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' Reply Brief in Support of Emergency Motion for Injunction Pending Appeal

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INTRODUCTION

Failing to grant Plaintiffs injunctive relief pending appeal would require ignoring decades of clear Supreme Court precedent on freedom of speech in favor of an alleged government interest in conscripting religious dissenters into an effort to do something that the State itself could more easily and much more effectively accomplish by itself. Defendants' defense of the decision below only serves to underscore the fact that it would appear that the district court *incorrectly* "apprehended the law with respect to the underlying issues in the case." *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1013 (9th Cir. 2001). Given the fundamental First Amendment right at issue here, and especially in view of the ease with which Defendants might readily achieve their goal without burdening that right, this Court should intervene to preserve the status quo and prevent the irreparable loss of rights before the matter can be fully adjudicated. *See U.S. Philips Corp. v. KBC Bank N.V.,* 590 F.3d 1091, 1094 (9th Cir. 2010).

ARGUMENT

I. The irrelevance of the "indisputably factual" nature of coerced speech.

Defendants—as did the district court—make much of the "indisputably factual" or "truthful" nature of the notice required by the Act. Opposition, at 1, 2, 5, 12. But this is constitutionally meaningless under controlling Supreme Court precedent. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* 487 U.S. 781, 797-98

("for First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of 'fact,' since either form of compulsion burdens protected speech.") That the court below seems to have invested with great significance a distinction held by the Supreme Court in *Riley* to be completely *insignificant* in a compelled speech context is telling. (That the court never acknowledged that the challenge in *Riley* was brought by "professionals" of a "state-licensed" enterprise is similarly telling.)

II. The lower court's "professional speech" analysis is fatally flawed.

Defendants' opposition brief does nothing to rehabilitate the fundamentally skewed "professional speech" analysis of the court below. For starters, Defendants follow the district court's error in citing *Ass'n of National Advertisers, Inc. v. Lundgren,* 44 F.3d 726, 729 (9th Cir. 1994) for the proposition that "[P]rofessional speech regulations must withstand intermediate scrutiny . . ." Ex. A, at 19-20, Opposition, at 10. Yet the *Lundgren* case says nothing of the kind. In fact, from start to finish *Lundgren* is about commercial speech *only*. The word "professional" occurs only twice in the entire opinion and then only in the citations of the law being challenged, a section of the California Business and *Professional* Code.

Just as flawed is the attempt to squeeze the facts of the instant case into the analysis employed by this Court in *Pickup v. Brown*, 740 F. 3d 1208 (9th Cir. 2014). To try to build on the foundation of *Pickup* an interpretative framework for

matters involving "professional speech" is misguided for the simple reason that the *Pickup* court found that the "speech" in that case was not speech at all but, rather, conduct. The whole point of the decision was that not all verbal statements made in the course of medical treatment are "speech"; otherwise, as the Court had to recognize, such statements would be entitled to "the strongest protection our Constitution has to offer," even when uttered by those engaged in state-licensed medical practices. *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). Thus, *Pickup* did not announce a brand new category of "professional speech" with a concomitant lesser level of scrutiny. Instead, mindful of the solicitude shown by the Supreme Court and this Court itself in protecting truly expressive speech of medical professionals, *Pickup* went to great lengths to explain when and under what circumstances verbal or written utterances made in a professional medical setting should not be considered speech at all for First Amendment analysis.

In fact, in *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), the Supreme Court reaffirmed its holding in *NAACP v. Button*, 371 U.S. 415 (1963), where the Court "rightly rejected the State's claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment, observing that 'it is no answer . . . to say . . . that the purpose of these regulations was merely to

insure high professional standards and not to curtail free expression.'" *Reed*, 135 S. Ct. at 2229 (quoting *Button*, 371 U.S. at 438-439).

Similarly flawed is the effort to equate the challenged notice in this case with the kind of treatment-specific medical information at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 882, 884 (1992). In *Casey*, the plurality found that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." *Id.* It strains credulity to purport to tease from this passage in a plurality opinion an entire hermeneutic of "professional speech" applicable to any and all government mandated speech required to occur in facilities or by persons licensed by the state, especially when such a hermeneutic blatantly contradicts clear teachings of the Supreme Court and this Court about the free speech rights of licensed professionals. *See*, *e.g*., *Florida Bar*, *supra*, and *Conant*, *supra*. Moreover, a notice that certain services (including services *not* provided by a facility) may be available free of charge elsewhere, presented to all who walk in the door—whether or not they are there for medical services—or, if they are, presented even before they speak to a medical professional, is hardly the equivalent of the type of "specific information about any medical procedure" given directly by a doctor to a patient that was discussed in

Casey.

III. The lower court's "commercial speech" holding is clearly erroneous.

Defendants' opposition does nothing to shore up what is arguably the weakest point of the decision below: the discussion of "commercial speech." It was plain error for the court to require that Plaintiffs—at the preliminary injunction stage— prove a negative, *i.e.*, that they are *not* engaged in commercial speech, in order to secure protection of their fundamental right to free speech. This burden shifting is the exact opposite of what all controlling precedent requires. "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). Yet here, presented with *uncontroverted* Declarations of Plaintiffs that clearly demonstrate that they are not even remotely engaged in "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, at 561, or speech that "does no more than propose a commercial transaction," *Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976), the court below found that "the mandated disclosures are commercial speech." Ex. A, at 15.

In so holding, the lower court relied in part (and Defendants repeat this error

in their opposition) on a case involving the interpretation of the Commerce Clause as applied to non-profit organizations, heedless of the fact that courts apply a different definition of "commerce" and consider different policy considerations in classifying speech as commercial speech in the Commerce Clause and antitrust contexts, as contrasted with the free speech context. *See* Ex. A, at 16, Opposition, at 14 (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997)).

Further, the court's finding that "further discovery is needed both to substantiate Plaintiffs' economic interests apart from their ideological motivations and to garner the perceptions of Plaintiffs' clientele," Ex. A., at 17, is indicative of an erroneous application of governing precedent. Most notably, it ignores the clear teaching of *Riley*, *supra*, that:

> . . . where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.

Id., at 796.

Thus, even if the further discovery called for by the district court were to reveal *some* element of commercial speech here intertwined with Plaintiff's plainly persuasive and informative speech, *Riley* commands that strict scrutiny—the "test for fully protected expression"—would still be the applicable test. *Id*.

IV. Plaintiffs clearly demonstrate "irreparable injury."

Defendants take issue with Plaintiffs' claim that they will be irreparably injured in the absence of an injunction. They dispute the plain inference drawn from the Amended Complaint and the Declarations that, since Plaintiffs consider the challenged notice the equivalent of a referral for abortion, and, further, since say they will never refer for abortions, it follows that they will not comply with the Act's notice provision. Whether or not Defendants consider Plaintiffs' interpretation of the provision to be "plausible" is irrelevant. The very purpose of the First Amendment is to protect expression of ideas that the majority might well find not plausible.

That aside, whether or not Plaintiffs do or do not intend to violate the Act is actually irrelevant. If Defendants' interpretation is correct, then it can only be that Plaintiffs are reluctant to violate the Act because of the chilling effect of the penalties its imposes for what Plaintiffs consider to be a legitimate expression of their First Amendment rights. That this "self-censorship" would be considered an "irreparable injury" is beyond dispute.

On the other hand, the district court's finding that Plaintiffs have not shown "irreparable injury" because they have made it clear that they *do* intend to violate the Act is also erroneous. No Supreme Court case holds that "self-censorship" caused by the "chilling effect" of speech limiting laws is the *only* form of

"irreparable injury" in this context. It would be plainly erroneous to suggest that a plaintiff who refrains from speaking for fear of government sanctions is irreparably injured, while a plaintiff who speaks in the face of government sanctions, and thereby risks penalties suffers no "irreparable injury." Exercising one's precious freedoms while constantly glancing nervously in the rear view mirror for flashing lights is hardly less injurious than simply deciding to play it safe and not leave the house; indeed, the former is arguably *far more* of an infringement than the latter.

In sum, Plaintiffs have made a strong showing here that the challenged provision is a content-based restriction on speech and thus subject to strict scrutiny. There is little or nothing to indicate that the speech in question qualifies for a lesser level of scrutiny as "commercial speech" or "professional speech." Further, they easily demonstrate that the Act, unless enjoined, imposes on them an irreparable injury to their free speech rights.

V. Properly understood, the balance of harms and public interest favor Plaintiffs.

Defendants and the court below assert broad principles that purport to tilt the balance of harms against Plaintiffs here. The court below expressed its view that denying the requested injunction "bestows upon the democratic process its due respect," Ex. A., at 21; Defendants claim that, should this Court enjoin the Act, California women "will have reduced access to care." Opposition, at 20. Neither argument is persuasive.

The whole purpose of the Bill of Rights was, and is, to safeguard certain fundamental rights from the democratic process. It is no argument against a claim that a legislative act allegedly abridges the freedom of speech that the act in question was enacted as part of the democratic process. And the claim that women will have "reduced access to care" unless religious objectors are forced to inform them of all possible low cost or free sources of such care seems not only far-fetched but also a highly ineffective means of achieving the government's stated goals. As the Second Circuit noted in a similar case, governments have ample means of communicating public health information besides the rather haphazard, constitutionally burdensome one chosen here. *Evergreen Ass'n v. City of New York*, 740 F. 3d 233, 250 (2d Cir. 2014).[1]

Notably absent from both the Defendants' and the court's analysis of the balance of harms and public interest factors is any mention of the seriousness with which the Supreme Court and this Court uniformly view the loss of First Amendment freedoms. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably

[1] The California Department of Public Health is certainly familiar with conducting advertising campaigns designed to disseminate what the Department considers to be important health information. *See*, *e.g.*, *California Debuts Ads to Counter E-cigarettes,* describing a campaign launched earlier this year to educate the public about the dangers of e-cigarettes through a series of television, digital and outdoor ads. https://www.cdph.ca.gov/Pages/NR15-024.aspx (last visited Dec. 29, 2015).

constitutes irreparable injury."); *see also*, *Sammartano v. First Judicial Dist. Ct.*, 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.") (quotation marks omitted).

CONCLUSION

Plaintiffs have demonstrated more than a colorable claim that, absent relief from this Court, their fundamental constitutional freedom will be infringed as of January 1, 2016, the effective date of the Act. This Court should grant the injunction pending appeal to prevent that injury and preserve the status quo in this case.

Respectfully submitted, this 29th day of December, 2015.

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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 29, 2015.

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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:

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