, the means the state has chosen to advance its interest are not "proportional to the resulting burdens placed on speech," and for at least two reasons. First, and most critically, the Act does not pinpoint fraudulent or deceptive speech as something to prohibit. Indeed, the Act does not prohibit or modify allegedly false statements or false advertisements by any person or facility. Rather, the Act imposes a broad prophylactic measure that sweeps within its scope all non-exempt licensed covered facilities whether such facilities have engaged in deceptive speech in the past or whether they will do so in the future. When the government imposes requirements to speak a government-mandated message in order to address a perceived problem, the First Amendment requires a scalpel, not a sledge hammer. Decisional law is clear that "[b]road 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." *NAACP v. Button* 371 U.S. 415, 438 (1963) (citations omitted). If the goal of the Act is to prohibit false and deceptive speech, then the Act should prohibit false and deceptive speech—not compel faith-based, pro-life pregnancy centers, like Plaintiffs, to speak a message

antithetical to their religious beliefs and mission. The Act is an indirect and overly broad way of addressing alleged deceptive practices. It does not "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 350, 357 (1995) ("The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.").

Second, if California perceives a lack of knowledge on the part of women regarding the availability of that state's public services as a problem to be remedied, one obvious way the State could choose to advance its goals, without having to compel Plaintiffs to speak a viewpoint-based and ideological message contrary to their religious mission, is for the State to disseminate the message *itself*. *See Evergreen*, 740 F.3d at 250 (noting that New York City could "communicate [the Government] message through an advertising campaign"); *Riley*, 487 U.S. at 800 (requirement that professional fundraisers disclose information about percentage of funds actually turned over to charity in the prior year was not narrowly tailored where "the State [could] itself publish the detailed financial disclosure forms it requires professional fundraisers to file"). As the Supreme Court has noted, with obvious relevance here: "The State can express [its] view

through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition." *Sorrell*, 131 S. Ct. at 2671 (internal citations omitted).

While non-binding, *Evergreen* illustrates how the Act should have been scrutinized by the court below. There, the Second Circuit preliminarily enjoined two mandated messages New York City pregnancy centers were compelled to disclose: (1) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider" (the "Government Message"); and (2) "whether or not they 'provide or provide referrals for abortion,' "emergency contraception," or "prenatal care" (the "Services Disclosure"). *Id* at 238.

The Second Circuit did not decide whether to apply strict or intermediate scrutiny because its conclusions were the same under both levels of review. *Id*. at 245. With respect to the Government Message, the court held that "mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue, deprives Plaintiffs of their right to communicate freely on matters of public concern." *Id*. at 250 (citation omitted). The court ruled that "[w]hile the government may incidentally encourage certain speech through its power to '[choose] to fund one activity to the exclusion of the other,' it may not directly 'mandat[e] that Plaintiffs affirmatively espouse the government's position on a contested public issue' through regulations, like [New York City's ordinance], that

threaten not only to fine or de-fund but also to forcibly shut down non-compliant entities." *Id*. at 250-51 (citations omitted). The court found this disclosure to be "insufficiently tailored to withstand scrutiny." *Id*. at 251.

With respect to the Services Disclosure, the court held that "[a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins." *Id*. The court found this disclosure to be "more extensive than necessary to serve a substantial governmental interest." *Id*.

The message mandated by the Act is a more egregious violation of a pro-life pregnancy center's speech and identity than the disclosures at issue in *Evergreen*. The Act does not require facilities like Plaintiffs to reveal whether they provide certain services; it affirmatively requires them to refer clients to a telephone number where the client could potentially receive a free abortion—the very procedure to which Plaintiffs religiously object and to which Plaintiffs provide alternatives. In sum, the Act "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

B. Remaining Preliminary Injunction Factors Weigh Decisively in Plaintiffs' Favor.

The court below held that Plaintiffs are not irreparably harmed by the Act,

finding "that Plaintiffs have failed to demonstrate, without self-censorship, that they would actually face irreparable injury if the Act were made effective." Ex. A at 21. The court is incorrect on both the facts and the law.

The district court seemed to indulge the unique notion that a challenger who cannot in good conscience comply with a law is not irreparably harmed by that law. Ex. A at 10, 12, 21. Under that view, the faithful Jews who were threatened with torture and death by Gentile rulers for their refusal to east pork, *see* 2 Maccabees 7, did not suffer irreparable injury because they refused to comply—they were killed, not chilled. But "chill" is not the only form of cognizable First Amendment harm. Being dragged through enforcement proceedings and saddled with penalties is also a harm—one that Plaintiffs face if preliminary relief does not issue.

In any event, contrary to what the court held, Plaintiffs *never* "maintain[ed] that their speech will not in fact be chilled." *Id*. at 12. In supplemental briefing filed with the court, per its order, Plaintiffs repeatedly argued that the Act chills their First Amendment speech. Plaintiffs, for example, argued that the "Hobson's Choice" imposed by the Act "does more than chill Plaintiffs' rights, it places them in a deep freeze, and the First Amendment does not allow the government to impose this impossible choice, with irreconcilable options, on Plaintiffs." Civ. Doc. #: 4:15-cv-04939-JSW ECF Doc. 50 at 6.

The court below itself noted that "in the specific context of the First Amendment, the Hobson's choice between compliance with a statute and a challenge to its constitutionality awaiting enforcement proceedings should not preclude a finding of standing or ripeness to make a preliminary adjudication of the claims." Ex. A at 10. That very Hobson's Choice, however, is precisely why Plaintiffs' face irreparable harm under the Act. They face an inescapable decision: violate the Act, in order to remain true to their religious principles, and risk financial penalties; or comply with the Act, in violation of their religious principles, in order to operate their establishments without fear of enforcement actions and penalties.

Under decisions of this Court, Plaintiffs are unquestionably irreparably harmed. *See United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) ("We have 'stated that an alleged constitutional infringement will often alone constitute irreparable harm.'"); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) ("a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.").

Moreover, the balance of equities significantly tips in Plaintiffs' favor. There can be no question that Plaintiffs' freedom of speech, a core constitutional right, outweighs the government's interest in disseminating a message that the

government can disseminate itself. "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists 'the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [the movant's] favor.'" *Id.* at 973 (quoting *Viacom Int'l, Inc. v. FCC*, 828 F. Supp. 741, 744 (N.D. Ca. 1993)).

Finally, the Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people' subjected to the same restrictions." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Sammartano*, 303 F.3d at 974).

The Act, which will go into effect on January 1, 2016, will unquestionably impact the speech of Plaintiffs. It will require them to speak a message their religious principles prohibit them to speak. Under *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id*. at 1131. If a moving party raises serious questions going to the merits and the balance of hardships tips sharply in its favor, then it is entitled to injunctive relief. *Id*. at 1134-35.

Balancing the preliminary injunction factors together, in light of what the

Act requires, and the direct and irreparable harm Plaintiffs face, Plaintiffs are entitled to an injunction pending appeal.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully ask this Court to grant their motion for an injunction pending appeal pursuant to Fed. R. App. 8.

Respectfully submitted, this 23rd day of December, 2015.

Robert H. Tyler, CA Bar No. 179572
Tyler & Bursch, LLP
24910 Las Brisas Road, Suite 110
Murrieta, California 92562
Tel: 951-304-7583
Fax: 951-600-4996
rtyler@tylerbursch.com

s/ Francis J. Manion
Francis J. Manion
(Lead Counsel)
American Center For Law & Justice
Post Office Box 60
6375 New Hope Road
New Hope, Kentucky 40052
Tel: 502-549-7020
Fax: 502-549-5252
fmanion@aclj.org

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 23, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Pamela K. Graham
City Attorney for Grass Valley, California
Colantuono, Highsmith & Whatley, PC
420 Sierra College Drive, Suite 140
Grass Valley, CA 95945-5091
Tel: 530-432-7357
Fax: 213-542-5710
mcolantuono@chwlaw.us
Counsel for Defendant-Appellee Michael Colantuono, in his official capacity

Amanda Uhrhammer
County of Nevada
950 Maidu Avenue, Suite 240
Nevada City, CA 95959
(cont. following page)
Tel: 530-265-1319
Fax: 530-265-9840
amanda.uhrhammer@co.nevada.ca.us
Counsel for Defendant-Appellee Alison Barrat-Green, in her official capacity

Cyndy Day-Wilson
City Attorney of Eureka, California
531 K Street Eureka, CA 95501
Tel: 707-441-4147
Fax: 707-441-4148
cday-wilson@ci.eureka.ca.gov

Mary Blair Angus
County Counsel
825 Fifth Street
Eureka, CA 95501
Tel: 707-445-7236
Fax: 707-445-6297
bangus@co.humboldt.ca.us
Counsel for Defendant-Appellee Jeffrey S. Blanck, in his official capacity

s/ Francis J. Manion

Francis J. Manion
(Lead Counsel)
American Center For Law & Justice
Post Office Box 60
6375 New Hope Road
New Hope, Kentucky 40052
Tel: 502-549-7020
Fax: 502-549-5252
fmanion@aclj.org