

15-17497

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**LIVINGWELL MEDICAL CLINIC, INC.,  
et al.,**

Appellants,

**v.**

**KAMALA HARRIS, et al.,**

Appellees.

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

No. 4:15-cv-04939-JSW  
The Honorable Jeffrey S. White, Judge

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## 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."<sup>1</sup> This case challenges California's legislative response to these practices.

Assembly Bill No. 775, also known as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, effective January 1, 2016, requires medical clinics licensed by the State of California that provide pregnancy-related services to give notice to their patients that publicly-funded family-planning programs (including contraception, prenatal care, and abortion) are available to patients.<sup>2</sup> The information contained in the notice is not subject to factual dispute, and does not promote or disparage any particular practice or form of reproductive healthcare. The Legislature found that the notice is "[t]he most effective

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<sup>1</sup> Assem. Comm. on Health, at 3. Appellants' Excerpts of Record ("ER") 34.

<sup>2</sup> Licensed primary care clinics enrolled as Medi-Cal providers and as providers in the Family Planning, Access, Care, and Treatment program are exempt from the Act's notice provisions, because such clinics themselves provide such services at public expense. Assem. Comm. on Judiciary, Analysis of Assembly Bill No. 775, at 4, 8-9. ER 42, 46-47.

way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions.”<sup>3</sup>

Appellants are state-licensed medical clinics providing pregnancy-related medical services. They are opposed to providing the notice required by the Act. Appellants sought an injunction preventing the Act from taking effect until after this action is fully litigated, claiming that mandated distribution of the notice would infringe upon their First Amendment free speech rights.

The district court denied the motion for preliminary injunction, holding that Appellants were unlikely to succeed on the merits. Additionally, the district court determined that an injunction would cause harm by undermining California’s legislative efforts to ensure that women possess information necessary to make informed reproductive health care decisions in a timely manner. Because the district court’s conclusions were correct, this Court should affirm the order denying the motion for preliminary injunction.

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<sup>3</sup> Assem. Bill No. 775, § 1(a)-(d). ER 66-67.

## **JURISDICTIONAL STATEMENT**

The district court had federal question jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's order denying the motion for preliminary injunction.

## **ISSUES PRESENTED**

Whether the district court erred when it denied Appellants' motion for preliminary injunction based on its determinations that:

1. The notice requirement constitutes a permissible regulation of professional speech in the context of pregnancy-related medical clinics licensed by the California Department of Public Health;
2. The notice may also constitute a permissible regulation of commercial speech providing information to consumers of pregnancy-related medical services; and
3. The public interest weighs against the injunctive relief sought.

## **STATEMENT OF THE CASE**

### **I. THE REPRODUCTIVE FACT ACT**

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.<sup>4</sup> According to the legislative findings:

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 every year and one half of these pregnancies are unintended. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.<sup>5</sup>

The Reproductive FACT Act’s legislative history also describes the nearly 200 licensed and unlicensed crisis pregnancy centers (CPCs) operating in California “whose goal is to interfere with women’s ability to be fully informed and exercise their reproductive rights” while posing as full-service women’s health clinics. The CPCs’ principal aim is to discourage or prevent women from seeking abortions, and they do so through “intentionally deceptive advertising and counseling practices [that]

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<sup>4</sup> Assem. Bill No. 775, § 1(a)-(d). ER 66-67.

<sup>5</sup> Assem. Bill No. 775, § 1(a)-(d). ER 66-67.

often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.”<sup>6</sup>

To address this conduct, and to fulfill the Legislature’s goals to inform women of these resources in a timely manner, 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 covered facility.” *See* Cal. Health & Safety Code § 123471(a) & (b). This case involves only the requirements applicable to licensed facilities.

Under the Act, a “licensed covered facility” is one “licensed under Section 1204 [of the Health & Safety Code] 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.<sup>7</sup> For a medical clinic to be licensed, it must provide diagnostic, therapeutic, radiological, laboratory or other services for the care and

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<sup>6</sup> Assem. Comm. on Health, Analysis of Assembly Bill No. 775, at 3. ER 34.

<sup>7</sup> Section 1204 and 1206(h), referenced in this provision, pertain to nonprofit community clinics and nonprofit free clinics.

treatment of patients in the clinic, or it must arrange for such services with other licensed, certified or registered providers. Cal. Code Regs. tit. 22, § 75026.

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 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 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:

The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to ensure licensed health care facilities that are unable to immediately enroll patients into the Family PACT and

Medi-Cal programs advise each patient at the time of her visit the various publicly funded family planning and pregnancy-related resources available in California and the manner in which to directly and efficiently access those resources.<sup>8</sup>

The Act supplements the State's other efforts to advise California women of available reproductive health programs.<sup>9</sup>

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:

(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).

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<sup>8</sup> Assem. Bill No. 775, § 1(d). ER 67.

<sup>9</sup> Assem. Bill No. 775, § 1(a)-(d). ER 66-67.

## **II. APPELLANTS**

Appellants are three religiously-affiliated entities that are licensed by the California Department of Public Health to provide health services. They maintain that they are subject to the Act as “licensed covered facilities,” and that they oppose the Act’s application to them.

LivingWell Medical Clinic, a California religious non-profit corporation under § 501(c)(3) of the Internal Revenue Code, is licensed by the California Department of Public Health. ER 71. According to Cathy Seapy, the clinic’s Chief Executive Officer, the clinic’s primary purpose is to offer pregnancy-related services to patients consistent with its religious values and mission. ER 71. The clinic provides patients with pregnancy testing, limited obstetrical ultrasounds, pregnancy options education and consultation, and material support through its thrift shop. ER 71. The clinic maintains that it discloses to patients that it neither performs abortions nor refers patients for an abortion both verbally during any phone inquiry and in writing on the “Services Provided” documents signed by patients before any services are offered. ER 71.

Pregnancy Care Center of the North Coast is also a California religious non-profit corporation under § 501(c)(3) of the Internal Revenue Code, and is also licensed by the California Department of Public Health. ER 74. Like



LivingWell Medical Clinic, Pregnancy Care Center identifies its primary purpose as offering pregnancy-related services to patients consistent with its religious values and mission. ER 74. The clinic provides its patients both pregnancy testing and ultrasound examinations. ER 74.

Confidence Pregnancy Center is likewise a California religious non-profit corporation under § 501(c)(3) of the Internal Revenue Code, licensed by the California Department of Public Health. ER 77. Again, the clinic maintains that its primary purpose is to offer pregnancy-related services to patients consistent with its religious values and mission. ER 77. The clinic offers pregnancy tests, ultrasounds, counseling and emotional support, and practical assistance such as maternity clothes and baby items. ER 77.

### **STANDARD OF REVIEW**

Review of an order denying a motion for preliminary injunction is “limited and deferential”; the order will be affirmed absent an abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). Thus, when the district court applies the correct legal rule to the relief requested, this Court will reverse “only when the district court reaches a result that is illogical, implausible, or without support in the inferences that may be drawn from the record.” *N.D. ex rel. Parents Acting as Guardian Ad Litem v. Haw. Dep’t of Educ.*, 600

F.3d 1104, 1111 (9th Cir. 2010). This Court will not reverse the district court simply because it “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, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982).

### **SUMMARY OF ARGUMENT**

The district court correctly denied Appellants’ motion for a preliminary injunction, based on its determination that Appellants are not likely to succeed on the merits of their First Amendment free speech claim, that the balance of equities did not tip in their favor, and that an injunction is not in the public interest. *See* ER 1-22.

In reaching this conclusion, the district court correctly determined that the Act’s notice requirement constitutes a permissible regulation of professional speech, imposed in the context of a professional relationship that is subject to the state’s regulation as a function of licensure. The district court found that the notice may also be “commercial speech providing information to consumers of pregnancy-related medical services,” and that the notice could pass the test for permissible regulation of commercial speech. ER 16-17. These conclusions were correct, even based on the limited factual record before the district court, and are likely to be bolstered on a full factual record.

The district court likewise did not abuse its discretion in weighing the equities and concluding that the public interest does not weigh in favor of injunctive relief. Enjoining the Act would have harmed the millions of California women who “are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery,” but are unaware of the public programs available to provide them with those vital services.<sup>10</sup> It would have prevented women who seek professional pregnancy-related goods and services from licensed medical clinics from receiving the full range of truthful information necessary to make informed decisions about their medical care. Under these circumstances, the district court did not abuse its discretion in denying Appellants’ motion for preliminary injunction. This Court should affirm the district court’s order.

## **ARGUMENT**

### **I. APPELLANTS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS**

The district court correctly concluded that the Reproductive FACT Act’s notice requirement is a regulation of professional speech that should be upheld under intermediate scrutiny. The district court also correctly

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<sup>10</sup> Assem. Bill No. 775, § 1(b). ER 66-67.

concluded that the notice is likely to be upheld as a reasonable regulation of commercial speech.

**A. The Notice Is a Permissible Regulation of Professional Speech**

This Court has established that a sliding scale applies to the review of speech restrictions imposed on licensed health care professionals. *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014).<sup>11</sup> Where the professional “is engaged in a public dialogue” via public advocacy, “First Amendment protection is at its greatest.” *Id.* at 1227. 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. By contrast, “[a]t the midpoint of the continuum, within the confines of a

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<sup>11</sup> Appellants question whether *Pickup* remains good law in light of the Supreme Court’s decision in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). Appellants’ Brief, at 40-41. But *Reed* had nothing to do with the regulation of professional speech within a doctor-patient relationship; *Reed* concerned restrictions on signs and billboards aimed at the general public. *Reed* casts no doubt on precedents holding that the First Amendment permits the state leeway to regulate professionals to protect the health 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). Indeed, California’s Act, which does not require that covered professionals or facilities communicate any particular view on the desirability or consequences of any particular reproductive choice, imposes far less of a burden on free speech than did the speech requirements upheld in *Casey*. *Id.*

professional relationship, First Amendment protection of a professional's speech is somewhat diminished.” *Id.* at 1228; see also *King v. Governor of the State of New Jersey*, 767 F.3d 216, 232-235 (2014) (departing from *Pickup's* analysis of sexual orientation change therapy as conduct rather than professional speech but agreeing that state regulation of professional speech is subject to intermediate scrutiny if it advances client protection).

The district court correctly located the Reproductive FACT Act disclosure at the mid-point of the *Pickup* continuum because it concerns the provision of medical services by a licensed clinic. ER 19. Appellants' observation that the Act may be complied with by providing the required notice in the patient waiting room—rather than as part of the physician's examination—does not remove the disclosure from the ambit of professional speech. On that basis, the district court correctly applied intermediate scrutiny to conclude that Appellants were unlikely to show any violation of their free speech rights. ER 19-21.

**1. The Notice Is Provided in the Context of a Professional Relationship**

Pursuant to its police power, the State may regulate medical professions. *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 (“Pursuant to its police power, California has authority to regulate licensed mental health providers’ administration of therapies that the legislature has deemed harmful.”). The First Amendment permits the state leeway to regulate professionals to protect the health 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). When professionals, by virtue of their state-issued licenses, form relationships with clients or patients, the purpose of those relationships is to advance the interest and welfare of the client or patient, rather than to contribute to a public debate. *See Pickup v. Brown*, 740 F.3d at 1228-29 (9th Cir. 2014). It is regulatory oversight that provides clients with the confidence to put their health in the hands of medical professionals. *See King v. Governor of the State of New Jersey*, 767 F.3d 216, 232 (3rd Cir. 2014).

Here, the clinics are licensed and regulated by the Department of Public Health pursuant to California’s Health & Safety Code. Such clinics must provide certain services, must have a licensed physician designated as the clinic’s medical director, and for certain enumerated medical procedures,

must provide a medical professional to be present. ER 19. These and other forms of state regulation of such clinics are routine and expected by those who seek medical services. As the district court noted, because Appellants are licensed medical clinics, there is “the imprimatur of the State on the legitimacy of the clinics and their medical services offerings.” ER 18.

California has the authority and responsibility to regulate licensed pregnancy centers so that California women are adequately informed of publicly-funded family planning and reproductive health care services in a timely and effective manner.

Appellants accept responsibility for providing medically-supervised treatment for patients, pursuant to their California licenses. The district court did not abuse its discretion in finding that the notice is a permissible regulation of professional speech: the notice is required only in the context of the provision of services to women seeking professional medical attention from licensed medical providers.

Appellants contend that the Act cannot be a professional speech regulation because it is implemented such that the notice is delivered to a woman before she meets a doctor or nurse—for instance, when the notice is posted in the waiting room where women wait to see the clinic’s healthcare professionals. Appellants are incorrect for two reasons.

First, it is up to Appellants to decide whether they wish to provide the required written disclosure to patients in the waiting room or later in the course of a physician examination. If Appellants believe it would be less burdensome for the clinic's licensed physician to provide the disclosure to each woman, there is nothing in the Act preventing them from doing so.

Second, it is not dispositive for First Amendment purposes whether the disclosure is provided by clinic staff or by a physician. Appellants acknowledge that they exercise judgment on behalf of their patients in a variety of ways. They offer their patients pregnancy testing and verification, limited obstetrical ultrasounds, pregnancy options education and consultation, STI/STD testing, education and treatment, and counseling and support, both emotional and material. ER 70-77. Appellants' employees and volunteers perform those services to "help women with unplanned pregnancies ... by presenting all the facts necessary to determine the best course of action for each individual." ER 71. This demonstrates that the professional nature of the relationship with Appellants' patients extends beyond any treatment a patient might receive from a doctor or nurse within a clinic examination room.

Appellants also object that the notice cannot be connected to professional speech since it would be viewed even by women who visit their



medical facilities “for nothing more than a baby blanket.” Appellants’ Brief, 36. It is not clear, as a factual matter, that the waiting room notice would indeed be visible to such women.<sup>12</sup> In any case, that Appellants provide “practical material assistance such as maternity and baby items,” ER 77, does not change their character as licensed medical facilities, in the same way that the presence of a gift shop does not negate the authority of the state to regulate a hospital. And the fact that some people who are not professional clients may view a required notice does not raise a First Amendment bar to requiring such notices for the benefit of professional clients. That is why the State may, for instance, require pharmacists to post notices alerting their patients as to important information, notwithstanding the notice will be visible not only to patients purchasing prescription drugs but also to delivery personnel, cleaning staff, and those buying other goods. *See* Cal. Business & Prof. Code § 4122(a) (requiring pharmacies to publicly post notice regarding, inter alia, “the availability of prescription price information” and “the possibility of generic drug product selection”); Cal. Code. Reg., tit. 16, § 1707.6 (requiring public notice about the availability of

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<sup>12</sup> In the case of the Living Well Medical Clinic, it appears from the record that women seeking only material support rather than medical services would be directed to a separate facility—the clinic’s thrift store. ER 71.

interpreter services and about the customer's right to receive large-font drug labels).

**2. Appellants Provide No Persuasive Basis to Deviate from *Pickup***

Appellants further contend that the district court erred in denying them protection for their "religious and political speech," and contend correspondingly that the Reproductive FACT Act is not a regulation of professional speech. Appellants' Brief, 36. They raise several contentions, all of which fail.

First, Appellants contend that the notice is an ideologically-driven message intended to lead women away from their clinics and their religious objection to abortion. Appellants' Brief, 37. Both allegations are wrong. As the district court noted, the notice provides incontrovertible information about the range of pregnancy-related public health services available to women locally, including prenatal care. ER 20. As the district court recognized, such factual information is especially relevant to patients of clinics that only provide limited pregnancy-related medical services. ER 20. Although Appellants argue that disclosing such information would frustrate their mission, that contention is hard to square with LivingWell's contention

that it already advises prospective patients of its refusal to perform or refer women for abortion services. See ER 71.

Second, Appellants contend that the notice dilutes their religious or political message to their patients. However, the notice does nothing to limit or weaken the clinics' religious or political speech. Indeed, the clinics may say *anything they want* about the undesirability of family planning or abortion services. Appellant LivingWell Medical Clinic states that it already advises prospective patients of its refusal to perform or refer women for abortion services. ER 71. (The notice could, perhaps, undercut certain misleading factual assertions by the clinics—in that, if the clinics were to tell patients that publicly funded services are *not* available, then patients might have reason to question such statements in light of the notice. But any success that the notice could have in limiting the effectiveness of such an untruth would hardly be a strike against the Act's constitutionality under *Pickup*. The government may prevent the dissemination of commercial information that is false, deceptive, or misleading without violating the First Amendment. *United States v. Schiff*, 379 F.3d 621, 630 (9th Cir. 2004).)

Third, Appellants contend that providing the notice impermissibly forces them to engage in a public dialogue advocating a message contrary to their religious identity. Appellants' Brief, 37. Not so. The Act "does not

restrain Plaintiffs from imparting information or disseminating opinions.”  
*See Pickup*, 740 F.3d at 1230. Nor does the Act require such discussions. California’s statute is entirely neutral as to whether a pregnancy center mentions, discusses, or advocates for its pro-life or pro-choice viewpoint. The statute neither requires nor forbids centers from communicating disagreement with the Act, with the notice, or with the uncontroversial fact that a particular phone number will reach the county health department. Pregnancy centers remain free to communicate with the public about any issue, it does not prevent pregnancy centers 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; while it bans a form of treatment for minors, it does nothing to prevent therapists from discussing the pros and cons of the treatment with their patients).<sup>13</sup>

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<sup>13</sup> As discussed above, Appellant LivingWell Medical Clinic states that it already engages in a public dialogue about abortion by advising prospective patients that “it does not perform or refer for abortion services during any phone inquiry, as well as on the ‘Services Provided’ document that clients sign before any services are offered.” ER 71.

### **3. The Court Correctly Applied Intermediate Scrutiny in its Professional Speech Analysis**

The district court correctly applied intermediate scrutiny in its analysis of the notice as a regulation of professional speech. To survive intermediate scrutiny, the Act's notice provision must directly advance a substantial governmental interest and be drawn to achieve that interest. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 at 2667-68 (2011). "There must be a fit between the Legislature's ends and the means chosen to accomplish those ends." *Id.* at 2668 (citation and quotation marks omitted). This level of scrutiny seeks to ensure "not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message." *Id.*

The stated purpose of the Act is to ensure California women know their reproductive rights, and the healthcare resources available to them when they make their personal reproductive healthcare decisions. ER 66-67. Appellants do not challenge the district court's finding that the State has a compelling governmental interest in ensuring the timely delivery of information to women making reproductive healthcare decisions. Appellants' Brief, 41-49. Nor could they challenge that finding. "The State has a strong interest in protecting a woman's freedom to seek medical and

counseling services in connection with her pregnancy.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 767 (1994). The federal Affordable Care Act has made millions of Californians—53 percent of them women—newly eligible for the State’s Medi-Cal program.<sup>14</sup> More than 700,000 California women become pregnant each year, and approximately half of those pregnancies are unintentional.<sup>15</sup> The Legislature found that thousands of California women remain unaware of the public health programs available to them.<sup>16</sup> Accordingly, the Legislature correctly recognized the State’s compelling interest in ensuring that California women receive accurate and timely information about healthcare services.

The district court determined that the Act’s notice provision “survives intermediate scrutiny as it directly advances a substantial governmental interest of keeping pregnant women fully informed of the continuum of their options while being provided time-sensitive, pregnancy-related medical care.” ER 20-21. The incontrovertible information contained in the notice is no more than a neutral list of reproductive health care services available.

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<sup>14</sup> Assem. Comm. on Health, at 3. ER 34.

<sup>15</sup> AB 775, § 1. ER 66.

<sup>16</sup> *Id.*

And, the inclusion of the telephone number for the local county services office provides women with a direct and efficient method of accessing the government body that will enable them to take advantage of those services. The notice goes no further than necessary to meet these important goals. Thus, the district court did not abuse its discretion in determining that the Act's notice provision was properly drawn to achieve the government's interest in keeping women informed of the medical information they needed.

Appellants argue that the Act cannot survive intermediate scrutiny because the notice provisions are too broadly drawn to combat deceptive practices by some crisis pregnancy centers. Appellants' Brief, 44-45. Legislative findings do indeed demonstrate that despite their professional obligations, some crisis pregnancy clinics are unwilling to provide incontrovertibly truthful information to their patients that is relevant to fully-informed medical decision making. ER 55-56. In addition, the Legislature found that many women are unaware of the resources and services available to them when they make time-sensitive decisions about their medical care. ER 66-67. The Act addresses such findings narrowly by limiting the notice to truthful, incontrovertible information. *Cf. Stuart v. Camnitz*, 774 F.3d 238, 252 (4th Cir. 2014) (holding provision of North Carolina's Woman's Right to Know Act requiring physicians to perform ultrasound, display

sonogram, and describe fetus to women seeking abortions failed to satisfy intermediate scrutiny since it imposed “a virtually unprecedented burden on the right of professional speech that operates to the detriment of both speaker and listener.”)

**B. The Notice Is a Permissible Regulation of Commercial Speech**

The district court also reasoned that the notice mandated by the Act may be “commercial speech providing information to consumers of pregnancy-related medical services,” and that the notice could be considered a permissible regulation of commercial speech. ER 16-17. These conclusions were correct, even based on the limited factual record before the district court. They are likely to be further bolstered on a full factual record.

The Constitution accords the government greater deference to regulate commercial speech, relative to other safeguarded forms of expression, because such speech “occurs in an area traditionally subject to government regulation.” *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 562 (1980). This is especially true when the government action is intended to increase, rather than restrict, the free flow of accurate information to consumers. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985).



For that reason, although restrictions on commercial speech are generally subject to intermediate scrutiny, *Central Hudson*, 447 U.S. at 563-566, the Supreme Court has applied rational basis review where the challenged law compels the disclosure of only factual and uncontroversial information, *Zauderer*, 471 U.S. at 651. This deference benefits the consumer, whose interest in the free flow of commercial information may be as keen ‘if not keener by far, than his interest in the day’s most urgent political debate.’ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976); *see Zauderer*, 471 U.S. at 646 (1985).

**1. The district court properly concluded Appellants’ speech may constitute commercial speech**

Under the governing test from *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), three factors are relevant when determining whether speech may be characterized as commercial: (1) whether the speech is admittedly advertising; (2) whether the speech references a specific product or service; and (3) whether the speaker has an economic motive for engaging in the speech. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (citing *Bolger*, 463 U.S. at 66-67.) It is not necessary that each of the characteristics “be present in order for speech to be commercial,” *Bolger*, 463 U.S. at 67 n.14, although “[t]he combination of all of these

characteristics ... provides strong support for the ... conclusion that [the speech is] properly characterized as commercial speech,” *id.* at 67.

The first *Bolger* factor raises no bar to the speech at issue here being treated as commercial speech. Courts commonly apply the commercial speech doctrine to speech that is not traditional advertising, on the basis that “the precise form of the speech does not determine whether it qualifies as ‘commercial speech.’” *National Ass’n of Manufacturers v. S.E.C.*, 800 F.3d 518, 534-35 (D.C.Cir. 2015) (corrective disclosures on corporate websites are commercial speech); see also *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C.Cir. 2009) (per curiam) (similar); *Riley v. National Federation of the Blind of North Carolina, Inc.* (1988) 487 U.S. 781, 796 (assuming, without deciding, that economically-motivated speech outside the context of advertising may qualify as commercial speech). As the District of Columbia Circuit explained, commercial speech “include[s] material representations about the efficacy, safety, and quality of the advertiser’s product, and other information asserted for the purpose of persuading the public to purchase” (or, given the corrective disclosures at issue, not to purchase) “the product.” *National Ass’n of Manufacturers*, 800 F.3d at 535 (quoting *Philip Morris USA*, 566 F.3d at 1095). The fact that the Act’s disclosures need not occur in the course of traditional advertising

thus is not dispositive because the required disclosures occur at the location and rough time when Appellants are providing or about to provide their services to clients—and, around the time when one clinic claims to provide its own service disclosures to patients. ER 71.

The second *Bolger* factor is also satisfied: the Act’s disclosure references specific reproductive health services. ER 66-69.

Appellants acknowledge that they advertise to prospective patients a variety of related commercial goods and services: pregnancy testing; first trimester obstetrical ultrasounds; sexually transmitted diseases testing, education, and treatment; maternity clothes and baby supplies through thrift stores. ER 71, 74, 77, 79-81. On this basis, the district court reasonably found that the disclosure is likely to be perceived as commercial expression by the women who visit Appellants’ clinics. ER 16.

Appellants’ arguments focus on the third *Bolger* factor, contending they are non-profits offering their services free of charge and, thus, have no economic motive for their speech. Appellant’s Brief, 32. Their argument fails, as other courts to consider this question have concluded.<sup>17</sup>

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<sup>17</sup> The district court did not, as Appellants suggest, improperly require them to “disprove their speech was commercial.” Appellants’ Brief, 24. True, the district court concluded that Appellants “failed to make a strong  
(continued...)

Appellants have situated themselves in the commercial marketplace. They acknowledge that they advertise to prospective patients a variety of goods and services. ER 71, 74, 77, 79-81. The clinic-provided goods and services fulfill their patients' commercial needs and function as substitutes for goods and services that other operators provide in the commercial marketplace. The clinics operate on a large enough scale that they not only affect the general commercial marketplace, but would be perceived as part of that overall marketplace by their target audience. *See* ER 71 (“LivingWell provides services for approximately 600 first-time clinic clients per year, as well as thousands of others through its thrift store and community education presentations.”). As the district court noted, Appellants' speech regarding the goods and services they offer—whether communicated through web-based ads, during a phone inquiry, or in person in the clinic—is likely considered commercial by the women who visit the clinics. ER 16.

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(...continued)

showing . . . that the mandatory notice does not fall within the ambit of commercial speech.” ER 17. But, Appellants contended below only that the Act does not regulate commercial speech because they do not charge their patients for their services. ER 15-16. As discussed above, providing free services is not dispositive when analyzing whether the speech regulated is commercial. ER 15-16.

The fact that Appellants do not charge for their services is not dispositive of whether their speech is economically motivated, as multiple courts have held. As the Fourth Circuit has reasoned, a speaker's lack of a profit motive cannot be dispositive of the commercial speech question, because "context matters." *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Baltimore*, 721 F.3d 264, 286 (4th Cir. 2013). "[T]hat context includes the viewpoint of the listener, for '[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.'" *Id.* at 286 (citing *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-62.). Similarly, in *Fargo Women's Health Organization, Inc. v. Larson*, 381 N.W.2d 176 (N.D. 1986), an argument was made that the advertising of a health clinic that offered its services for free could not be considered commercial speech. *Id.*, at 180. The North Dakota Supreme Court acknowledged some uncertainty about whether the clinic was receiving money in exchange for the clinic's services. *Id.* Nonetheless, the court concluded that whether the clinic's services were offered for free was not dispositive of whether the clinic's speech was commercial, because the

clinic's advertisements were placed into a commercial context in order to promote the clinic's services and solicit patronage. *Id.*, at 181.

Here, the record supports the district court's determination that—on the record before it—Appellants' speech could be considered commercial speech. ER 16. Although Appellants state that they offer their services free of charge, the record strongly suggests that the clinics also sell clothes and baby supplies through their thrift stores. ER 71. The clinics also have apparent commercial interests in securing financial support from benefactors who measure the clinic's success by the number of commercial abortion and contraception transactions the clinic forestalls. ER 71. On the record before it, the district court did not abuse its discretion in finding that the Act could be a permissible regulation of commercial speech, and in concluding that this was another reason why Appellants were unlikely to prevail on the merits. ER 16-17.

**2. The district court properly applied the rational basis test in its commercial speech analysis.**

The Supreme Court has applied rational basis review where a challenged law compels the disclosure of only factual and uncontroversial information. *Zauderer*, 471 U.S. at 651; see *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 250 (2010) (rational basis review proper where

compelled disclosures require only accurate statement of advertiser's legal status and the character of assistance provided.)

The information that the Reproductive FACT Act requires licensed covered facilities to provide is not subject to debate. Although people certainly may disagree about whether California law *should* cover reproductive healthcare services, the Appellants do not dispute that California *does* cover those services. Nor do Appellants dispute that particular county health departments can be reached at the phone numbers to be listed in the notice. Indeed, the required disclosure is akin to the type of “accurately and readily determined” facts that would be subject to judicial notice because their accuracy cannot be reasonably questioned. Fed. R. Evid. 201(b)(2); *see, e.g., Reese v. Malone*, 747 F.3d 557, 570 (9th Cir. 2014) (taking judicial notice of undisputed information made available on a public website); *Matthews v. National Football League Management Council*, 688 F.3d 1107, 1113 (9th Cir. 2012) (taking judicial notice that a particular football team played 13 games in California). The disclosure thus does not raise the sorts of concerns that could be raised regarding required statements of opinion, *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001), advice on “metaphysical matters,” *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 741 (8th

Cir. 2008), or statements taking sides in an expert debate, *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 900 (8th Cir. 2012) (acknowledging “degree of ‘medical and scientific uncertainty’” regarding link between abortion and suicide).

Under the rational basis standard, the notice is constitutional because, as the district court correctly determined, it directly advances the government interest in keeping pregnant women fully informed of their inherently time-sensitive options. ER 18. Indeed, as discussed above, the statute directly advances important goals in a manner that would allow it to survive intermediate scrutiny as well. Permitting the State to further such disclosure is congruent with the overall purposes of the First Amendment and the commercial speech doctrine, since this is not a statute that threatens to inhibit the free flow of information. To the contrary, by ensuring that women receive, in a timely manner, non-ideological background information relevant to their immediate circumstances, the notice, as the district court noted, “furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the ‘marketplace of ideas.’” ER 17.

Finally, the Reproductive FACT Act is not subject to the “heightened judicial scrutiny” under which content- and speaker-based restrictions on



commercial speech might be analyzed. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664; *see also Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016). In *Sorrell*, Vermont enacted a ban on the sale, disclosure, and use of information that identified physicians and the prescription medications they prescribed to their patients. But the ban was a narrow one, designed to prevent pharmaceutical manufacturers from using the information to market their brand-name drugs, while making the information available to almost anyone else. 131 S. Ct. at 2664; *see id.* at 2668 (“[t]he explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers”). That meant both that the Act was subject to heightened scrutiny, and that it was not appropriately tailored to survive such scrutiny.

Here, by contrast, the Reproductive FACT Act requires *all* licensed medical clinics providing pregnancy-related services to provide the pertinent notice. The sole exception—for clinics enrolled as Medi-Cal providers or as providers in the Family Planning, Access, Care, and Treatment program—are exempt for a good reason: because those clinics themselves provide such services at public expense, providing the notice to patients already at those

clinics would be superfluous.<sup>18</sup> Consequently, even assuming, *arguendo*, that the notice was subject to heightened scrutiny—which Appellees do not concede is warranted—the notice would survive such scrutiny.

## **II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGHED HEAVILY AGAINST AN INJUNCTION PENDING APPEAL**

To receive a preliminary injunction, Appellants were required to show “that the balance of equities tips in [their] favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); see *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009) (moving party has burden of establishing elements necessary to obtain injunctive relief). Where, as here, the government is a party, these two factors “merge” into a single inquiry. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) cert. denied, 134 S. Ct. 2877.

The district court properly weighed the equities and reasonably found that the public interest weighs against the injunctive relief sought. If the court had enjoined the Act, it would have harmed the millions of California women who “are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care

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<sup>18</sup> See Assem. Comm. on Judiciary, Analysis of Assembly Bill No. 775, at 4, 8-9. ER 42, 46-47.

and delivery,” but are unaware of the public programs available to provide them with those vital services.<sup>19</sup> It also would have prevented those women in California who seek professional pregnancy-related goods and services from Appellants, or other licensed pregnancy clinics, from receiving an incontrovertible statement about the availability of publicly-funded care at the moment the Legislature determined it was most necessary for women to receive it. The district court correctly declined to interfere with the Legislature’s intention that California women eligible for free or low cost publicly-funded family planning services have access to such care and that those women have timely and accurate information when they seek family-planning or pregnancy-related services from licensed pregnancy clinics.

The district court also correctly found that Appellants failed to establish an equivalent harm, much less harm that outweighs the fact that “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977); see also *Clark v. Coye*, 60 F.3d 600, 603-04 (9th Cir. 1995) (“[d]ue to concerns of comity and federalism, the scope of federal injunctive relief

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<sup>19</sup> Assem. Bill No. 775, § 1(b). ER 66-67.

against an agency of state government” is carefully scrutinized). Indeed, the Act does not prohibit Appellants from voicing criticisms of the publicly-funded services listed in the notice. Nor does it require them to provide abortions or even, as Appellants claim, refer patients to clinics that do provide such services. Under the Act, Appellants remain free to advance their viewpoint or express any kind of opinion.

Appellants argue that the balance of equities tips in their favor simply because this case involves First Amendment concerns. Not so. 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). Enjoining the Act during the pendency of litigation would have adversely affected the ability of Californian women who are or may be pregnant from accessing neutral, factual information vital to their time-sensitive reproductive decisions—harm for which no bond could have compensated.

Accordingly, the district court did not abuse its discretion in concluding that Appellants failed to carry their burden to show that issuing an injunction was in the public interest. This Court should affirm that decision.

### **CONCLUSION**

This Court should affirm the district court's denial of Appellants' motion for preliminary injunction.

Dated: February 16, 2016

Respectfully submitted,

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4:15-cv-04939-JSW

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**LIVINGWELL MEDICAL CLINIC, INC.,  
et al.,**

Appellants,

**v.**

**KAMALA HARRIS, et al.,**

Appellees.

**STATEMENT OF RELATED CASES**

The following related case is pending: *A Woman's Friend Pregnancy Resource Clinic, et al v. Kamala Harris* (9<sup>th</sup> Cir. 15-17517) (E.D. Cal 2:15-cv-02122-KJM).

Dated: February 16, 2016

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**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1**  
**FOR 4:15-cv-04939-JSW**

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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February 16, 2016

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Dated

*s/ Noreen P. Skelly*

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Noreen P. Skelly

Deputy Attorney General

## CERTIFICATE OF SERVICE

Case **Livingwell Medical Clinic,** No. **15-17497**  
Name: **Inc., et al. v. Kamala**  
**Harris, et al.**

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I hereby certify that on February 16, 2016 I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

### APPELLEES' BRIEF

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

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On February 16, 2016 I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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*Defendant Pro Per, in her official  
capacity*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 16, 2016, at Sacramento, California.

---

Eileen A. Ennis  
Declarant

---

/s/ Eileen A. Ennis  
Signature

**ADDENDUM TO BRIEFS  
PURSUANT TO CIRCUIT RULE 28-2.7**

Pertinent constitutional provisions, treaties, statutes, ordinances, regulations  
or rules.

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U.S.C.A. Const. Amend. I-Full text

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage;  
Petition of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<This amendment is further displayed in three separate documents according to subject matter>

<see USCA Const Amend. I, Religion>

<see USCA Const Amend. I, Speech>

<see USCA Const Amend. I, Assemblage>

U.S.C.A. Const. Amend. I-Full text, USCA CONST Amend. I-Full text

Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

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Effective: January 1, 2016

West's Ann.Cal.Health & Safety Code § 123470

§ 123470. Short title

Currentness

This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

**Credits**

(Added by Stats.2015, c. 700 (A.B.775), § 3, eff. Jan. 1, 2016.)

West's Ann. Cal. Health & Safety Code § 123470, CA HLTH & S § 123470

Current with urgency legislation through Ch. 1 of 2016 Reg.Sess. and Ch. 1 of 2015-2016  
2nd Ex.Sess.

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Effective: January 1, 2016

West's Ann.Cal.Health & Safety Code § 123471  
§ 123471. Definitions; applicability of article

Currentness

(a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility 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 tests, or pregnancy options counseling.
- (5) The facility offers abortion services.
- (6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is 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 prenatal care to pregnant women.
- (2) The facility offers pregnancy testing or pregnancy 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.

(c) This article shall not apply to either of the following:

- (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
- (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.

## Credits

(Added by Stats.2015, c. 700 (A.B.775), § 3, eff. Jan. 1, 2016.)

West's Ann. Cal. Health & Safety Code § 123471, CA HLTH & S § 123471

Current with urgency legislation through Ch. 1 of 2016 Reg.Sess. and Ch. 1 of 2015-2016

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Effective: January 1, 2016

West's Ann.Cal.Health & Safety Code § 123472

§ 123472. Required notice; licensed covered facilities; unlicensed covered facilities

Currentness

(a) A licensed covered facility shall disseminate to clients on site the following notice 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.

(1) The notice shall state:

"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 [insert the telephone number]."

(2) The information shall be disclosed 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.

(3) The notice may be combined with other mandated disclosures.

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice 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.

(1) The notice shall state: "This 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."

(2) 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.

(3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous" 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.

## **Credits**

(Added by Stats.2015, c. 700 (A.B.775), § 3, eff. Jan. 1, 2016.)

West's Ann. Cal. Health & Safety Code § 123472, CA HLTH & S § 123472

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Effective: January 1, 2016

West's Ann.Cal.Health & Safety Code § 123473  
§ 123473. Violation of article; civil penalty

**Currentness**

(a) Covered facilities that fail to comply with the requirements of this article 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. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

(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).

(b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

**Credits**

(Added by Stats.2015, c. 700 (A.B.775), § 3, eff. Jan. 1, 2016.)

West's Ann. Cal. Health & Safety Code § 123473, CA HLTH & S § 123473

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