Docket No. 15-17517

In the

United States Court of Appeals

For the

Ninth Circuit

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC,
CRISIS PREGNANCY CENTER OF NORTHERN CALIFORNIA
and ALTERNATIVE WOMEN'S CENTER,

Plaintiffs-Appellants,

v.

KAMALA HARRIS,
Attorney General, State of California,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:15-cv-02122-KJM · Honorable Kimberly J. Mueller

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Proc. 26.1, there is no parent corporation or other entity owning 10% relative to Plaintiffs-Appellants.

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INTRODUCTION

As its latest move in the highly-charged public debate over abortion, the State of California has ordered religious, pro-life non-profits known as crisis pregnancy centers to join the State's efforts to tell women about the availability of taxpayer-subsidized abortions and contraceptives. California is not the first jurisdiction to attempt such an enactment, and not surprisingly prior efforts have faced constitutional challenges based on the First Amendment's safeguard against compelled speech. The only appellate courts to have considered such directives have found them to be unconstitutional. As the Second Circuit summarized the issue in a remarkably similar case, "[A] law that requires a speaker to advertise on behalf of the government offends the Constitution... ." *Evergreen Association v. New York City*, 740 F.3d 233, 249, 250 (2d Cir. 2014).

The District Court in this case acknowledged that this challenge raised serious First Amendment questions. Moreover, the District Court also agreed that the law would cause the Plaintiffs irreparable harm if not enjoined. But the District Court denied the preliminary injunction because the Court believed the First Amendment concerns were outweighed by public interests and the balance of hardships. This is peculiar, for the State barely addressed these two issues.

The District Court's approach has put this Circuit on a collision course with the Second and Fourth Circuits, and with the Supreme Court's compelled speech

jurisprudence. It was clear error of law for the District Court to sweep aside the heightened First Amendment concerns that attend a Legislature's attempt to coerce pro-life organizations to proclaim a message that directly contradicts their own mission and message.

STATEMENT OF JURISDICTION

In accordance with Ninth Cir. R. 28-2.2, the U.S. District Court for the Eastern District of California has original jurisdiction over this case under 28 U.S.C. §1331, in that the Complaint alleges violations of the United States Constitution actionable under 42 U.S.C. §1983.

This appeal is from an order denying a preliminary injunction, and therefore this Court has jurisdiction pursuant to 28 U.S.C. §1292(a)(1). The District Court's order denying the preliminary injunction was entered on December 21, 2015. Excerpts of Record ("ER") 1-59. Defendants filed a notice of appeal on December 23, 2015. ER 75-76.

STATEMENT OF THE ISSUES

The California Legislature passed Assembly Bill ("AB") 775, which it called the "Reproductive FACT Act." AB 775 requires pro-life crisis pregnancy centers to display or distribute to potential clients a government-prescribed message directing women to contact the county for free or low-cost abortions and contraceptives, among other things. The issues for review are:

1. Whether the District Court erred in determining that the Reproductive FACT Act is narrowly tailored, using the least restrictive [compulsive] means.

2. Whether the District Court erred in determining that in balancing the hardships, the hardships do not tip sharply in the Clinics' favor.

3. Whether the District Court erred in determining that enjoining the Reproductive FACT Act as to the three Clinics is not in the public interest.

4. Whether the District Court erred in determining that the Reproductive FACT Act is a general law of neutral applicability.

STATEMENT OF THE CASE

On October 9, 2015, Gov. Brown signed into law AB 775, known as the Reproductive FACT Act (or "Act"). The Act adds sections 123470 to 123473 to the California Health and Safety Code.

On October 10, 2015, this suit was filed by two of the Plaintiffs in the Eastern District of California. The Plaintiffs filed an Amended Verified Complaint For Declaratory And Injunctive Relief on October 19, 2015, adding a Plaintiff from southern California. ER 333. Defendant, Attorney General Kamala Harris ("Harris"), filed an Answer on November 9, 2015 (ER 320), with one affirmative defense (ripeness). ER 328. A motion to preliminarily enjoin sections 123472 and 123473 of the Act was filed on November 13, 2015. ER 317. Following a hearing on December 18, on December 21, 2015, Judge Mueller issued an Order denying the preliminary injunction. ER 1-59.

On December 23, 2015, Plaintiffs filed their Notice of Appeal with this Court. ER 75-76. On December 28, the Plaintiffs filed an "Emergency Motion To Enjoin Sections 123472 And 123473 Of The Health and Safety Code Pending Interlocutory Appeal Or In The Alternative A Temporary Injunction Until A FRAP 8 Motion Can Be Filed With The Ninth Circuit Court Of Appeals." ER 63. On December 30, 2015, the District Court denied the motion. ER 60. A motion to enjoin the Act as against these Plaintiffs was filed with this Court on December 31, 2015. Document 6. On January 11, 2016, this Court denied said motion. Document 11. A motion to consolidate this case with *Living Well Medical Clinic v. Harris*, (No. 15-17497) was filed on January 8, 2016, by the Defendant. Document 10-1. The motion was denied on January 11, 2016. Document 11.

STATEMENT OF FACTS

On September 3, 2015, the California Legislature passed the Reproductive FACT[1] Act, which imposes speech requirements on "licensed covered facilities." The focus of the bill is crisis pregnancy centers referred to in the legislative history as "CPCs." Committee reports explain:

> According to a 2011 report by the Public Law Research Institute of UC Hastings College of the Law, CPCs are pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.[2]

On or about October 9, 2015, Governor Edmund G. Brown, Jr., signed and submitted the bill to the Secretary of State who chaptered the bill. ER 207. The Act defines a "licensed covered facility" as follows:

> 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:

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[1] FACT is an acronym for *freedom-accountability-comprehensive care-transparency*. Legislative Digest for AB 775. ER 207.

[2] AB 775 Bill Analyses, Senate Rules Committee, June 24, 2015. ER 254, ¶1. Senate Health Committee, June 24, 2015 (ER 261, ¶1); Senate Rules Committee, June 24, 2015. ER 268, ¶1. The committee reports filed by Plaintiffs were not submitted to prove the truth of the matters asserted in said reports. Indeed, Plaintiffs take issue with the representations made therein. Instead, the reports filed merely to go to the motives of lawmakers.

(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 related 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 to collect health information from clients. ER 209

The Act requires that a licensed covered facility shall disseminate to clients on site 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]. ER 209

The disclosure notice for licensed covered facilities requires the notice 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. ER 209-210.

Based on religious convictions, these clinics strongly object to being compelled to speak the messages required by the Act's "disclosure" provisions.[3]

Section 123473(a) of the Act provides that "[c]overed 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 ($1000) for each subsequent offense." ER 210. Under 123473(a), the Attorney General enforces the Act. Said section provides in part, as follows:

> 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 non-compliance, 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).[4] ER 210

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[3] Amended Verified Complaint ("AVC") ¶¶ 25, 32, 39, 49 (ER 341, 343-44, 346, 349).

[4] The Reproductive FACT Act has another notice provision involving unlicensed facilities. Health & Safety Code § 123472(b)(1) ("This facility is not licensed as a

The three Plaintiff-Pregnancy-Centers (collectively "A Woman's Friend") offer, and will continue to offer, to women and girls a variety of high quality medical services at their clinics, such as consultations, pregnancy testing, ultrasound examinations, and medical referrals.[5] They provide education related to sexually transmitted diseases and infections, information regarding abortions and abortion procedures, prenatal education, nutrition information, and fetal development education. They also provide Bible-based post abortion emotional and spiritual healing and recovery courses, and other practical support related to pregnancy.

Each of the CPCs are religious not for profit corporations[6] that do not provide abortion services and do not provide referrals or otherwise give information to girls and women directing them to abortion providers, do not counsel girls and women to obtain abortions, but rather encourage girls and women to consider the options to abortion and the risks and consequences of an abortion.[7] The basis for their position relative to abortion is based upon their religious beliefs and moral convictions. A Woman's Friend holds the biblically-based conviction

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medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.") ER 210. That provision is **not** challenged in this suit.

[5] ER 10-15.

[6] ER 9, 12-13

[7] ER 336-37, 341, 343, 346.

that human life is a precious gift of immeasurable value given by God, and that the taking of innocent human life by abortion is evil and a sin.[8] In light of that, to the extent that the legislative committee reports describing *crisis pregnancy centers* as "pro-life largely Christian belief-based organizations,"[9] such is true as to these three CPCs.

However, A Woman's Friend does not engage in commercial transactions, providing all services and items free of charge.[10] A Woman's Friend receives no governmental funding; all of their funding comes from donations of individuals, local businesses, and churches.[11] Many of the workers and those interacting and serving the clients are volunteers, including but not limited to licensed physicians and registered nurses.[12] In addition to offering pregnancy-related medical services they provide to their clients, A Woman's Friend brings the message of the gospel of Jesus Christ to their clients. Often at the request or with the permission of the client, the volunteer worker prays with the client regarding her situation: requesting God to intervene and provide guidance and assistance.[13]

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[8] ER 341, 344, 346.
[9] ER 254, ¶1, ER 261, ¶1 and ER 268, ¶1.
[10] AVC ¶¶ 9-11 (ER 335-38); Declaration of Tamara DeArmas ("DeArmas decl.") ¶18 (ER 279); Declaration of Carol Dodds ("Dodds decl,"), ¶¶23(6) and 28 (ER 293-94); Declaration of Shelly Gibbs ("Gibbs decl.") ¶22 (ER 304).
[11] AVC ¶¶ 26, 33, 40 (ER 341, 344, 346).
[12] Id.
[13] AVC ¶¶ 9-11, 23, 30, 37 (ER 335-36, 340-41, 343, 345).

A Woman's Friend disagrees with the statement memorialized in the Reproductive FACT Act, the content of which directly contradicts the foundational religious principles upon which these three CPCs operate, as well as the message they convey to their clients regarding abortion.[14] Nonetheless, the State, knowing full well that crisis pregnancy centers are Christian belief-based organizations, affirmatively requires the dissemination of the statement. A Woman's Friend cannot comply with the notice requirement. As a result, these three CPCs are subject to imminent adverse enforcement action against them by the Attorney General. A Woman's Friend has no adequate remedy at law, as the violation of constitutional rights poses imminent injury and irreparable harm.

SUMMARY OF THE ARGUMENT

The District Court properly rejected the first three major premises put forward by the State, namely, that AB 775 was not ripe for review; that it regulated only conduct and not speech; and that, to the extent it concerned speech at all, the law regulated only commercial speech.

The District Court then committed its first major error by determining that the Act regulated professional speech at the midpoint of the continuum described

[14] DeArmas decl. ¶22 (ER 280); Dodds decl., ¶¶30-31 (ER 295); Gibbs decl., ¶24 (ER 304-05).

by this Court in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). This holding was incorrect because the Legislature did not promulgate its mandate as a professional regulation in either form or substance. The mandate applies outside the physician-patient relationship, is designed to prevent the very formation of such a relationship, and is not policed by any professional body but rather by the Attorney General and her local counterparts.

The District Court further erred by failing to properly apply the Supreme Court's holdings on compelled speech, which apply even to professional speech. Under these precedents, compelled speech mandates like AB 775 are content-based restrictions that must be evaluated under *strict scrutiny*. The Act fails under strict scrutiny because there is no compelling interest. Further, even if there were a compelling interest, the Act is not narrowly tailored because it **requires** more speech than necessary. Namely, it does not generally direct women to Medi-Cal or insurance coverage through Covered California in order to provide comprehensive medical care for women. Instead, the law forces CPCs to specifically insert the topic of abortion when pointing women to comprehensive reproductive care.

The District Court acknowledged that AB 775 raised serious First Amendment questions for A Woman's Friend and would cause irreparable harm if not enjoined. The District Court minimized these concerns, however, and wrongly elevated speculative public interests not supported by evidence over the A

Woman's Friend's freedom of speech. The District Court's determination that compelled speech is of less weight than generalized public interests, or hardships to unknown persons, was clear and reversible error.

The District Court further erred by giving short shrift to A Woman's Friend's Free Exercise challenge. The lower court failed to recognize that the Act is not a valid and neutral law of general applicability. Rather, it is targeted at religious, belief-based non-profits precisely because they do not adhere to government orthodoxy on the highly controversial issue of abortion.

ARGUMENT

I. STANDARD OF REVIEW

The District Court's order granting the preliminary injunction is found at ER 1-59. An order granting a preliminary injunction is generally reviewed for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). see also *Yokoyama v. Midland Nat'l Life Ins. Co*., 594 F.3d 1087, 1091 (9th Cir. 2010) ("[A]n error of law is an abuse of discretion"). The court's conclusions of law are reviewed de novo. *Alliance for the Wild Rockies*, 632 F.3d at 1131. "The inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Thus, where the appeal turns on a pure question of law, this Court undertakes "plenary" review of the case without

any deference to the District Court's decision. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc) (citation and quotation marks omitted).

As to the facts, the party challenging a decision based upon facts in the record must that the lower court "based its decision…on clearly erroneous findings of fact." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (citation and quotation marks omitted).

II. THE DISTRICT COURT ACKNOWLEDGED THAT THE STATUTE RAISED SERIOUS FIRST AMENDMENT QUESTIONS AND WOULD CAUSE A WOMAN'S FRIEND IRREPARABLE HARM.

A. The District Court Rejected The State's First Three Major Premises On Ripeness, Conduct And Commercial Speech.

The District Court found common ground with A Woman's Friend in several respects. First, the lower court held that the motion was ripe for review, in light of the imminent effective date and anticipated enforcement of the statute. ER 16-24. Second, the District Court rebuffed the Attorney General's alternative attempt to classify the statute as a regulation of *commercial speech*. ER 27-33. Third, the District Court disagreed with the Harris's claim that the mandates of the Reproductive FACT Act focused on merely conduct and not speech. ER 38. Although these three initial holdings are not being challenged on appeal, they merit at least cursory examination because they are foundational to other, contested holdings of the District Court.

a. The prescribed government text is ripe for injunctive relief and will cause irreparable harm to A Woman's Friend's speech rights if not enjoined.

Harris initially claimed that the Act could not yet be challenged because it had not yet been enforced against A Woman's Friend. ER 143-44. The Attorney General ignored the routine acceptance of pre-enforcement challenges on First Amendment grounds, particularly in the abortion context, and the District Court was right to reject these arguments. ER 16-24. Since the statute has now gone into effect as of January 1, 2016, even less basis exists for second-guessing the District Court on this justiciability holding. Further, Harris raised but one affirmative defense – ripeness – in her Answer. ER 328. It was error for the lower court to entertain other defenses raised for the first time in opposition to the motion for preliminary injunction.

The District Court further found in A Woman's Friend favor on the related issue of *irreparable harm*. These CPCs submitted three detailed declarations (35 pages) in support of their motion for preliminary injunction. ER 271-305. The evidence was without objection. This evidence demonstrated that, absent an injunction, A Woman's Friend would be compelled to promote a government message that contradicts their own deeply-held religious beliefs. In contrast, the Attorney General provided no evidence to rebut that proffered by A Woman's

Friend. Considering the uncontested evidence, the District Court correctly held that this coercion would constitute irreparable harm. ER 54-56. As such, on appeal Harris has the burden to show "clearly erroneous findings of fact" if she contests that A Woman's Friend suffered irreparable harm. *Stormans*, 586 F.3d 1119.

b. The prescribed government text is not commercial speech.

The District Court further agreed with A Woman's Friend that the government text mandated by the Act cannot be properly characterized as *commercial speech*. Both, the Attorney General and A Woman's Friend agreed that the starting point for a commercial speech analysis is determining whether the restriction concerns "expression related *solely* to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (emphasis added). Stated another way, commercial speech is "speech which does 'no more than propose a commercial transaction.'" *Va. Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748, 762 (1976), quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1976).

A Woman's Friend's services and speech are unquestionably offered in furtherance of their religious nonprofit ministries.[15] The District Court thus declined the Attorney General's invitation to recast the religious ministry of A Woman's Friend as commercial speech. As a finding of fact, the lower court determined that A Woman's Friend is engaged in noncommercial speech. ER 29-33. In view of the extensive declarations provided by A Woman's Friend, the District Court was well within its discretion to make that finding.

Not finding the authority it needed in commercial speech jurisprudence, Harris urged the District Court to venture far afield to Commerce Clause cases. A Woman's Friend is aware of no authority that has suggested the Commerce Clause is relevant to commercial speech, and this Court should follow the trial court's approach of declining to adopt such a holding.

Nor does Harris's attempt to re-cast the mandates of AB 775 as merely informational, when the abortion debate is undeniably ideological, transform the mandate into commercial speech. Compelled statements – whether of opinion or fact – burden protected speech. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 797-798 (1988).

Forcing a pro-life ministry to advertise the availability of taxpayer-subsidized abortion is hardly non-controversial or purely factual. *Zauderer v.*

[15] Dodds decl. ¶3 (ER 282-83); DeArmas decl. ¶19 (ER 279).

Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985). The court in *Evergreen* determined that this type of government message is the center of a public debate over the morality and efficacy of abortion. *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 249 (2014). To require that a religious pro-life CPC point women to cheap or free abortions is incendiary. Expression on a public issue has always hung on the highest run of the hierarchy of First Amendment values. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982).

Compelled statements of fact and compelled statements of opinion are both suspect, and often inseparable. *Riley v. National Federation of the Blind of NC*, 487 U.S. 781, 797-98 (1988). "Purely factual matter of public interest may claim protection." *VA State Bd. Of Pharmacy v. VA Citizens Consumer Council*, 425 U.S. 748, 762 (1976). The availability of inexpensive abortions from the government is a matter of public interest. *Bigelow v. VA*, 421 U.S. 809, 822 (1975) The advertisement in *Bigelow* was equivalent to the notice at issue here. "Abortions are now legal in New York. There are no residency requirements." Id.

The mandate found in the Act is not mere factual information. It pertains to constitutional interests. Hence a high level of legal review is called for. Id. For these reasons, the District Court correctly determined that commercial speech was not at issue.

c. The prescribed government text is not conduct.

The District Court further resisted the Attorney General's urging to avoid the First Amendment by classifying the mandated signage as *conduct* and not speech under *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). In *Pickup,* this Court determined that counseling by mental health providers could be deemed "treatment," akin to other medical treatment, and therefore not analyzed under the usual First Amendment frameworks. *Id.* at 1229, 1232. The District Court recognized that there was no logical way to define the signs here, that have no life of their own and unquestionably communicate a certain message, to be non-speech. *Accord, Wollschlaeger v. Gov. of Fla.*, 2015 U.S.App.LEXIS 21573 at *59-65 (11th Cir. Dec. 14, 2015) (explaining difference between anti-discrimination provision regulating conduct and record-keeping, inquiry and harassment provisions which must be analyzed as speech). The District Court did, though, find other aspects of *Pickup* relevant, as will be discussed next.

B. The District Court Erred By Categorizing The Prescribed Government Text As Professional Speech.

While the District Court could not swallow the Attorney General's preferred approach of re-casting the mandates of AB 775 as merely conduct or commercial speech, the Court did classify it under *professional speech*.

A number of problems arise with this approach. First, the Legislature did not promulgate the Act as a professional speech regulation. Enforcement is not vested with a professional oversight body, such as the Medical Board, but with the Attorney General and her counterparts at the local level. *Cf., Wollschlaeger* (restrictions on doctors' questioning patients as to firearms was disciplinary rule enforced by Florida Board of Medicine). Nor is the mandate housed in the Business & Professions Code, or anywhere else one might expect to find a professional regulation.

a. The Act does not purport to regulate professionals.

The Act addresses clinics licensed under section 1204 of the Health and Safety Code. What the Act does not regulate is a professional. Harris and the District Court attempt to skirt this problem by conflating regulation of a venue or enterprise with the regulation of a physician or nurse. A review of the face of the text shows that no professional is actually being regulated.

"Under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment."). *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013)

i. The statutory scheme for licensing a medical professional and a medical facility are located in different parts of the Code.

The District Court overlooked the fact that licensure of a professional medical license and a medical clinic are dealt with by entirely different statutory schemes. The statutes setting forth the definition, qualifications, licensure, and governance of physicians is found in California's Business and Professions Code section 2000 et seq. Physicians are governed by the California Medical Board. The Medical Board also regulates osteopathic physicians (sec. 2099.5, et seq.), midwives (sec 2505, et seq.), psychoanalysts (sec. 2529, et seq.), registered dispensing opticians (sec. 2550, et seq.), and polysomnographic technologists (sec. 3575, et seq.). Nurses are generally licensed and governed by the Board of Registered Nursing. Bus. & Prof. Code § 2701. It is crucial to note that the Medical Board and the Board of Registered Nursing are part of the Department of Consumer Affairs, whose Director is Awet Kidane.[16]

In contrast, medical clinics are **not** governed by the Department of Consumer Affairs. Medical clinics fall under the jurisdiction of the Department of Public Health, whose Director is Karen Smith.[17] These are licensed under Health and Safety Code & 1200, et seq., and not the Business and Professions Code.

[16] http://www.dca.ca.gov/about_dca/leadership.shtml (accessed January 14, 2016).
[17] https://www.cdph.ca.gov/Pages/KarenSmithWelcome.aspx (January 14, 2016)

Clinics must apply to the California Department of Public Health and must comply with a series of licensing requirements to provide supervised medical care.

The Act covers clinics licensed under Health & Safety Code §§1204 and 1206. But the Act provides no directives to a medical professional. e.g., a physician or nurse. Hence, the District Court erred by viewing the law as a regulation of professional speech. Professional regulation involves government enactment of generally applicable licensing provisions limiting the class of persons who may practice the profession. *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181, 228, 232 (1985) (White, J., concurring).

"[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client… ." *King v. Governor of N.J.*, 767 F.3d 216, 231 (3d Cir. N.J. 2014) quoting *Moore-King v. County of Chesterfield, Va*, 708 F.3d 560, 569 (4th Cir. 2013).

ii. The Legislature purposefully excluded the speech mandate from "the confines of a professional relationship."

The District Court placed AB 775 at the midpoint of the *Pickup* continuum. In so doing, it misapprehended not only the relevant statutory scheme, but this Court's description of that point as governing speech "within the confines of a

professional relationship." *Pickup*, 740 F.3d at 1229 . Here, the Legislature instead applied the mandate *before* a visitor to a CPC can meet a professional or form a professional relationship. The State is imposing its speech mandate in an area of the clinics where women will first encounter a receptionist, not a physician. *Cf. Wollshlaeger,* at *98-106 (restriction on doctors' speech related "almost exclusively" to discussions in examining rooms where patient was a "captive audience"). Equating the waiting room with an exam room, or a receptionist with a physician, stretches the professional speech doctrine beyond its limits.

b. The speech mandate, divorced from a professional relationship or procedure performed at the CPC, is unlike informed consent or medical disclosures.

The Legislature's approach here is also markedly different than disclosure or informed consent mandates routinely placed on doctors and approved in decisions such as *Planned Parenthood of SE. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality).

The speech at issue here does not involve a physician providing specific information about a medical procedure prior to its performance. Id. See also, *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889 (8th Cir. 2012); *Tex. Med. Providers Performing Abortion Svcs. v. Lackey*, 667 F.3d 570 (5th Cir. 2012)

(upholding requirements of showing and describing sonagram and fetal heartbeat to a woman contemplating abortion).

The plurality in found a speech requirement for a physician constitutional when a "doctor give[s] specific information about any medical procedure." *Casey*, 505 U.S. at 884. Of course, CPC's do not perform abortion at all, which is exactly why abortion activists and their mouthpieces in the Legislature despise CPC's. Creatively re-labeling coerced advertising for the opposition as "informed consent" or "disclosure" does not work. Even informed consent statutes have been invalidated on compelled speech grounds when they are ideological, as was decided in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) cert. denied sub nom. *Walker-McGill v. Stuart*, 2015 WL 1331672 (U.S., June 15, 2015, 14-1172) (striking down provisions requiring sonagram and related disclosures to women contemplating abortion).

The District Court significantly enlarged, rather than merely applying, the scope of "professional speech" to encompass an entire facility, independent of the professional's actual involvement. This extension is out of step with the Supreme Court's approach to either professional speech or commercial speech. The District Court's unwarranted expansion of professional speech, to the detriment of more established doctrines condemning compelled speech, was clear error and must be corrected.

III. THE PROPER STANDARD FOR CONTENT-BASED COMPELLED SPEECH IS STRICT SCRUTINY.

While the District Court applied the wrong legal standard by calling the Act a professional speech regulation, ultimately classification as professional or even commercial speech would not save the mandate, because it remains content-based compelled speech subject to strict scrutiny.

"[A] State cannot foreclose the exercise of constitutional rights by mere labels." *Bigelow v. VA*, 421 U.S. 809, 826 (1975) See also, *Pacific Gas & Elec. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986) (subjecting to strict scrutiny and striking down compelled commercial speech). And in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), this Court noted that "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" 309 F.3d at 637 (internal citations omitted). Indeed, the leading case condemning compelled speech, *Riley*, discussed in more detail below, was a regulation of professional fundraisers. The Supreme Court specifically avoided delving into commercial or professional speech, instead subjecting the regulation to strict scrutiny as compelled speech.

A. Compelled Speech Is Content-Based And Highly Disfavored.

The District Court acknowledged the relevance of Supreme Court precedents strongly condemning compelled speech, including *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) (ER 18, 26, 28, 31-33) and *Hurley v. Irish–American*

Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). ER 32.

Under this line of authority, the free speech clause "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Free speech inherently involves the decision as to what not to say. *Hurley*, 515 U.S. at 573 (internal citations and quotations omitted).

The First Amendment stringently limits the government's authority to compel a private party to express a view with which the private party disagrees. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Thus, the First Amendment mandates the presumption that private citizen speakers – not the government – know best both what they want to say and how to say it. *Riley*, 487 U.S.at 782.

The Legislature admits, as it must, that AB 775 is content-based.[18] The statute mandates that the pro-life centers inform clients of the availability of free or low cost abortions and, by using the imperative verb *contact*, directs clients to government entities that can determine if clients qualify for the abortions.

On their own, these three CPCs before the Court would not communicate the message mandated by the Act. "Mandating speech that a speaker would not

[18] See the discussion under the heading FIRST AMENDMENT DOCTRINE: COMPELLED SPEECH in the AB 775 Bill Analysis, Assembly Committee On Judiciary, April 28, 2015. ER 226-27.

otherwise make necessarily alters the content of the speech." *Riley* , 487 U.S.at 795 (1988). Put simply, this compelled speech is content-based.

B. The Second And Fourth Circuits Have Strongly Condemned Compelled Speech Mandates On CPC's.

The District Court also noted the relevance of decisions in the Second Circuit and Fourth Circuit striking down regulations very similar to the Act. *Evergreen Ass'n v. City of N.Y.*, 801 F.Supp.2d 197 (S.D.N.Y. 2011), *aff'd in part, vacated in part*, 740 F.3d 233 (2 Cir. 2014), *cert. denied*, 135 S.Ct. 435 (2014); *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804, 814 (D. Md. 2011), *aff'd sub nom. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012), *aff'd in part, vacated in part en banc*, 721 F.3d 264 (4th Cir. 2013); *cf. Centro Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 464 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012), *aff'd en banc sub nom. Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184 (4th Cir. 2013). ER 23-24, 31-32, 45-47.

In *Evergreen Ass'n*, the Second Circuit invalidated, on compelled speech grounds, provisions of a New York City ordinance that, like the Reproductive FACT Act, required pro-life pregnancy clinics to point women toward abortion. The court upheld only a provision requiring disclosure of whether the clinic had licensed medical staff, which mirrors a separate provision of AB 775 not

challenged by A Woman's Friend. The Second Circuit hedged its bets by holding that the mandates could not survive either strict or intermediate scrutiny.

Meanwhile, the Fourth Circuit struck down compelled speech signage requirements at pregnancy clinics in *Greater Balt. Ctr. Inc. v. Mayor & City Council of Balt.*,721 F.3d 264 (4th Cir. 2013). (On remand, the District Court did the same in *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) and 5 F. Supp. 3d 745 (D.Md. 2014) (on remand).

C. Compelled Speech Is Not Cured By Allowing The Speaker To Contradict Himself.

The District Court believed that, notwithstanding the compelled nature of the government script, its effect could be offset by A Woman's Friend's counter-speech. "Plaintiffs remain free to advocate their viewpoint, or even to communicate disagreement with the Act or required notice. The Act does not seek to suppress a disfavored message." ER 43:24-26. This reasoning has been thoroughly rejected by the Supreme Court, perhaps most pointedly in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (describing the counter-speech argument as begging the question). More recently, and in the abortion context specifically, "That a doctor may supplement the compelled speech with his own perspective does not cure the coercion." *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014).

D. The Reproductive FACT Act Is Subject To Strict Scrutiny.

A content-based speech regulation is presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Unlike other laws, courts decline to give the benefit of the doubt to the government when reviewing a content-based prohibition or compulsion of speech. Such laws must pass through the crucible of strict scrutiny.

The notion that content-based laws regarding commercial or professional speech may receive a lesser standard of review is now dead. Just under a year ago, the U.S. Supreme Court buried that doctrine and wrote this epitaph. "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." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). In *Reed* a municipal sign code "governing the manner in which people [could] display outdoor signs" was struck down as violative of the Free Speech Clause. To underscore its argument, the *Reed* Court specifically pointed to a case (*NAACP v. Button*) involving regulation of professionals.

> Although *Button* predated our more recent formulations of strict scrutiny, 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 *NAACP v. Button*, 371 U.S. 415, 438-439 (1963).

Likewise, the *Reed* Court also dealt a mortal wound to the idea that a lesser standard of review is applicable for commercial speech. The sign ordinance granted greater expressive rights to "ideological signs" (defined in part as "noncommercial") than other signs. *Reed*, 135 S.Ct. at 2224. The view that commercial speech should receive a different level of review than strict scrutiny was raised but garnered just three votes. *Reed*, 135 S.Ct. at 2235 (Kagan, J., concurring in judgment).

Barely six months after the death of the lower level of review for professional speech, lawmakers in Sacramento – and the Attorney General – seek to resuscitate the distinction between professional or commercial expression and "ordinary" speech. But the death certificate for differentiating between categories of speech has been issued. The law is now settled that the government must bear the heavy burden of justifying content-based restrictions by demonstrating a compelling state interest, narrowly tailored, using the least restrictive means.

Since the Act compels the content of speech, it is presumptively unconstitutional and the burden shifts to the government to prove that the law is justified by a compelling state interest that is narrowly tailored and uses the least restrictive means. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 395; *see also,*

Conant, 309 F.3d at 637-638 (content-based restrictions are presumptively invalid).

Regulations targeting viewpoint are an especially egregious form of content-based discrimination. *Id*. at 637. An unmistakable indicator that speech has been targeted is official disagreement with the underlying views and perspectives of the speaker. *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 829 (1995). "There must be no realistic possibility that official suppression of ideas is afoot." *R.A.V. v. St. Paul*, 505 U.S. at 390. Here, the Legislature's contempt for CPC's leaps out of the legislative history, rendering the Act not only content but also viewpoint-based, and highly unlikely to survive.

IV. THE DISTRICT COURT ERRED BY SUBSTITUTING HYPOTHETICAL HARDSHIPS AND PUBLIC INTERESTS FOR THE LEAST RESTRICTIVE, COMPELLING INTERESTS THAT WERE REQUIRED.

The District Court, though agreeing A Woman's Friend had met the first two elements of the injunction standard, took a divergent path as to the latter two elements of *public interest* and *balance of hardships*. Although the Attorney General offered no evidence and very little argument on these points, the District Court chose to make this the cornerstone on which its decision rested.

In so doing, the District Court both failed to apply strict scrutiny for compelled speech, and it gave inordinate weight to a generalized public interest

and speculative hardships. Because these errors overlap, they will here be considered together.

A. Informing Women About The Expansion Of Medi-Cal May Be In The Public Interest, But It Is Far From A Compelling Interest That Would Justify Coerced Participation In Government Propaganda.

The District Court found that "the State has…shown a strong interest in providing public health…[to] the California women who seek services from plaintiffs." ER 57:21-22. As noted above, *Bigelow* and *Bolger* explained that information about the availability of abortions is in the public interest. But it is fallacious to hold, as did the District Court, that the public interest preventing the government from banning information about abortion now requires CPC's to promote abortion.

The notion that "access" can require a speaker to print or proclaim views opposite to his own was unanimously rejected in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. at 247-48, 254, 256-57. The District Court had no authority to resurrect this discredited proposition. The *Miami Herald* court reasoned that a government-enforced right of access actually dampens, rather than increasing, the right of public debate. *Id.* at 257.

In the name of access, the State may limit expressive activities like actively blocking the entrances to abortion clinics. *See, e.g., Hill v. Colorado*, 530 U.S. 703

(2000). It does not follow that the government could further require such protestors to not only refrain from blocking abortion clinics, but carry signs praising the clinic they are opposing.

Lost on the District Court is the reality that *Casey*, and more recently *Gonzales v. Carhart*, 550 U.S. 124 (2007), emphasized that one of the three central principles undergirding *Roe* is the State's interest in protecting potential life in the womb. CPC's serve this compelling public interest, and the *Casey* framework cannot exist without it. It was clear error for the District Court to identify only the public interest in abortion information without the counterbalance of the important public interest in protecting life. It was further error for the District Court to fuse the State's own interest in providing information with a wholly unprecedented interest in forcing objectors to proclaim its message.

B. The State chose a most repressive, not least restrictive, means of achieving its interest.

Even where the Court accepts that the government may have a compelling interest in providing services like contraceptives to women, as the Court did arguendo in *Hobby Lobby Stores, Inc. v. Burwell*, 134 S. Ct. 2751 (2014), the Attorney General cannot overcome the least restrictive means aspect of the test.

Restrictions on speech must be a last resort, not a first resort. *Conant*, 309 F.3d at 637. The State can promote its own message very effectively through

utilization of its own vast resources, as well as selective funding and restrictions on the speech of those it chooses to fund.

Local governments have already been permitted, for instance, to restrict advertising on municipal buses to exclude pro-life messages. *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998). Not content with controlling its own, considerable advertising channels and space, the government now takes a very large step outside of its own buildings and seeks to commandeer the wall-space of private religious non-profits as well. This is not the least restrictive means; it is the most onerous. The notion, put forward here, that these three CPCs can simply counter the government message with one of their own is remarkable in that it was thoroughly rejected in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. at 256-57.

a. The District Court turns government-required speech in exchange for receipt of government-money on its head.

The District Court's holding as to state funding fares no better. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court made clear that governmental funding on controversial issues like abortion is a powerful medium through which the government speaks. The District Court flatly disagreed with the Supreme Court's assessment.

[T]he less restrictive alternative means proposed by plaintiffs would

> likely not be as effective in achieving the statute's purpose. Plaintiffs first suggest the State could use selective funding to give clinics incentives to make the notice, but it is not clear the State would be able to disseminate the information as widely through selective funding. For example, plaintiffs do not receive governmental funding and their position suggests government funding would not be an effective method of persuading them to disseminate the notice. ER 44:18-24.

In other words, if a non-profit religious group declines government funding, wary of the strings attached to such funding, under this holding the State may simply dispense with the funding ploy and tie up the entity with direct mandates. In the process, A Woman's Friend not only forgoes government funding, but loses their liberty interests in free speech.

b. The State may not burden the speech of others in order to tilt public debate in a preferred direction.

The government violates liberty of conscience of private actors by coercing them to present the state's message in order to gain leverage in public debate. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011). *See, also, Harris v. McRae*, 448 U.S. 297 (1980).

The District Court badly misconstrues *Rust*. No other court in the country has judo flipped the concept of government speech or funding like the District Court, confusing "least restrictive" with "most effective." Of course it would often be more effective for the government to promote its preferred message by getting someone else to repeat it. Intuitively, messages are usually more effective when

conveyed by a trusted friend, family member or professional than by a nameless, faceless government entity. This absolutely does not mean the government can co-opt private citizens, or private entities, to parrot its message whenever the government feels that would be more persuasive than speaking the message itself. "[A] State's failure to persuade does not allow it to hamstring the opposition." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011).

In sum, the District Court reduced the least restrictive means test to merely a question of how the government can most effectively cajole, co-opt and coerce its citizens. This was serious error.

C. The Notice Compels More Speech Than Is Necessary To Advance The Government's Interest.

The claimed interest of the State is to make women aware of the expanded free or low cost health care options available to them, particularly in light of the Affordable Care Act. The Attorney General's Brief in opposition to the motion for preliminary injunction explains as follows:

> The Act was based on findings 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. See Assem. Bill No. 775, § 1(a)-(d) [ER 207-08]. This is particularly true in light of the expansion of the Affordable Care Act, which made millions of Californians— more than half of them women—newly eligible for services provided through the Medi-Cal program. See Plaintiffs' Motion, Exhibit 6, p. 4. [ER 254]

ER 157:23 to 158:2.

In order to meet narrow tailoring, a law cannot "[compel] more speech than necessary" to carry out the government's interest. *Long Beach*

Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1023 (9th Cir. Cal. 2008), *see* also, *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990). A brief explanation is necessary about insertion of the word *compel* in the prior sentence. Although most free speech cases involve the some form of alleged government censorship, the analysis for compelled speech works the same. *Wooley*, 430 U.S. at 714. Hence, it is proper to swap *prohibit* or *restricts* (speech) with *compels* and *requires* (speech) in quotes from judicial opinions dealing with the right to free speech.

Here the District Court erred by determining that "[t]he required notice provides no more compelled speech than is necessary to convey the desired factual information." ER 43:17-18. In truth, the notice addresses abortion. In contrast, a notice that merely directed women to Medi-Cal or Coverer California to take care of **all** health care needs rather than the specific information relative to abortion would have met the States claimed interests of making women aware of medical resources. Of course, "comprehensive publically funded family planning services and pregnancy related care" (ER 56) is but a small part of healthcare. The medical

needs of California's women would be far better met with information about comprehensive medical care rather than merely comprehensive family planning. In sum, the notice fails narrow tailoring and least *compulsive* means by requiring CPCs to utter more details than is necessary to achieve the State's ends.

The notice is not simply purely factual information devoid of social or civic interest. The decisions in *Bigelow* and *Bolger* stand for the proposition that when speech involves reproductive issues (i.e., abortion, contraception and the like) then such has high levels of protection under the First Amendment. Here the notice is within the broader topic of the public debate over the morality and efficacy of abortion. *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 249 (2014). One need only look to the legislative history's list of supporters and opponents of the bill – along with their arguments – to grasp that the Act represents another move between competing ideologies as they wrestle over abortion.

D. The State's Chosen Method Of Coercing CPC's Is So Attenuated To Its Stated Goals That It Cannot Survive Even A Lower Level Of Scrutiny.

While compelled speech requires the compelling interest test, even a lesser standard poses significant problems for the State. In *Evergreen Ass'n v. City of New York* the Second Circuit found "under either [strict or intermediate] review, the Government Message and Services Disclosure fail… ." *Id.*, 740 F.3d 244.

Similarly, even a low level of scrutiny cannot save AB 775, in light of the extraordinarily poor connection between its asserted ends and the means chosen to effectuate those ends.

The Legislature asserts that the expansion of the federal Affordable Care Act has made millions of women newly eligible for Medi-Cal. ER 215, 238, 247, 253, 267. The implication is that the Reproductive FACT Act simply informs women that they may be eligible for Medi-Cal. The state already directs residents to Covered California,[19] a program which assists the public in signing up for a variety of health insurance options. Indeed, it is undisputed that A Woman's Friend directs clients to Medi-Cal, county public health services and the like. ER 301.

As noted above, the State insists that the expansion of Medi-Cal via the Affordable Care Act necessitates the mandate of AB 775. But the Act's signage is not a referral to Medi-Cal to pay for general medical services. Instead, the Act intentionally speaks to "comprehensive family planning services." This includes abortions which the A Woman's Friend views as sinful. If the intent of the notice is to connect women with medical insurance coverage for their medical needs, the text of the notice does not accomplish that purpose. It does not notify these three

[19] Each year the State spends well in excess of $100 million for marketing, outreach, public relations, and like activities. See, *2014-15 Covered California Budget* http://bex.coveredca.com/financial-reports/PDFs/2014Budget.pdf (accessed Dec. 8, 2015). ER 128

CPCs clients that they should contact Covered California. At best, it would launch them onto a circuitous path to Medi-Cal.

At bottom, the mandate is not really about connecting women to free medical services; as the Legislature knew, CPC's already provide free pregnancy-related services.[20] Indeed, they are free clinics by operation of law. Health & Safety Code §1206.

Next, Harris claims in her opposition to a preliminary injunction that the Legislature recognized that "pregnancy decisions are time sensitive and care early in pregnancy is critical. Thus, women need to be notified of available resources as soon as possible." ER 153:4-6 (Ct. Doc. 16). Yet, of the "resources" euphemistically referenced by the State and the mandate, prenatal care is already provided by the CPC's (ER 288-90, 292-93; Dodds decl. at ¶¶15-17, 19 and 23). Except for abortifacients, pregnant women are past the point of needing "FDA-approved methods of contraception," and CPC's will already refer them to Medi-Cal. This leaves only abortion as the interest the State is really advancing. The circuitious path taken by the Act toward this end is not narrowly tailored or even rationally related to the State's interests. As explained in *Casey*, the State does not have an interest only in promoting abortion, but a balanced interest that also includes protecting life in the womb. This latter, indispensable aspect of the State

[20] ER 215, 224, 226-27, 255, 269.

interest is not achieved at all by AB 775.

E. In the balance of hardships, hypothetical harms are heavily outweighed by actual harms.

The balance of hardships and public interest inquiries should not be close calls. A concrete interest and an ethereal interest are not of comparable weight, any more than a feather is comparable to a stone. It was therefore clear error for the District Court to deny preliminary injunctive relief on these latter two elements.

As an initial matter, in the section of the lower court's order on balancing the hardships, the District Court did not cite to a single fact in the undisputed record presented by A Woman's Friend. ER 56-57. The District Court only cited to Harris's Opposition Brief which merely references the text of the bill (AB 775). Id. What is worse, in analyzing the public interest, the District Court did not cite to a solitary fact in the record filed by either party. *See*, ER 57-59. In these fact-sensitive inquiries, it is self-evident that completely ignoring the facts constitutes error.

Looking at the respective evidence produces by both sides, the District Court's decision to elevate an ill-defined public interest in information above the significant First Amendment right against compelled speech, in an ideologically-charged context, was unprecedented and untenable.

Before the Court are three clinics whose speech will be compelled and whose beliefs will be violated by the mandates of the Act. On the other side of the scales, the State cannot identify a single person who has been harmed by A Woman's Friend's exercise of its First Amendment rights, or a single person who will be suddenly harmed as of January 1 by entering one of the three clinics without seeing the newly-prescribed State-mandated signs. Indeed, there is zero evidence as to what effect the presence or absence of the signs will have on anyone other than the clinics required to post them.

It was a clear error of law for the District Court to hold that the particularized injury to A Woman's Friend's First Amendment freedoms must yield to the speculative harm the District Court believes might inure to unknown persons at unknown times.

Predictive judgments by the Legislature about potential harm does not satisfy the strict scrutiny standard as a matter of law. *Brown v. Entertainment. Merchants' Ass'n*, 131 S.Ct. 2729, 2739 (2011). Nor can reliance on supposed societal costs. The State's balancing act is reminiscent of the sobering premise of the federal government in an animal cruelty depictions case. In its brief, lawyers for the Government attempted to create a new test for speech that invoked a "balancing of the value of the speech against its societal costs." The Supreme

Court hit the brakes hard. "As a free-floating test for First Amendment coverage, that sentence is startling and dangerous." *Stevens*, 130 S.Ct. at 1585.

Thus, speculation and hypothetical societal costs do not tip the hardship scales, for purposes of the preliminary injunction inquiry, in the State's favor. Even when members of the public affected by an injunction are more readily ascertainable than they are here, a religious ministry's right not to fund contraceptives or abortion outweighs employees' rights to force the employer to do so on their behalf. See, e.g., *Eternal Word TV Network v. Secy. Of HHS*, 756 F.3d 1339 (11th Cir. 2014).

V. THE DISTRICT COURT ERRED BY HOLDING THAT A WOMAN'S FRIEND WAS UNLIKELY TO SUCCEED ON THEIR FREE EXERCISE CLAIMS.

The District Court, while agreeing that A Woman's Friend's speech claims raised "serious questions" and irreparable harm requiring further analysis, determined that A Woman's Friend was unlikely to succeed on the Free Exercise claim.

The Supreme Court's jurisprudence of the last quarter-century has most often asked first whether a challenged statute is a valid and neutral law of general applicability. Merely classifying a prohibition as involving medical treatment or promoting health and safety does not mean a regulation will survive. In *Central*

Rabbinical Cong. Of the United States v. New York City Dept. of Health and Mental Hygiene, 763 F.3d 183 (2d Cir. 2014), the Second Circuit looked beyond attempts to cast a restriction on circumcision as simply a medical regulation. In light of the religious significance of circumcision, that court viewed the regulation skeptically and ultimately struck it down as not being truly neutral and generally applicable as required by Free Exercise.

A. A Woman's Friend Should Prevail Under The *Smith-Lukumi* Framework.

From its inception, the Act was intended to rein in religious non-profits expressing beliefs with which the State disagrees, and declining to promote practices like abortion which the State advocates.

The two gateposts of the Free Exercise avenue are generally regarded as *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1992) (*Smith II*) and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Crucial to understanding the two ends of the Free Exercise spectrum is assessing whether the challenged regulation responds to a perceived evil that is religious in nature, or whether a religious practitioner is complaining about a restriction that was enacted for wholly separate reasons and likely did not even contemplate his conscientious conflict.

In *Smith II*, the criminal statute at issue was so broad, and so disconnected from religious motivation, that the Court at first was unsure the prohibition even applied to the religious conduct in question. The Court thus remanded the case to the Oregon Supreme Court to determine whether the statute had been applied erroneously to the Petitioners. *Employment Div., Dept. of Human Res. v. Smith*, 485 U.S. 660, 673-74 (1988) (*Smith I*). After the Oregon Supreme Court confirmed that there was no statutory exemption, sweeping in sacramental peyote use with the broader criminal prohibition, the Supreme Court articulated its doctrine that neutral laws of general applicability need not be justified by a compelling state interest.

Unlike AB 775, in *Smith II* it was not even contended that the challenged law was an attempt to regulate religious entities or the communication of their beliefs. *Smith II*, 494 U.S. at 882.

B. Religion Is Anything But Incidental To Those Seeking To Regulate CPC's.

"Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of Lukumi Babalu Aye*, 508 U.S. at 534.

The conflict between the mandates of AB 775 and religious values was not an afterthought, nor was it an unintended consequence, as has been the case with

most other laws deemed to be neutral and generally applicable. Rather, lawmakers in Sacramento suffered from no confusion as to the religious values that motivate CPC's.[21]

C. Other Free Exercise Authorities Do Not Lead To Different Conclusions.

This Court's most recent foray into Free Exercise illustrates the limits of the traditional approach to the present case. In *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), this Court followed *Smith II* and resisted a challenge to pharmacy rules in Washington. The Court, however, emphasized the accommodations available to individual pharmacists and the onus of the rule being on the for-profit businesses. In the present case, there is no such safe harbor for CPCs, as the Legislature knew.

The Reproductive FACT Act focused on CPC's which are primarily religious entities. As evidence, A Woman's Friend requested the District Court to take judicial notice of the legislative history. The request was granted. ER 16. The uncontested evidence is that lawmakers pointed an accusing finger at CPCs finding

[21] AB 775 Bill Analyses, Senate Rules Committee, June 24, 2015 (ER 254, ¶1); Senate Health Committee, June 24, 2015 (ER 261, ¶1); Senate Rules Committee, June 24, 2015 (ER 268, ¶1).

them "pro-life (largely Christian belief-based) organizations."[22] Because that factual assertion is taken directly from the legislative history and nothing was proffered in dispute, the Attorney General concedes that fact.

In contrast is *Stormans*. There the State of Washington was able to cite to decades of statutes that required pharmacies to carry a broad range of medicines. Here California cannot cite decades of laws mandating that pro-life advocates promote a pro-abortion message. Instead, there have been decades of ideological struggles between those promoting abortion and those promoting life. The mandate arose precisely because of the religiously-motivated practices condemned by the Legislature.

Further, the insistence of Washington that its rules were necessary to ensure access to pharmacies is juxtaposed to California's attempt to deter women from visiting the CPC's offering much-needed assistance to pregnant women, particularly low-income women. Quite simply, the State here does not want women to be exposed to pro-life religious beliefs and messages that it believes are not good for them. The State's hostility to these religious beliefs is barely masked and is more akin to the political hostility that prompted – and ultimately doomed – the restrictions in *Church of the Lukumi Babalu Aye*.

[22] Id.

The Legislature has left no doubt that it was targeting CPC's precisely because of – not in spite of – their religious motivations and messaging. The District Court therefore erred by holding A Woman's Friend was unlikely to succeed on this claim.

CONCLUSION

The Reproductive FACT Act is an extraordinary speech mandate calling for the extraordinary remedy of a preliminary injunction. The District Court recognized that this challenge presented serious constitutional questions, and the mandate would cause irreparable harm to the three CPCs before this Court. Although the District Court rejected the Attorney General's first three major premises, the Court broke new ground by classifying the speech mandates of the Act as professional speech regulations. The District Court then committed serious error by applying a lower level of scrutiny to compelled speech than does the Supreme Court. The District Court also departed from directly contrary holdings of the Second and Fourth Circuits. The District Court committed separate, serious error by giving short shrift to A Woman's Friend's Free Exercise claims. It is

therefore essential that this Court restore the First Amendment balance and reverse the denial of preliminary injunctive relief.

Date: January 19, 2016

_/s/_Kevin T. Snider

_/s/_Matthew B. McReynolds

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 14-point Times New Roman type.

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I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words. According to Microsoft Word's "Statistics," this document contains 10.355 words.

January 19, 2016 _/s/ Kevin Snider_____

Kevin T. Snider

STATEMENT OF RELATED CASES

Living Well Medical Clinic v. Harris, (No. 15-17497), challenges the same law and is also on appeal to his Court. A motion for consolidation was filed by the Attorney General, and properly denied. There are significant factual distinctions between that case and the present, and the District Courts utilized different analytical frameworks. However, the cases are calendared together.

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2016, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent