15-17517

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, et al.,

Plaintiffs-Appellants,

v.

KAMALA HARRIS, Attorney General of the State of California, in her Official Capacity,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:15-02122-KJM-AC
Kimberly J. Mueller, Judge

OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

(continued)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

There are crisis pregnancy centers in California that pose as full-service women's health clinics, but through "intentionally deceptive advertising and counseling practices confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care."[1] This case challenges California's legislative response to these practices. On December 30, 2015, this Court denied a similar emergency motion for an injunction pending appeal in a related case challenging the same statute. *See* Dkt. No. 14, *LivingWell Medical Clinic v. Harris* (No. 15-17497).

Assembly Bill No. 775, also known as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, which became effective on January 1, 2016, requires medical clinics licensed by the State of California that provide pregnancy-related services, whether religiously affiliated or not, to give notice to their patients that comprehensive publicly-funded family-planning programs (including

[1] Assem. Comm. on Health, at 3. (Declaration of Noreen P. Skelly, Exhibit 1 (Skelly Declaration in Support of Opposition to Motion for Preliminary Injunction, Exhibit A.).)

contraception, prenatal care, and abortion) are available to patients.[2] It is indisputable that the information contained in the notice required by the Act is factual and true. The Legislature found that the notice is "[t]he most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions."[3]

Appellants are state-licensed crisis pregnancy centers employing licensed medical professionals. Appellants are opposed to providing their patients with true, factual information that would allow fully-informed, time-sensitive medical decisions. Appellants seek to enjoin the Act until after this action is fully litigated. They claim that mandated distribution of the notice infringes upon their First Amendment rights.

In the trial court, the Honorable Kimberly J. Mueller denied Appellants' motion for preliminary injunction on December 21, 2015. The district court held that while Appellants may have raised serious questions

[2] Licensed primary care clinics enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment programs are exempt from the Act's notice provisions because they provide the full continuum of healthcare services. Assem. Comm. on Judiciary, Analysis of Assembly Bill No. 775, at 4, 8. (Skelly Declaration, Exhibit 1 (Skelly Declaration, Exhibit B.).)

[3] Assem. Bill No. 775, § 1(a)-(d). (Skelly Declaration, Exhibit 2.)

going to the merits of their First Amendment claim, they are unlikely to succeed on the merits of that claim. Order, at 26-27.

The district court also ruled that an injunction would cause harm by undermining California's legislative efforts to ensure all women have access to the full spectrum of reproductive health care options, and possess the information necessary to make informed reproductive health care decisions in a timely manner. Order, at 57. The district court also found that while Appellants would suffer irreparable harm in the absence of a preliminary injunction, this harm would not be sufficient to tip the balance of hardships in their favor. While Appellee disagrees that Appellants will suffer any cognizable harm, the district court in any case correctly determined that the balance of hardships and the public interest strongly counsel in favor of upholding AB 775. *Id*., at 54-58.

The district court's determination that Appellants are not entitled to a preliminary injunction is correct. Accordingly, this Court should deny Appellants' motion for an injunction pending their appeal of the Order denying the motion for preliminary injunction.

BACKGROUND

The California Legislature passed AB 775 on October 9, 2015, based on findings that all California women, regardless of income, should have

access to reproductive health services; that many women are unaware of the free or low-cost public programs available to provide them with such services; and that women need to be notified of those resources as soon as possible because pregnancy decisions are time sensitive.[4] The Reproductive FACT Act's legislative history indicates that:

> there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.[5]

To achieve its goals, AB 775 imposes two notice requirements upon clinics that provide pregnancy-related services. One applies to any clinic that is a "licensed covered facility" and the other applies to any "unlicensed

[4] Assem. Bill No. 775, § 1(a)-(d). (Skelly Declaration, Exhibit 2.).

[5] Assem. Comm. on Health, Analysis of Assembly Bill No. 775, at 3. (Skelly Declaration, Exhibit 1 (Skelly Declaration, Exhibit A.).)

covered facility." Cal. Health & Safety Code § 123471(a) & (b).[6] This case implicates only the requirements applicable to licensed facilities.

Under the Act, a "licensed covered facility" is one "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 criteria specified in the Act.[7] Appellants have stated that they qualify as licensed covered facilities under that definition. Order, at 9:5-6; 12:9-10; 14:1. Appellants are non-profit organizations that do not charge patients for their services.[8] Order, at 9:6; 12:10; 14:2.

Under the Act a licensed covered facility shall disseminate the following notice:

> 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

[6] All further statutory references in this brief are to the California Health and Safety Code unless otherwise indicated.

[7] Sections 1204 and 1206(h), referenced in this provision, pertain to nonprofit community clinics and nonprofit free clinics.

[8] Appellants have not disclosed their economic model, but in order to provide goods and services they certainly receive funding from some source.

> whether you qualify, contact the county social services office at [insert the telephone number].

§ 123472(a)(1).

The notice for licensed facilities must be disclosed in one of three ways: as a public notice posted at the facility, as a printed notice distributed to a patient at any time during her visit, or as a digital notice to be read by clients upon arrival. § 123472(a)(2)(A)-(C). The notice contains only factual and incontrovertibly true information and does not include language endorsing or recommending such services. Moreover, the Act does not prohibit Appellants from disagreeing with, or even disparaging, the notice and the incontrovertibly true information it contains. The Legislature determined that the notice requirement is the most effective way to ensure that women quickly obtain the information they need to make timely reproductive decisions.[9]

Covered facilities that fail to comply with the requirements are liable for a civil penalty of five hundred dollars for a first offense and one thousand dollars for each subsequent offense. § 123473(a). Under the Act, "[t]he Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty," but only after doing both of the following:

[9] Assem. Bill No. 775, § 1(d). (Skelly Declaration, Exhibit 2.).

> (1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.
>
> (2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

§ 123473(a)(1)-(2).

ARGUMENT

A party seeking an injunction or stay of a state action that the district court has declined to enjoin must demonstrate: (1) a strong showing of likelihood of success on the merits of the appeal; (2) irreparable injury absent a stay; (3) that the issuance of a stay would not substantially injure the other interested parties; and (4) that the stay is in the public interest. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Appellants cannot meet this burden.

I. APPELLANTS HAVE NOT MET THEIR BURDEN TO DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS OF THE APPEAL.

On review, it must be determined, "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly 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). A district court's order is reversible for legal error if the court does not employ the appropriate legal standards governing the issuance of a preliminary injunction. *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Abuse of discretion may also occur where the district court rests its conclusions on clearly erroneous factual findings. *Buchanan v. United States Postal Service*, 508 F.2d 259, 267 n.24 (5th Cir. 1975). However, "[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form, Inc. v. United Press, Int'l*, 686 F.2d 750, 752 (9th Cir. 1982).

A. The Notice is a Permissible Regulation of Professional Speech

The notice constitutes a permissible regulation of professional speech under the state's police powers over licensed medical care practitioners. Order, at 33-39. Such a regulation is subject to intermediate scrutiny, which the FACT Act passes, as it is directly-related to the significant governmental interest of ensuring pregnant women have access to all the information they need to make informed decisions about their medical care. Order, at 41.

Because the notice requirement is constitutional under the district court's application of intermediate scrutiny, and Appellants therefore have no likelihood of success on the merits, the motion for injunction pending appeal should be denied.

Pursuant to its police powers, California has authority to regulate licensed pregnancy centers so that California women are adequately informed of publicly-funded reproductive health care services in a timely and effective manner. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession."); *Pickup*, 740 F.3d at 1229 (holding that California may regulate licensed mental health providers' administration of therapies the Legislature has deemed harmful).

Appellants' licensed status, and the evidence provided in support of their motion for preliminary injunction, establish their patient communications are professional speech offered in the context of individualized care. Order, at 36:18-20. And because the State's regulatory authority "extends to the clinic as a whole," *id.*, at 36:20-22, that the notice may be distributed by staff in the waiting room, posted in the waiting area, or distributed electronically, does not diminish the professional nature of the speech.

It is well-settled that the government has a legitimate and significant role to play in regulating those who accept responsibility for providing medically-supervised services to patients. There is no evidence in the record to suggest that Appellants' patients seek a standard of care that is subordinated to Appellants' religious beliefs. To the contrary, there should be a strong presumption that patients who seek medical services from licensed professionals at a licensed clinic do so with the expectation that the State licensing process itself assures a degree of reliability in the information they will receive.

The First Amendment accordingly permits the state leeway to regulate professionals to protect the health, morals, and general welfare of its citizens, even where the state's regulation has an incidental effect on protected speech. *See e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-84 (1992) (plurality opinion); *Shea v. Bd. of Med. Examiners*, 81 Cal.App.3d 564, 577 (1978). It is this regulatory oversight that provides clients with confidence to put their healthcare in the hands of licensed medical professionals. *See King v. Governor of the State of New Jersey*, 767 F.3d 216, 232 (3rd Cir. 2014). Here, Appellants are licensed and regulated under California's Health & Safety Code, but ask this Court to excuse them from the notice requirement

because they are "diametrically opposed" to providing their patients the factual information contained in the notice. Motion, at 2.

The Ninth Circuit has rejected a First Amendment challenge to California's statute banning licensed mental health providers from administering Sexual Orientation Change Effort Therapy to child-patients. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). *Pickup* established that a sliding scale applies to the review of speech restrictions imposed on licensed health care professionals. Where the professional "is engaged in a public dialogue" via public advocacy, "First Amendment protection is at its greatest." *Id*. at 1227. By contrast, "[a]t the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished." *Id*. at 1228 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992) as upholding a requirement that doctors disclose "truthful, nonmisleading information about the nature of the procedure"). Finally, at the other end of the continuum is regulation of professional conduct, where the government's regulatory power is greatest, and First Amendment protection weakest. *Id.*, at 1229.

Like the law at issue in *Pickup*, the FACT Act "does not restrain Plaintiffs from imparting information or disseminating opinions." *See*

Pickup, 740 F.3d at 1230. It does not prohibit a pregnancy center from advocating for its pro-life viewpoint, or communicating disagreement with the Act, the notice, or the undeniably truthful information it contains. Nor does the requirement prevent pregnancy centers from communicating with the public about any issue, prevent them from expressing their views to patients about abortion, or prevent them from recommending against abortion. *See id*. at 1229 (law's constitutionality supported by its avoidance of First Amendment impacts).

The regulation of professional speech must withstand intermediate scrutiny, requiring the challenged law directly advance a substantial governmental interest. *Ass'n of Nat'l Advertisers, Inc. v. Lundgren*, 44 F.3d 726, 729 (9th Cir. 1994). The FACT Act's notice requirement passes this test. It was based on findings that many women are unaware of publicly-funded reproductive health programs; and that patients would benefit from being notified of those resources as early in their pregnancy as possible because pregnancy decisions are time sensitive.[10] Therefore, AB 775 directly relates to the substantial state interest in providing women with timely notice of the availability of the pregnancy-related medical services.

[10] Assem. Bill No. 775, § 1(a)-(d). (Skelly Declaration, Exhibit 2).

Because the Act's notice requirement is a permissible regulation of professional speech, Appellants' motion should be denied.

B. The Act's Notice Provisions Would Survive Even Strict Scrutiny

Even if this Court were to apply strict scrutiny to the Act, it would survive such review because it is narrowly tailored to support a substantial governmental interest.

The legislative findings demonstrate, at a minimum, that despite their professional obligations, crisis pregnancy clinics are unwilling to provide incontrovertibly truthful information to their patients that is relevant to fully-informed medical decision making. The Reproductive FACT Act addresses such conduct narrowly. The notice, by its terms, is designed to inform women who need pregnancy-related services, that such services are available. The mandated disclosures mention an array of services available to pregnant women in a collective fashion, including family planning, prenatal care, and abortion. The disclosures do not include language endorsing or recommending such services. Rather, the notice only alerts women to the existence of publicly-funded options. Pregnancy is a time-sensitive condition. Ensuring that women receive the notice at licensed pregnancy clinics will help ensure they have the information they need when

they are seeking medical assistance for pregnancy. The regulation thus is narrowly tailored, and would survive even strict scrutiny.

C. The Notice is also a Permissible Regulation of Commercial Speech

The commercial speech doctrine provides an independent basis on which to conclude Appellants have not met their burden to demonstrate a likelihood of success on the merits. Although Judge Mueller determined that Appellants speech would not be characterized as commercial speech, Order, at 30:1-2, Judge White concluded otherwise in the related matter of *LivingWell v. Harris*. Order, at 15-17, Dkt. No. 60. For the reasons set forth in Judge White's order, Order, at 16-17, this is correct.

Commercial speech has been defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980), and as speech that "does no more than propose a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 752 (1976). The Supreme Court has, however, recognized the challenge inherent in "drawing bright lines that will clearly cabin commercial speech as a distinct category." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993). A

free speech analysis requires consideration of the context from the viewpoint of the listener because '[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." Order, at 15:16-18 (quoting *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 286 (4th Cir. 2013)).

Although Appellants are non-profit entities claiming a religious motivation to deny their patients factual information, they do provide valuable pregnancy-related goods and services such as pregnancy testing and baby supplies, which are no doubt perceived as commercial offerings by their patients. This is why speech related to such valuable goods and services can be considered commercial in nature even where no money changes hands. For example, a Maine non-profit corporation that operates a summer camp for the benefit of children of the Christian Science faith could engage in commercial activity even where the cost of the summer camp was borne by contributions from private donors and an endowment. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997). Indeed, the women who seek out Appellants' clinics likely do so precisely because of the value of the goods and services offered. *See*

Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 721 F.3d 264, 286 (4th Cir. 2013).

Compelled commercial speech is subject to either intermediate scrutiny, *Central Hudson*, 447 U.S. at 563-66 (1980) or, where the challenged law compels disclosure of factual and uncontroversial information, rational basis review, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

Judge White, in the *LivingWell Medical Clinic v. Harris* matter, applied the rational basis test to this commercial speech because the notice provides only factual and incontrovertibly true information. He concluded that "viewed as commercial speech, the regulation directly advances the rational government interest of keeping pregnant women fully informed of their inherently time-sensitive options while being provided pregnancy-related medical care." Order, at 18:1-4. And he observed that the notice "furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" Order, at 17:17-19.

Judge White's commercial speech analysis is correct, and demonstrates that the crisis pregnancy centers here, like those in the *LivingWell* matter,

cannot demonstrate a likelihood of success on the merits. Accordingly, the motion should be denied.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANTS FAILED TO ESTABLISH THAT THE BALANCE OF HARDSHIPS TIPPED STRONGLY IN THEIR FAVOR AND THAT AN INJUNCTION IS IN THE PUBLIC INTEREST

Injunctive relief is an extraordinary remedy, which may be granted only upon a clear showing that the plaintiff is entitled to such relief. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). This requires a showing that the balance of hardships tips strongly in favor of granting injunctive relief, and that an injunction would be in the public interest. Appellants cannot meet these requirements. Although the district court found that Appellants had established they would suffer irreparable harm in the absence of injunctive relief, Order, at 21:12-14, the court denied the motion for preliminary injunction because the balance of harms does not tip sharply in Appellants' favor, and because an injunction would not serve the public interest. Order, at 54-59. The district court's denial of the injunctive relief was correct.

The circumstances strongly suggest that Appellants would suffer no cognizable harm whatsoever from the notice requirement, which requires the facilities only to convey neutral, factual information regarding services

available to women in the State of California. But to the extent "irreparable harm" could be found, it would be of minimal extent, for the following reasons: the notice requires licensed facilities to provide only true factual information to patients who seek professional care; AB 775 has no impact on the full expression of Appellants' religious beliefs in any context, including the professional context; the notice does not require Appellants to provide abortions; the notice does not require Appellants to refer or otherwise advise patients to seek abortion services; and Appellants are free to disagree with the notice and the true information it provides. Although AB 775 requires Appellants to distribute the notice, there is no risk that its content would be attributed to Appellants.

In contrast to whatever harm Appellants will suffer from providing truthful information to their patients, "the State has [] shown a strong interest in providing public health—the health of the California women who seek services from plaintiffs." Order, at 57:21-22. An injunction would harm those women in California who would seek professional pregnancy-related goods and services from Appellants, or other licensed pregnancy clinics, but who would not receive the full range of truthful information necessary to make informed decisions about their medical care. As highlighted in the legislative history of the Act, in 2012, more than 2.6 million California

women were in need of publicly-funded family planning services. More than 700,000 California women become pregnant each year, and half of these pregnancies are unintended.[11] If the Court were to grant an injunction pending the resolution of this appeal, the California women eligible for free or low cost publically-funded family planning services will have reduced access to care.

Even though in most cases the public interest favors the exercise of First Amendment rights, "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may [then] in the public interest withhold relief until a final determination of the rights of the parties, even though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). The district court found that enjoining the Act during the pendency of the litigation would adversely affect the ability of some women who are or may be pregnant "from accessing the straightforward information in the required notice when they are making their time sensitive reproductive decisions."

[11] AB 775 § 1. (Skelly Declaration, Exhibit 2.).

Order, at 58:19-21. Withholding such information would constitute a harm for which no bond could compensate.

Granting an injunction would interfere with the Legislature's explicit intention to provide timely and accurate information to all women seeking family-planning or pregnancy-related services from licensed pregnancy clinics. Appellants' emergency motion should, therefore, be denied.

CONCLUSION

For all of the reasons set forth above, this Court should deny Appellants' emergency motion for a preliminary injunction pending their appeal of Judge Mueller's Order denying the motion for preliminary injunction.

Dated: January 6, 2016

Respectfully submitted,

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FOR THE NINTH CIRCUIT

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, et al.,,

Plaintiffs,

v.

KAMALA HARRIS, Attorney General of the State of California, in her Official Capacity,,

Defendant.

STATEMENT OF RELATED CASES

The following related case is pending: *LivingWell Medical Clinic, et al v. Kamala Harris, et al* (9th Cir. 15-17497) (N.D. Cal 4:15-cv-04939-JSW).

There is one other case that, while not technically related pursuant to the definition of a related case contained in Rule 28-2.6, raises the same or closely related issues: *National Institute of Family and Life Advocates, et al v. Harris, et al* (S.D. Cal. 3:15-cv-02277).

Dated: January 6, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 15-17517

I certify that: (check (x) appropriate option(s))

[ ] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

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January 6, 2016

s/ Noreen Pl Skelly

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