No. 15-17497

In the United States Court of Appeals
for the Ninth Circuit

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

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

BRIEF FOR APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants LivingWell Medical Clinic, Inc., Pregnancy Care Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc. state that they are all non-profit corporations and that there is no parent corporation or publicly held corporation that owns 10 percent or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTRODUCTION

First Amendment law is grounded in the idea that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Indeed, it is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *AID v. AOSI, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). That very principle is at stake in this litigation.

This case involves a challenge to the constitutionality of a part of California's recently enacted Reproductive FACT Act (hereafter "Act"). The Act, in pertinent part, compels "licensed covered facilities" to disseminate to their clients a notice informing them of the availability, at low or no cost, of various reproductive services, including abortion. The notice also directs clients to a source for obtaining those services. Plaintiffs are three non-profit, faith-based pregnancy care centers that meet the definition of "licensed covered facilities." Plaintiffs, as a matter of religious principle, are opposed to abortion. Their centers exist to

provide women with alternatives to abortion. Each of them objects to complying with the Act's notice provision because it compels them to speak a message contrary to their religious mission and purpose. The notice amounts to promoting, facilitating, encouraging, and referring for the very thing Plaintiffs are opposed to as a matter of faith, namely, abortion.

In denying Plaintiffs' motion for a preliminary injunction, the court below correctly found that Plaintiffs had standing and that the challenged provision is "quintessentially compelled, content-based speech," a finding that carries with it a presumption of unconstitutionality under governing Supreme Court authority. Nevertheless, the court employed an erroneous preliminary injunction standard and committed several errors of substantive law which, together, constitute a clear abuse of discretion.

Two federal circuits have upheld preliminary injunctions against regulations of pregnancy care centers that were arguably far less antithetical to the religious purposes of those centers than is the provision of the Act challenged here. *Evergreen Ass'n v. City of New York*, 740 F.3d 233 (2d Cir. 2014); and *Centro Tepeyac v. Montgomery*

County, 722 F.3d 184 (4th Cir. 2013) (en banc). At a minimum, Plaintiffs have raised serious questions going to the merits of their First Amendment free speech claim, and, further, have demonstrated undeniable irreparable harm, and that the balance of equities and the public interest tip significantly in their favor. This Court should reverse and remand with instructions to enter a preliminary injunction to preserve the status quo pending the outcome of the litigation in the court below.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The court's order denying Plaintiffs' motion for preliminary injunction ("Order") was entered on December 18, 2015. (Order, EOR 1-22.) Plaintiffs filed a timely appeal on December 22, 2015. (Notice of Appeal, EOR 23.) As this is an appeal from an order denying a motion for a preliminary injunction, this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

I. Whether the district court abused its discretion by erroneously grafting onto the preliminary injunction standard a factor derived from dicta in a decision since rejected by this Court.

II. Whether the district court abused its discretion by improperly requiring Plaintiffs to conclusively negate the possibility that their speech was commercial, and by failing to apply controlling Supreme Court precedent on commercial speech.

III. Whether the district court abused its discretion in finding that the Act's written notice about the availability of publicly funded health care services constitutes "professional speech."

IV. Whether the district court abused its discretion by failing to properly apply the test for "intermediate scrutiny."

V. Whether the district court abused its discretion in holding that Plaintiffs would not suffer irreparable injury in the absence of injunctive relief.

VI. Whether the district court erred in holding that the remaining preliminary injunction factors favored denial of injunctive relief.

PERTINENT STATUTORY PROVISIONS

Article 2.7
Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (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.

. . . .

(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.

123472. (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.

. . . .

123473. (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.

(The full text of the Act is provided at EOR 66-69.)

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983 challenging the constitutionality of a provision of the recently enacted California Reproductive FACT Act, article 2.7 of Chapter 2 of Part 2 of Division 106 of the California Health and Safety Code. (The Act, EOR 66.) Plaintiffs allege that, by compelling them, under penalty of fines, to disseminate a government notice that they believe contradicts and undermines their religious purposes, the Act violates fundamental rights guaranteed to them under the First and Fourteenth Amendments as well as state constitutional provisions.

I. THE PLAINTIFFS

Plaintiffs are three California non-profit, faith-based pregnancy resource centers: LivingWell Medical Clinic, Inc. ("LivingWell"), Pregnancy Care Center of the North Coast, Inc. ("PCC"), and Confidence Pregnancy Center, Inc. ("CPC").

A. LivingWell

LivingWell, located in Grass Valley, California, is a nonprofit corporation under § 501(c)(3) of the Internal Revenue Code and is licensed by the California Department of Public Health as a Free Clinic. The primary purpose of LivingWell is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission. (Seapy Declaration, EOR 70-72.)

LivingWell helps women with unplanned pregnancies meet and accept the stresses and challenges that come with an unplanned pregnancy. It does this by presenting all the facts necessary to determine the best course of action for each individual. LivingWell addresses every area of concern regarding the pregnancy—from physical to emotional, economic to social, practical to spiritual, lifestyle to future hopes. (Seapy Declaration, EOR 71.)

LivingWell's services include pregnancy options education and consultation; pregnancy testing and verification; limited obstetrical ultrasounds; STI/STD testing, education, and treatment; past abortion healing retreats; community education presentations; and material support. Since pregnancy may directly or indirectly affect others,

LivingWell's services extend to partners and family members, as well. LivingWell personnel provide support both during and after pregnancy, helping to ensure the comfort of all who are involved. (Seapy Declaration, EOR 71.)

LivingWell provides services for approximately 600 first-time clinic clients per year. All services are free to clients and LivingWell never asks a client for a donation. (Seapy Declaration, EOR 71.)

Based on its religious tenets and principles, LivingWell has never, nor will it ever, refer for abortion. LivingWell discloses verbally 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. (Seapy Declaration, EOR 71.)

LivingWell believes that the message contained in the notice required by the Act violates its core beliefs as a faith-based organization because it promotes abortion services. LivingWell further believes that the Act's notice is tantamount to a referral for abortion, giving its patients the impression that LivingWell approves of and recommends abortion as an appropriate course of action—something that it does not and will not do. LivingWell's Statement of Principles states it "never

advises, provides, or refers for abortion or abortifacients." (Seapy Declaration, EOR 71-72.)

B. PCC

PCC is a California non-profit corporation under § 501(c)(3) of the Internal Revenue Code that owns and operates a clinic, J. Rophe Medical, licensed by the California Department of Public Health as a Free Clinic. The primary purpose of PCC is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission. (Van Groenou Declaration, EOR 73-75.)

PCC, which is morally and religiously opposed to abortion, encourages, through education and outreach, the recognition of human life from the moment of conception and to minister in the name of Jesus Christ to women and men facing unplanned pregnancies by providing support and medical services to them that will empower them to make healthy life choices. (Van Groenou Declaration, EOR 74.)

Over the past 12 months, PCC has seen over 880 clients and has had over 3,400 client visits. PCC has provided over 610 ultrasound and 290 pregnancy tests, along with ongoing support services. (Van Groenou Declaration, EOR 74.)

Like Livingwell, PCC never charges or asks its clients for donations. And, also like Livingwell, based on its religious beliefs and mission, PCC does not and will not encourage, facilitate or refer for abortions. (Van Groenou Declaration, EOR 74.)

C. CPC

The third Plaintiff, CPC, located in Salinas, California, is a California non-profit corporation under § 501(c)(3) of the Internal Revenue Code and is licensed by the California Department of Public Health as a Community Clinic. CPC's mission and purpose are similar to those of the other two Plaintiffs: helping women deal with unplanned pregnancies by offering, free of charge, a variety of educational, medical, and material resources, including ultrasounds, counseling and emotional support, and maternity and baby items. CPC serves about 1,200 clients per year. CPC also opposes abortion and will not refer, recommend encourage or facilitate clients to obtain abortions. (Morris Declaration, EOR 76-77.)

II. THE ACT

On October 9, 2105, Governor Edmund G. Brown, Jr. signed into law AB 775, the Reproductive FACT Act ("Act"). The Act requires

"licensed covered facilities" to disseminate the following language to its clients:

> 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].

Cal. Health & Safety Code § 123471(a)(1). (The Act, EOR 68.)

The message must be disseminated in one of three ways: (1) as a public notice posted in a conspicuous place; (2) a printed notice distributed to all clients; or (3) a digital notice distributed to all clients that can be read at the time of check-in or arrival. § 123471(a)(2). (The Act, EOR 68-69.)

Two entities are specifically exempt from having to comply with the Act's mandated disclosures:

> (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.

§ 123471(c) (The Act, EOR 68).

Where a licensed covered facility fails to comply with the Act's speech mandate, the Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty of five hundred dollars for a first offense and one thousand dollars for each subsequent offense. § 123473(a). Prior to commencing any enforcement action, the Act requires said officials to first provide a covered facility with a notice of noncompliance, informing the facility that it is subject to a civil penalty if it does not correct the violation within thirty days of the notice being delivered. *Id.* Officials must also verify that that violation was not corrected within this thirty-day period. *Id.* (The Act, EOR 69.)

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

According to the Act's author, the purpose of the Act, and the notice provision being challenged here, is to make sure that California women who become pregnant are made aware of what the author views as the State's "forward thinking programs" that provide free or low-cost services, including abortions. (Bill Analysis, EOR 42-43.) The author further opined that it is "in the best interest of the state, patients, and providers that women are aware of available assistance to them—

whether it is for preventing, continuing, or terminating a pregnancy." (Bill Analysis, EOR 43.) The author claimed that there are nearly 200 pregnancy care centers in California which have as their goal to "discourage and prevent women from seeking abortions," and that these centers engage in deceptive and misleading practices in furtherance of that goal. No specific center or centers were identified. The Act, so its author claimed, was intended to address the alleged hindrance to access created by the behavior of these centers. (Bill Analysis, EOR 55.)

Plaintiffs, obviously, do not share the Act's author's view that programs that pay for or subsidize abortions are "forward thinking." Nor do Plaintiffs share the view that they should be required to direct clients to sources of free or low-cost abortions. On the contrary, Plaintiffs view the notice requirements of the Act—whether by digital or written notices or a large sign in their waiting rooms—as tantamount to coercing them into facilitating or even referring clients for abortions. Plaintiffs' religious beliefs forbid them to do that. (Declarations, EOR 71-72, 74-75, 77.)

III. PROCEEDINGS BELOW

In anticipation of the Act's effective date on January 1, 2016, Plaintiffs filed the underlying action on October 27, 2015. (Docket, EOR 91.) Plaintiffs filed a First Amended Complaint on November 2, 2015. (Docket, EOR 91.) The First Amended Complaint sounded in four counts: a First Amendment Free Speech claim; a First Amendment Freedom of Assembly claim; a First Amendment Free Exercise of Religion claim; and a California state constitutional rights claim. It named as Defendants, all in their official capacities, the California Attorney General, the Director of the California Department of Health, and the city and county attorneys of the respective cities and counties in which each of Plaintiffs is located. (Amended Complaint, EOR 78-86.)

Plaintiffs filed their motion for a preliminary injunction on November 13, 2015. (Docket, EOR 94.) Plaintiffs' motion was based solely on their First Amendment free speech claim. Defendants opposed the motion, arguing that, as a pre-enforcement challenge, the matter was not ripe, that the motion was not supported by evidence, that Plaintiffs were not likely to succeed on the merits, that Plaintiffs could not show irreparable harm, and that the balance of hardships and the

public interest weighed against granting an injunction. (Docket, EOR 97.)

On December 7, 2015, the district court ordered the parties to file supplemental briefs addressing specific questions, including whether or not whichever party lost the motion intended to appeal and ask for a stay pending appeal. (Docket, EOR 99.) A hearing on the motion was scheduled for December 18, 2015. The hearing, however, was vacated and the court, on December 18, 2015, issued an order denying Plaintiffs' motion for preliminary injunction and denying the anticipated stay request. (Order, EOR 1-22.)

In denying the motion for preliminary injunction, the district court held as follows: (1) Plaintiffs had standing and the matter was ripe; (2) that the challenged notice provision was "quintessentially compelled, content-based speech;" (3) that the notice provision was "commercial speech," or, rather, that "based on this limited record, Plaintiffs fail to make a strong showing of likelihood of success on the merits on the issue that the mandatory notice does not fall within the ambit of commercial speech;" (4) that Plaintiffs "have not raised a substantial question whether the notice would be construed as

professional speech;" (5) that viewed as "professional speech," the notice provision survives intermediate scrutiny; (6) that because it appeared that Plaintiffs planned to risk punishment by refusing to comply with the notice provision in the absence of an injunction they could not be said to have sustained "irreparable harm"; (7) that respect for the democratic process and due deference to the legislative purpose of the Act would best serve the public interest. Accordingly, the court held that "Plaintiffs have failed to meet the high standard for granting of an injunction of a legislative act." (Order, EOR 1-22.)

This appeal followed. Plaintiffs filed a timely Notice of Appeal on December 22, 2015. (Docket, EOR 102.) Plaintiffs also filed an Emergency Motion for Preliminary Injunction Pending Appeal to this Court on December 23, 2015. That motion was denied on December 30, 2015. (Docket, EOR 102-03.)

SUMMARY OF ARGUMENT

In this challenge to part of the Act requiring all pregnancy care centers in the state to post or distribute notices of the availability of, among other things, publicly funded abortions, the district court held that Plaintiffs, faith-based pregnancy care centers opposed to abortion, were not entitled to preliminary injunctive relief on their claim that the Act violates their First Amendment right to be free from compelled speech they do not wish to make. In so doing, the court committed clear abuse of discretion by: (1) requiring Plaintiffs to satisfy a "more rigorous" and "particularly heavy" standard for injunctive relief solely because they challenged a legislative act; (2) by requiring Plaintiffs to disprove that their speech was "commercial speech" in spite of the court's own finding that the Act was "quintessentially compelled, content-based speech" and, thus, presumptively unconstitutional under controlling Supreme Court precedents; (3) finding that the Act's compelled notice of the availability of publicly funded services was "professional speech;" (4) failing to properly apply the test for intermediate scrutiny; (5) holding that the Plaintiffs suffer no irreparable injury because they chose to follow their consciences and not

comply with the Act; and, (6) holding that the balance of equities and public interest favor the government instead of the Plaintiffs, despite the fact that the government could readily achieve its stated goal even were the Act enjoined, while Plaintiffs have no alternative to forfeiting their First Amendment rights except to place themselves in jeopardy of significant fines.

However, a correct application of First Amendment law governing government compelled speech, and a proper analysis of the factors governing preliminary injunctions in First Amendment cases, yields one conclusion: Plaintiffs are entitled to a preliminary injunction. In light of the long established principle that "the First Amendment prohibits the government from compelling citizens to express beliefs that they do not hold," *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 915 (9th Cir. 2005), Plaintiffs should be permitted to refrain from advocating the government's promotion of abortion services pending a final disposition of their legal claims in the court below.

ARGUMENT

I. THE COURT BELOW APPLIED AN INCORRECT STANDARD FOR A PRELIMINARY INJUNCTION MOTION.

This Court's review of an order denying a preliminary injunction is "limited and deferential." *Southwest Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 918 (9th Cir. 2003) (en banc). In general, the standard is that of abuse of discretion. *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 398 (9th Cir. 2015) (citation omitted). The district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Rucker v. Davis,* 237 F.3d 1113, 1118 (9th Cir. 2001) (en banc), *rev'd on other grounds*, *Dep't of Hous. & Urban Dev. v. Rucker,* 535 U.S. 125 (2002). When the district court is alleged to have relied on an erroneous legal premise, this Court reviews the underlying issues of law *de novo*. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (citations omitted).

A preliminary injunction "is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). Its purpose "is

merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

A. The court below erroneously applied a higher standard than the law requires for granting preliminary injunctive relief.

The district court incorrectly grafted onto the standard for granting a preliminary injunction a "particularly heavy" and "more rigorous" standard than required by governing law. (Order, EOR 11.) This was error and an abuse of discretion requiring reversal.

The court began its analysis by correctly noting the traditional four factors applicable in such cases. *See Winter v. Natural Res. Def. Council, Inc., v. Hubbard,* 555 U.S. 7, 20 (2008). The court also correctly acknowledged this Court's "serious questions" sliding scale approach refinement of the traditional four factors, and that that approach remains good law even after *Winter*. *See Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 113 (9th Cir. 2011) (preliminary injunctive relief may be granted where plaintiff shows that serious questions going to the merits were raised and the balance of the hardships tips sharply in the plaintiff's favor.) But the court's analysis went askew when it

held that the burden on a plaintiff is "more rigorous" and "particularly heavy" and that a particularly "high standard" (that is, even higher than the *Winter* standard), applies whenever a plaintiff is "challenging the operation of a statute." (Order, EOR 11-12.)

As support for this proposition the court relied on a statement from this Court's decision in *Coalition for Econ. Equity v. Wilson,* 122 F.3d 718, 719 (9th Cir. 1997) ("it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined"), a case not involving a preliminary injunction motion, but instead, an application for a stay of mandate pending the disposition of a petition for writ of certiorari. This Court, however, has at least twice subsequent to that decision expressly rejected the authority of the *Wilson* case and, in particular, the statement quoted by the district court as the basis for grafting onto the preliminary injunction standard a higher, or heavier, or more rigorous burden for plaintiffs.

In *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell – Jolly,* 572 F.3d 644 (9th Cir. 2009), this Court rejected the *Wilson* statement as mere "dicta," observing that if it were the law, then the rule requiring "balance" of "competing claims of injury," would be "eviscerated," and

that federal courts "have the power to enjoin state legislative enactments, in part, because those laws sometimes offend federal law provisions, which, like state statutes, are themselves 'enactment[s] of its people or their representatives.'" *Id*. at 658.

More recently, in *Latta v. Otter,* 771 F.3d 496 (9th Cir. 2014), this Court again declined to adopt (in the context of a stay application) the principle derived by the court below from *Wilson*, noting the *Maxwell* court's characterization of the quoted statement as dicta and noting further that no Supreme Court decision has adopted such a principle to be applied in a competing harms analysis. *Id*. at 500.

It is clear that for the court below this "more rigorous standard" to be applied to challenges to legislative enactments was well nigh dispositive. *See* Order, EOR 12 ("The Court finds that . . . Plaintiffs have failed to meet the high standard required for granting of an injunction of the enactment of a legislative act."); (Order, EOR 12) (balance of equities did not favor the plaintiffs because "[a]s found by the California legislative branch, the public will be best served by application of the Act in full.") (Order, EOR 21). Presumably, however, every legislative branch that has ever enacted anything has found that

the public would best be served by application of its acts. But as this Court has noted, adoption of such a standard would effectively eviscerate not only a court's duty of balancing competing harms, but also a court's more basic role of passing upon the legality and constitutionality of any law.[1] *See Maxwell*, *supra*. It is a standard that has no basis in Supreme Court or Ninth Circuit precedent. For the district court to hold Plaintiffs to such a standard for obtaining preliminary injunctive relief constitutes plain error and, as such, amounts to an abuse of discretion. Accordingly, this Court should reverse the decision below.

II. THE COURT BELOW IMPROPERLY SHIFTED THE BURDEN TO PLAINTIFFS ON THE ISSUE OF COMMERCIAL SPEECH AND IGNORED CONTROLLING PRECEDENT.

The district court erred in requiring Plaintiffs to disprove that their speech was commercial and in failing to follow controlling Supreme Court precedent on commercial speech intertwined with pure

[1] It would render nugatory such things as 42 U.S.C. § 1983, for example, if plaintiffs seeking to enjoin enactments made "under color of state law" were required to meet a "more rigorous" or "particularly heavy" burden out of respect for or deference to the democratic process. The Bill of Rights itself is, after all, little more than an attempt to limit or provide protection from potential excesses of the democratic process.

speech. This Court reviews for abuse of discretion, *Int'l Franchise Ass'n*, 803 F.3d at 398, which in this case is premised on the district court's reliance on erroneous legal premises and misapplication of controlling authority. *Rucker*, 237 F.3d at 1118. This Court reviews the underlying issues of law de novo. *Farris*, 677 F.3d at 864.

A. The district court improperly placed on plaintiffs the burden of disproving that the Act's content-based speech regulation was "commercial."

The district court correctly held that the Act involves a "quintessentially compelled, content-based speech" mandate. (Order, EOR 13.) And for good reason. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). *See also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2105) (the "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys"); *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (a speech regulation is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has

occurred") (citation omitted). Because the Act, on its face, requires licensed covered facilities to speak the government-mandated message, in a manner dictated by the government, it cannot be characterized as anything but content based.

The court also held, however, that Plaintiffs have failed to show that the disclosures are *not* commercial speech. (Order, EOR 17.) The Supreme Court "defines" commercial speech as that which does no more than "propose a commercial transaction," or that "relates solely to the economic interests of the speaker and its audience." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-62 (1980); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) ("the 'core notion of commercial speech' is that it 'does no more than propose a commercial transaction.'") (quoting *Bolger v. Youngs Drug Prods Corp.*, 463 U.S. 60, 66 (1983)).

Plaintiffs are non-profit, religious-based clinics that offer their services free of charge to all clients and do not ask their clients for donations. (Declarations, EOR 71, 74, 77.) Plaintiffs thus propose no commercial transaction when caring for their clients and the

relationship between Plaintiffs and their clients does not relate, even partially, to the economic interests of the clinics or their clients.

As a "quintessentially compelled, content-based speech" mandate, (Order, EOR 13), the Act is presumptively unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional"). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group*, 529 U.S. 803, 816-17 (2000) (citing *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183 (1999)).

Given the court's finding that the notice provision was a (presumptively invalid) content-based regulation of speech, it would seem that, at a minimum, the court should have concluded that Plaintiffs presented "serious questions going to the merits," and proceeded from that finding to an application of strict scrutiny. And, had the court found that Plaintiffs raised at least "serious questions" about the ability of the Act to survive strict scrutiny, it should have

gone on to consider whether or not the balance of hardships "tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies, supra.*

Indeed, the Supreme Court has repeatedly emphasized that government attempts to dictate what private individuals or groups must say are highly suspect. *See, e.g.*, *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("The government may not . . . compel the endorsement of ideas that it approves."); *Hurley v. Irish-Am. GLB*, 515 U.S. 557, 573 (1995) ("[A] speaker has the autonomy to choose the content of his own message."); *Pac. Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) (plurality) (holding unconstitutional a requirement that a utility company include speech from an opposing group in its newsletters); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (highlighting the significant burden imposed upon First Amendment rights when a speaker is forced to alter its message and devote space and money to convey government-mandated content); *Barnette*, *supra* (holding that a public school could not compel students to recite the Pledge of Allegiance).

Instead, however, of applying strict scrutiny to the Act's content-based regulation, as it should have, *see*, *e.g.*, *Reed v. Town of*

Gilbert, 135 S. Ct. 2218, 2228 (2105) ("[a] law that is content based on its face is subject to strict scrutiny"), [2] and setting aside any presumption of unconstitutionality, the district court flipped the burden and held that Plaintiffs did not conclusively negate the possibility that their speech was commercial, and that the Act was therefore subject to a lesser standard of review. (Order, EOR 13-21.) In short, the court improperly placed on Plaintiffs not only the burden of showing either a likelihood of success on the merits or the existence of serious questions going to the merits, but also the burden of conclusively disproving—at the preliminary injunction stage—any possible defenses to the arguments raised by Defendants.

That the district court followed this erroneous approach at least on the "commercial speech" argument is clear from the manner in which the court couched its holdings on this issue. After its discussion of the parameters of commercial speech doctrine as gleaned from governing

[2] *See also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) ("[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the [most exacting] rigorous scrutiny.") (citations omitted); *Riley*, 487 U.S. at 800 (the government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored"); *McCullen*, 134 S. Ct. at 2530 (laws that are content or viewpoint based "must satisfy strict scrutiny").

Supreme Court and other persuasive authorities, the court concluded that "based on this limited record, Plaintiffs fail to make a strong showing of likelihood of success on the merits[3] on the issue that the mandatory notice does not fall within the ambit of commercial speech." (Order, EOR 17.)

This is not the approach followed by this Court. On the contrary, proper application of this Court's "serious questions" sliding scale approach should have led the court below—in view of its own handling of the commercial speech arguments—to conclude that Plaintiffs had, in fact, raised such questions instead of concluding that Plaintiffs failed to do so because they could not—at this preliminary posture of the case—conclusively *disprove* the contrary. *See Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) ("Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the

[3] Of course, under this Court's precedents, Plaintiffs may prevail even in the absence of such a showing, as long as they raise "serious questions going to the merits." *Alliance for the Wild Rockies, supra.*

merits.") (internal citations and quotation marks omitted). In fact, the court's finding that further discovery is needed in order to determine whether or not plaintiffs' speech is "commercial," (Order, EOR 17), underscores as much as anything could that Plaintiffs presented on this issue a question that is "fair ground for litigation and thus for more deliberative investigation." *Id.*

B. The lower court's commercial speech analysis ignores controlling Supreme Court precedent on commercial speech "inextricably intertwined" with pure speech.

The court's error regarding on the commercial speech issue was compounded by the court's failure to correctly apply the teaching of the Supreme Court's leading case dealing with situations where fully protected speech is intertwined with arguably commercial speech.

In *Riley*, *supra*, the Supreme Court upheld the granting of a preliminary injunction against the North Carolina Charitable Solicitations Act governing the solicitation of charitable contributions by professional fundraisers. The Court squarely rejected the state's arguments that the speech in question, because it had numerous undeniably commercial aspects, should be subjected to the lowest level of scrutiny regardless of whether it also contained elements that were

non-commercial. The Court held that "even assuming, without deciding, that such speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796. Moreover, the Court refused the state's invitation to try to chop the speech at issue into parts, with the parts being subjected to greater or lesser levels of scrutiny depending on their commercial or non-commercial nature:

> . . . 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.

The court below focused in on Plaintiffs' provision to their clients of pregnancy-related goods and services, pregnancy testing, ultrasound examinations, maternity clothes, and baby supplies. (Order, EOR 16.) The speech related to those things, the court said, "can be considered commercial in nature, and likely is considered commercial in nature by many consumers of Plaintiffs' services." (Order, EOR 16.) But the district court's analysis on this point omitted the undisputed facts also

before the court—and acknowledged in its Order—that Plaintiffs are engaged in such things as "education and outreach," religious ministering, counseling, and the like, activities that are plainly not commercial. (Order, EOR 1-2.) Thus, even if one were to accept the court's characterization of the provision of free pregnancy tests, ultrasounds, baby clothes, etc. as "commercial" (Plaintiffs do not), at worst the court should have concluded that this was, as in *Riley*, a situation in which commercial speech is "inextricably intertwined" with non-commercial speech. And, under *Riley*, the court should have applied strict scrutiny. That the court failed to do so, but instead appears to have applied an erroneous principle that is quite the opposite of *Riley*'s "inextricably intertwined" principle, shows that the court's decision was founded on an "erroneous legal premise," and, as such, constitutes an abuse of discretion requiring reversal.

The court's improper shifting of the burden onto plaintiffs to disprove that their speech was commercial, and the court's failure to follow Supreme Court authority on commercial speech "intertwined" with non-commercial speech both constitute abuse of discretion requiring reversal.

III. THE COURT INCORRECTLY FOUND THAT THE ACT'S NOTICE OF AVAILABLE SERVICES CONSTITUTES "PROFESSIONAL SPEECH".

The district court incorrectly held that the mandatory notice provision of the Act should be considered "professional speech." (Order, EOR 15.) This Court reviews for abuse of discretion, *Int'l Franchise Ass'n*, 803 F.3d at 398, which in this case is premised on the district court's reliance on erroneous legal premises and misapplication of controlling authority. *Rucker*, 237 F.3d at 1118. This Court reviews the underlying issues of law de novo. *Farris*, 677 F.3d at 864.

The district court held that, because plaintiffs are licensed medical facilities under regulations of the California Department of Public Health, the sign or notice required by the Act constitutes "professional speech" subject to intermediate scrutiny. The court relied largely on broad, uncontroversial principles about the state's power to regulate medical and other professions found in cases such as *Gonzalez v. Carhart*, 550 U.S. 124, 157 (2007) and *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 884 (2007), and this Court's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). From these principles the court drew the unwarranted conclusion that,

because it happens to take place within the confines of a licensed medical facility, the notice mandated by the Act is akin to a doctor's discussion with a patient of the specific risks, benefits and alternatives of specific forms of treatment and, as such, entitled to a lesser degree of scrutiny than a doctor's general statements of, say, his or her social or political opinions. But both *Casey* and *Pickup* are readily distinguishable from the instant set of facts and the court's reliance on them was was erroneous.

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

The court below correctly held that the speech mandated by the Act involves *speech*, not conduct. (Order, EOR 19.) Hence, at worst, the First Amendment protection here would only be "*somewhat* diminished."

A fair application of *Pickup* to the facts of the instant case, however, shows that the district court erred in not affording the Plaintiffs full First Amendment protection for their religious and political speech. First, the Act's notice provision requires Plaintiffs to speak the mandated message even before a client has been seen by a licensed medical professional and thus before any physician-client relationship has been established. Indeed, it requires Plaintiffs to speak the message even if a client is not visiting one of Plaintiffs' clinics for medical services or advice. As the court below correctly recognized, Plaintiffs do not just offer medical services. (Order, EOR 16, noting that Plaintiffs provide such goods as maternity items and baby supplies.) Thus, a client visiting one of Plaintiffs' clinics for nothing more than a baby blanket would have to be informed by that clinic of the government's promotion of abortion services, a message *wholly*

unrelated to the client's visit, not to mention antithetical to the clinic's mission.

In addition, the government-mandated message is not simply about, *inter alia*, promoting abortion services, but how clients can potentially obtain abortion services for free or at low cost. That is not a message implicating professional speech. It is, for all intents and purposes, a public service announcement, and an ideologically driven one at that, designed to lead clients away from Plaintiffs' clinics and their religious message. Forcing Plaintiffs to speak the government's message is tantamount to forcing them to engage in a public dialogue advocating a message contrary to their very religious identity. It forces Plaintiffs to "pamphleteer" in their own offices using a pamphlet, as it were, whose content has been dictated solely by the government. *See id.* at 1227.

Similarly flawed was the court's equating of the Act's notice with the kind of treatment-specific medical information at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*. 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.* at 884. 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 Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) ("[b]eing a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights . . . To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'") (quoting *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995)) (internal citation omitted).

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*.

It is worth noting that, aside from *Casey* and *Pickup*, none of the other cases cited by the court in its discussion of professional speech dealt with factual settings that are particularly analogous to the case at bar. *See King v. Governor of the State of New Jersey,* 767 F. 3d 216, 232 (3d Cir. 2014) (constitutionality of statute banning sexual orientation change therapy); *Gonzalez v. Carhart*, *supra* (constitutionality of partial-birth abortion ban); *Shae v. Bd. of Med. Exam'rs,* 81 Cal. App. 3d 564, 577 (1978) (state had power to discipline for unprofessional conduct doctor found to have engaged in lewd speech with patients under hypnosis); *Moore-King v. Cnty. Of Chesterfield, Va.,* 708 F. 3d 560, 569 (4th Cir. 2013) (government could require licensing of fortune tellers as engaged in "profession"); *Ass'n of Nat'l Advertisers, Inc. v. Lundgren,* 44 F. 3d 726, 729 (9th Cir. 1994) (decision on commercial speech; no discussion of professional speech); and, *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975) (general discussion of state's power

to establish licensing standards for professions; no discussion of professional speech).

The general principle under *Pickup* that the government has the power to exercise *some* control over the speech of those involved in licensed professions without running afoul of the First Amendment is not in dispute here. What is in dispute is whether or not the particular exercise of that power via the Act's notice provision falls within that power. The lower court's analysis fails to demonstrate how that government-mandated notice is more like the words a physician speaks to an individual patient about the specifics of a particular procedure (*Casey*) than it is like words dictated by the government to force even objecting speakers to advertise what the government considers to be its own "forward thinking" viewpoint on a controversial social and religious issue.

In sum, the district court's finding that the Act's notice provision was professional speech was premised on a misreading of applicable law. As such, it constitutes an abuse of discretion requiring reversal.[4]

[4] In addition, in light of the Supreme Court's decision last term in *Reed v. Gilbert*, *supra*, there is good reason to doubt that when a law is facially content based, as is the Act, that anything less than strict

IV. THE COURT BELOW FAILED TO PROPERLY APPLY THE INTERMEDIATE SCRUTINY TEST.

Assuming, *arguendo*, that the challenged notice provision does constitute professional speech, and is thus subject to intermediate scrutiny, the court failed to properly apply the test for intermediate scrutiny. (Order, EOR 20-21.) This Court reviews for abuse of discretion, *Int'l Franchise Ass'n*, 803 F.3d at 398, which in this case is premised on the district court's failure to correctly apply the applicable legal test. *Rucker*, 237 F.3d at 1118. This Court reviews the underlying issues of law *de novo*. *Farris*, 677 F.3d at 864.

Under intermediate scrutiny, "the State must show at least that the statute directly advances a substantial governmental interest *and*

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scrutiny should apply, even when a law regulates "professional speech"—a category of speech never recognized by the Supreme Court, unlike, of course, "commercial speech." In *Reed*, the Supreme Court stated, *without qualification*, that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2228 (citation omitted). In fact, in *Reed*, 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).

that the measure is drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-68 (2011) (emphasis added). There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 2668 (citation omitted). This is a "demanding" requirement. *Retail Digital Network, LLC v. Appelsmith*, No. 13-56069, 2016 U.S. App. LEXIS 140, *19 (9th Cir. Jan. 7, 2016) (for publication).[5] Intermediate 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." *Sorrell*, 131 S. Ct. at 2668. The government need not use "the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Retail Digital Network*, 2016 U.S. App. LEXIS 140, at *20 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). These standards help prevent "the government from too

[5] In *Retail Digital Network*, this Court held that *Sorrell* has "modified the *Central Hudson* test for laws burdening commercial speech. Under *Sorrell*, courts must first determine whether a challenged law burdening non-misleading commercial speech about legal goods or services is content- or speaker-based. If so, heightened judicial scrutiny is required." *Id.* at *18 (citing *Sorrell*, 131 S. Ct. at 2664). Thus, the district court's application of mere rational basis to the Act (which it held to be content-based), under a commercial speech theory, was erroneous.

readily sacrific[ing] speech for efficiency." *Retail Digital Network*, 2016 U.S. App. LEXIS 140, at *20 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014)).

The test is, thus, a two-pronged one: the challenged measure must (1) advance a substantial governmental interest; and (2) be narrowly drawn to achieve that interest.

In this case, the district court's application of intermediate scrutiny to the Act's notice provision reads as follows: "The Court finds that, when viewed as professional speech, the regulation 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." (Order, EOR 20-21.) This is an application of the first—advances a governmental interest—prong of the test. There is, however, no mention or application of the equally important second prong of the test, *i.e.*, narrow tailoring. In fact, the court's entire discussion of professional speech lacks anything that could be fairly construed as the application of the second prong of the intermediate scrutiny test. It is simply omitted. (Order, EOR 18-21.)

Plaintiffs contend that the Act's notice provision could not survive the second prong of intermediate scrutiny in any event. Narrow tailoring in the free speech context requires that a law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 134 S. Ct. at 2535 (citation omitted).

According to the Act's author, the motivation behind the Act was to protect women from the allegedly deceptive tactics of some pregnancy care center operators. Assuming *arguendo* that the government's interests here are substantial in nature,[6] the means the state has

[6] Any contention that the Act serves a substantial interest of informing pregnant women that they might be eligible for free or low cost pregnancy-related services is undermined by the Act's *total* exemption for licensed facilities who are enrolled as Medi-Cal and FPACT providers. (The Act, EOR 68.) A woman who visits one of these exempt clinics and thinks she has to pay for pregnancy-related services using her own funds does not have to be told, *per the Act*, that those services might actually be available for free or at low cost. She does not have to be informed, *per the Act*, of a telephone number for her to call to find out her eligibility to obtain free or low cost services. While these exempt facilities might very well choose to inform the patient of these facts, the Act does not *require them to do so*, as it requires non-exempt facilities like Plaintiffs. The under-inclusiveness of the Act in this regard "undermines the likelihood of a genuine [governmental] interest." *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984). *See also*, *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1105 (2009) ("The statute's discriminatory purpose is further evidenced by its

chosen to advance its interest are not "proportional to the resulting burdens placed on speech," and for at least two reasons. First, and most critically, the Act does not pinpoint fraudulent or deceptive speech as something to prohibit. Indeed, the Act does not prohibit or modify allegedly false statements or false advertisements by any person or facility. Rather, the Act imposes a broad prophylactic measure that sweeps within its scope all non-exempt licensed covered facilities whether such facilities have engaged in deceptive speech in the past or whether they will do so in the future. When the government imposes requirements to speak a government-mandated message in order to address a perceived problem, the First Amendment requires a scalpel, not a sledge hammer. Decisional law is clear that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button* 371 U.S. 415, 438 (1963) (citations omitted). If the goal of the Act is to prohibit false and deceptive speech,

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substantial . . . underinclusiveness with respect to the State's asserted interest in passing the legislation."); *Hill v. Colorado*, 530 U.S. 703 (2000) (a content-neutral statute is one that "does not distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds.").

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

Second, if California perceives a lack of knowledge on the part of women regarding the availability of that state's public services as a problem to be remedied, one obvious way the State could choose to advance its goals, without having to compel Plaintiffs to speak a viewpoint-based and ideological message contrary to their religious mission, is for the State to disseminate the message *itself*. *See Evergreen*, 740 F.3d at 250 (noting that New York City could "communicate [the Government] message through an advertising

campaign"); *Riley*, 487 U.S. at 800 (requirement that professional fundraisers disclose information about percentage of funds actually turned over to charity in the prior year was not narrowly tailored where "the State [could] itself publish the detailed financial disclosure forms it requires professional fundraisers to file").

As the Supreme Court has noted, with obvious relevance here: "The State can express [its] view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition." *Sorrell*, 131 S. Ct. at 2671 (internal citations omitted).

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

The Second Circuit did not decide whether to apply strict or intermediate scrutiny because its conclusions were the same under both levels of review. *Id.* at 245. With respect to the Government Message, the court held that "mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue, deprives Plaintiffs of their right to communicate freely on matters of public concern." *Id.* at 250 (citation omitted). The court ruled that "[w]hile the government may incidentally encourage certain speech through its power to '[choose] to fund one activity to the exclusion of the other,' it may not directly 'mandat[e] that Plaintiffs affirmatively espouse the government's position on a contested public issue' through regulations, like [New York City's ordinance], that threaten not only to fine or de-fund but also to forcibly shut down non-compliant entities." *Id.* at 250-51 (citations omitted). The court found this disclosure to be "insufficiently tailored to withstand scrutiny." *Id.* at 251.

With respect to the Services Disclosure, the court held that "[a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by

mandating the manner in which the discussion of these issues begins." *Id*. The court found this disclosure to be "more extensive than necessary to serve a substantial governmental interest." *Id*.

The message mandated by the Act is a more egregious violation of a pro-life pregnancy center's speech and identity than the disclosures at issue in *Evergreen*. The Act does not require facilities like Plaintiffs to reveal whether they provide certain services; it affirmatively requires them to refer clients to a telephone number where the client could potentially receive a free abortion—the very procedure to which Plaintiffs religiously object and to which Plaintiffs provide alternatives. In sum, the Act "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 134 S. Ct. at 2535 (citation omitted).

While it is not necessary to be convinced of the correctness of Plaintiffs' view of how the second prong of the intermediate scrutiny test should have been conducted in order to reach the conclusion that the district court erred, the fact that the court failed to conduct the test at all certainly constitutes an abuse of discretion requiring reversal.

V. THE COURT INCORRECTLY HELD THAT PLAINTIFFS FAILED TO SHOW IRREPARABLE INJURY.

The court below held that Plaintiffs are not irreparably harmed by the Act, finding "that Plaintiffs have failed to demonstrate, without self-censorship, that they would actually face irreparable injury if the Act were made effective." (Order, EOR 21). The court is incorrect. The fact that, as the court found, the Plaintiffs find themselves conscientiously unable to comply with the Act, does not mean that they have not suffered—indeed they continue to suffer—irreparable harm. This Court reviews for abuse of discretion based on the district court's reliance on erroneous legal premises. *Rucker*, 237 F.3d at 1118. This Court reviews the underlying issues of law *de novo*. *Farris*, 677 F.3d at 864.

The district court took the view that a challenger who cannot in good conscience comply with a law is not irreparably harmed by that law. (Order, EOR at 10, 12, 21). Under that view, the faithful Jews who were threatened with torture and death by Gentile rulers for their refusal to eat pork, *see* 2 Maccabees 7, did not suffer irreparable injury because they refused to comply—they were killed, not chilled. But "chill" is not the only form of cognizable First Amendment harm. Being

forced to operate their centers with the threat of penalties looming over them is also a harm—one that Plaintiffs face now on a daily basis.

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

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

Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.").

No Supreme Court case, nor any decision of this Court, 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 governmental 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.

Plaintiffs, moreover, are unaware of any case that disallows a challenge to a speech-restrictive law because the challengers intended to violate that law. Indeed, it is that intent which gives the party standing by creating the "case or controversy" at issue. In the compelled speech case of *Wooley v. Maynard*, 430 U.S. 705 (1977), for example, the

challengers had been repeatedly cited for covering up the state motto on their automobile license plate, *id.* at 708, and there was no indication that they would not continue on their religiously mandated course, incurring repeated prosecutions. *See id.* at 712 ("The threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an automobile, is sufficient to justify injunctive relief"). While a challenger who refrains from conduct that would violate a statute may have standing on the alternative basis of a desire to pursue the forbidden conduct and the chilling effect of the law, challengers whose conscience is sufficiently firm that they proceed despite the chill are no less entitled to assert their First Amendment rights. Indeed, to require a willingness to comply with the law as a prerequisite for a showing of irreparable injury would have deleterious effects. No one of extraordinary firmness of conscience or intent could sue for prospective relief, as such a challenger would remain undeterred by the law. Moreover, status-based injuries (*e.g.*, from a law based upon alienage or race or illegitimacy) could not be challenged prospectively

because the challenger is unable to "abandon" that status. Such is most assuredly not the law.

In sum, the district court's holding on the issue of "irreparable injury" represents a novel departure from controlling law. It constitutes an abuse of the court's discretion requiring reversal.

VI. THE COURT ERRED IN HOLDING THAT THE BALANCE OF HARMS AND PUBLIC INTEREST FACTORS DID NOT FAVOR PLAINTIFFS.

The district court held that the balance of equities did not tip in Plaintiffs' favor. This Court reviews for abuse of discretion based on the district court's reliance on erroneous legal premises. *Rucker*, 237 F.3d at 1118. This Court reviews the underlying issues of law de novo. *Farris*, 677 F.3d at 864.

In finding that the balance of harms and public interest factors did not favor Plaintiffs, the court again resorted to the mistaken notion that colored its articulation of the standard for granting a preliminary injunction in general, *i.e.*, deference to and respect for the democratic process. (Order, EOR 21-22). *See* Section I, *supra*. There can be no question that Plaintiffs' freedom of speech, a core constitutional right, outweighs the government's interest in disseminating a message that

the government can disseminate itself. "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists 'the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [the movant's] favor.'" *Sammartano*, 303 F.3d at 973 (quoting *Viacom Int'l, Inc. v. FCC*, 828 F. Supp. 741, 744 (N.D. Ca. 1993)).

This Court has "consistently recognized the 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people' subjected to the same restrictions." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Sammartano*, 303 F.3d at 974). The district court's conclusory recitation of the legislature's stated purpose in enacting the Act—providing women full information about their choices—is not sufficient to overcome the undeniable public interest in upholding the bedrock free speech principles at stake here. Conspicuous by its absence from the court's discussion of the balance of harms/public interest factors, however, is any mention of the readily available alternatives by which

the government could achieve its stated goals in the event the Act were enjoined pending full adjudication of this matter. As the Second Circuit noted in *Evergreen*, governments have ample means of communicating public health information besides the rather haphazard, constitutionally burdensome one chosen here. *Evergreen*, 740 F.3d at 250.[7]

Unlike the government here, the Plaintiffs have no readily available alternative. They must either agree to forfeit their precious First Amendment freedom during the pendency of this case, or conduct themselves while daily facing the threat of monetary sanctions. Under these circumstances, the balance of harms and the public interest tip sharply in Plaintiffs' favor.

The Act, which went into effect on January 1, 2016, unquestionably impacts the speech of Plaintiffs. It requires them to speak a message their religious principles prohibit them to speak or

[7] 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).

refrain from doing so at great risk. Under *Alliance for the Wild Rockies*, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." 632 F.3d at 1131. If a moving party raises serious questions going to the merits and the balance of hardships tips sharply in its favor, then it is entitled to injunctive relief. *Id.* at 1134-35.

The district court's application of the balancing of equities and public interest factors rested on erroneous legal premises. As such, it was an abuse of discretion requiring reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand with instructions to enter the requested preliminary injunction.

STATEMENT OF RELATED CASES

Pursuant to 9th Cir. Rule 28-2.6, Plaintiffs advise the Court that currently pending before it is *A Women's Friend Pregnancy Resource Clinic, et al., v. Kamala Harris* (Case No. 15-17517, filed Dec. 24, 2015). This case involves a First Amendment challenge to the same law, the Reproductive FACT Act, that Plaintiffs challenge here.

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Dated: January 19, 2016

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Appellants:

1. Complies with the type-volume limitation of Fed. R. App. P. 28.1(e). This brief contains 11,442 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). Microsoft Word 2010 was used to calculate the word count; and

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook type style.

Dated: January 19, 2016

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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 January 19, 2016; I also served it upon the following CM/ECF participants, or by Federal Express if not ECF registered:

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