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)

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INTRODUCTION

Appellees-Defendants do not dispute three critical components of Plaintiffs' free speech challenge against the Reproductive FACT Act ("Act"): (1) the Act *compels* speech; (2) the Act compels *speech*; and (3) the Act dictates the *content* of that speech. Defendants maintain, however, as did the district court below, that because the Act allegedly compels professional speech and regulates commercial speech, the Act passes constitutional muster under relevant levels of scrutiny. Defendants, as well as the lower court, are incorrect.

The Act regulates neither professional speech nor commercial speech. It is an effort by the State of California to conscript pro-life pregnancy centers to speak a message on the government's behalf and against their will and religious convictions. The lower court, relying on erroneous legal standards, erred in denying Plaintiffs a preliminary injunction and this Court should reverse.

ARGUMENT

I. THE LOWER COURT ERRED IN APPLYING A "MORE RIGOROUS" OR "PARTICULARLY HEAVY" STANDARD TO PLAINTIFFS' PRELIMINARY INJUNCTION MOTION.

While 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), and 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), where the district court's decision is based on an erroneous legal standard, this Court has held that it "necessarily abuses its discretion." *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).

In other words, this Court's "deferential" review of the lower court's decision begins with a determination of whether or not the lower court "got the law right." *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Lands Council v. McNair,* 537 F. 3d 981, 986 (9th Cir. 2008) (en banc)). If the district court didn't, this Court must reverse. If it did, and if its fact findings were not clearly

erroneous, this Court affirms even if it might have reached a different conclusion in the first instance.

The district court held that the burden on a plaintiff is "more rigorous" and "particularly heavy" and that a particularly "high 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), a statement that this Court has *twice* subsequently and expressly rejected. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell – Jolly,* 572 F.3d 644, 658 (9th Cir. 2009); *Latta v. Otter,* 771 F.3d 496, 500 (9th Cir. 2014).

This clearly erroneous standard adopted by the district court undermined its entire analysis of the motion and seems to have been all but 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 21 (balance of equities did not favor the plaintiffs because "as found by the California legislative branch, the public will be best served by application of the Act in full.").

Yet, concerning this glaring and fundamental flaw in the court's reasoning, Defendants say – nothing. In fairness, there is little they could say. The law is clear. There is no special treatment, "more rigorous," or "particularly heavy," to be applied when an applicant for a preliminary injunction is challenging a legislative act. The standard remains the four factors described in *Alliance for the Wild Rockies v. Cottrell* and a dozen other cases (applying the traditional four factors plus "serious questions" sliding scale approach). Anything more than that is error requiring reversal.

II. DEFENDANTS IGNORE THE CONTEXT OF THE COMPELLED SPEECH AT ISSUE.

In *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), the Supreme Court held that when evaluating a compelled speech regulation, *context matters*. *See id.* at 796-97. *See also*, *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014) ("With all forms of compelled speech, we must look to the context of the regulation to determine when the state's regulatory authority has extended too far.") (citing *Riley*, 487 U.S. at 796); *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 249 (4th Cir. 2014) ("When evaluating compelled speech, we consider the context in which the speech is made") (citing *Riley*, 487 U.S. at 796-97).

Defendants, in addition to the court below, ignore the context in which Plaintiffs must speak the government mandated message. While in one sense, and standing alone, the mandated message contains only factual and truthful information, the context in which that message must be spoken, *including by whom*, makes it wholly different than, say, a regulation mandating that a store display its hours of operations or statutes requiring pharmacies to post notices regarding "the availability of prescription price information" and "the possibility of generic drug product selection." Def. Br. at 17-18. Placed in its proper context, the message Plaintiffs must speak is one charged with overwhelming moral, religious, and political import.

There can be no doubt that abortion is a highly contentious political, legal, and societal issue. *See Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (recognizing "the controversial nature" of abortion, and that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child"); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) ("[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the

profound moral and spiritual implications of terminating a pregnancy"); *McCullen v. Coakley*, 708 F.3d 1, 3 (1st Cir. 2013) ("[f]ew subjects have proven more controversial in modern times than the issue of abortion.").

And there can be no question that the extent to which one is willing to participate or cooperate in the provision of abortion services, "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

Forcing Plaintiffs (religious, pro-life facilities that care for women facing unwanted pregnancies) to tell their clients where they might be able to obtain free abortions involves something much more—morally, religiously, and politically speaking—than simply advising them of the existence of a government program. It requires them to undermine the very nature of who they are and what it is they do. Indeed, any suggestion that the mere recitation of fact cannot be charged with moral or religious implications depending on its context flies in the face of

reality. The homeowner shielding Jews from the Nazis is not merely providing factual information to the Gestapo officer who makes an inquiry. A priest counseling a parishioner facing an unexpected pregnancy understands that saying she might be eligible for a free or low cost abortion is doing more than merely stating a fact.

In *Evergeen*, the Second Circuit upheld on First Amendment grounds a preliminary injunction against a government requirement that crisis pregnancy centers disclose the factual and truthful information of "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care.'" *Id.* at 238. Evaluating the context in which the compelled speech was to be made, per *Riley*, 487 U.S. at 796-97, the court held that this mandated disclosure overly burdened the speech of the pro-life centers. *Id.* at 249. According to the Second Circuit, the context was clear: "a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the ordinance] provide alternatives." *Id.* Noting that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," *id.* (quoting *Riley*, 487 U.S. at 795), the court correctly observed 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.*

In other words, it did not matter to the Second Circuit for purposes of its compelled speech analysis that the mandated disclosure contained only purportedly factual or truthful information.[1] The context in which the pro-life centers were being made to speak the government's message was clear and could not be ignored. In addition, the Act's mandated message goes much further than the compelled disclosures in *Evergreen*. Whereas New York City's Services Disclosure required pregnancy centers to indicate whether or not they provide referrals for abortion, the Act positively and affirmatively requires pregnancy centers, like Plaintiffs, to point clients to a government program that might pay for a free abortion.

[1] The same holds true with respect to another disclosure against which the Second Circuit upheld a preliminarily injunction: "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." *Evergreen*, 740 F.3d at 238.

In *Stuart*, the Fourth Circuit upheld a preliminary injunction against a North Carolina law requiring physicians to perform an ultrasound, display the sonogram, and describe the fetus to a woman seeking an abortion. 774 F.3d at 242-43. Like the Second Circuit in *Evergreen*, the Fourth Circuit understood that the government mandated factual statements could not be properly understood in the absence of context: "[t]hough the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage." *Id.* at 253. The court understood that the "factual" nature of the compelled speech does "not divorce the speech from its moral or ideological implications." *Id.* at 247.

It would turn a blind eye to reality to suggest that the Act requires Plaintiffs *merely* to provide factual information. It requires them to speak a message wholly contrary to their religious, political, and social mission and identity.

And not only is it incorrect to say that the Act *merely* compels factual and incontrovertible information, it is incorrect to say that any such disagreement with the message can be cured by Plaintiffs

supplementing the Act's required speech with their own contrary speech. Def. Br. at 20.

The Fourth Circuit rejected that very idea in *Stuart*:

> [T]he clear and conceded purpose of the [law] is to support the state's pro-life position. That the doctor may supplement the compelled speech with his own perspective does not cure the coercion—the government's message still must be delivered (though not necessarily received).

Id. at 246.

Indeed, it would not have availed the State of New Hampshire in *Wooley v. Maynard*, 430 U.S. 705 (1977) to argue that George and Maxine Maynard could have placed bumper stickers on their car objecting to the motto, "Live Free or Die." It would not have helped the State of California in *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Calif.*, 475 U.S. 1 (1986) (holding unconstitutional a requirement that a utility company include speech from an opposing group in its newsletters) to argue that the utility company could have included additional information in its newsletters. The decision in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a public school could not compel students to recite the Pledge of Allegiance), would

have been the same even if West Virginia allowed students to cross their fingers as an expression of their disapproval.

A law that "forces speakers to alter their speech to conform with an agenda they do not set," is unconstitutional even if that law does not restrict other speech on that same topic or the speaker is permitted to contradict himself. *Pacific Gas & Electric Co.*, 475 U.S. at 9. Cognitive dissonance is no cure to compelled speech.

It is axiomatic that the government may not "'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-786 (1978)). By means of the Act, California has radically skewed the public debate over abortion by forcing pro-life pregnancy centers to recommend or refer clients to the very services to which these pro-life centers religiously object.

III. THE LOWER COURT ERRED IN ITS APPLICTION OF THE PROFESSIONAL SPEECH DOCTRINE.

A. The Act Does Not Compel Professional Speech

It is within this context that the *Pickup* continuum for analyzing professional speech must be applied. *Pickup v. Brown*, 740 F.3d 1208

(9th Cir. 2014). The district court correctly held that the Act does not compel conduct; it compels speech. Order, EOR 13 & 18, n.2. The issue, therefore, is whether Plaintiffs are entitled to the fullest protection the First Amendment allows or whether their rights are "somewhat diminished" under a professional speech standard. *Pickup*, 740 F.3d at 1227-28.

Defendants are, of course, correct that the State may regulate the medical profession. (It also may regulate attorneys, taxidermists, beauticians, etc.) It is equally true, however, that "[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.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995)) (internal citation omitted).

As an initial matter, however, the Act does not impose *any* speech requirements on *licensed professionals*; it only imposes speech requirements on *licensed facilities*. Indeed, the legislative history is clear that the target of the Act is not doctors, nurses, and other health

professionals, but the "nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California." EOR 34. It is these centers, and these centers alone, that *allegedly* "interfere with a woman's ability to be fully informed and exercise their reproductive rights." EOR 34. The legislative history makes no mention of licensed professionals failing in their professional duties.

The text of the Act, of course, bears this out. The complete Act applies to both licensed and unlicensed facilities. EOR 66-69. Those facilities are solely responsible for disseminating the mandated message under the Act, not medical professionals. A facility that fails to comply with the speech mandate is subject to civil penalties. Medical professionals face no civil penalties for failing to comply with the speech mandate because they have no obligation under the Act to do anything.

For these reasons, the *Pickup* continuum, arising out of this Court's consideration of "the First Amendment rights of professionals, such as doctors and mental health providers," is inapplicable. *Id.* at 1227. Even if, however, the professional speech doctrine were to be broadened to include the facilities where professionals provide their

services, that does not mean the free speech rights of professionals are at the mercy of the state that licenses them.

This Court's decision in *Conant* is instructive. At issue in that case was a First Amendment free speech challenge to a federal policy declaring that a doctor's "recommendation" of marijuana would lead to revocation of his or her license. 309 F.3d at 633. Noting that "[b]eing a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights," *id.* at 637 (citations omitted), the Court held that "the government's policy . . . seeks to punish physicians *on the basis of the content of doctor-patient communications* . . . . [it] does not merely prohibit the discussion of marijuana; *it condemns expression of a particular viewpoint*." *Id.* (emphasis added). Recognizing that "[s]uch condemnation of particular views is especially troubling in the First Amendment context," *id.*, the Court held that the policy had to have "the requisite 'narrow specificity'" in order to pass muster under the First Amendment. 309 F.3d at 639 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).[2] As this Court

[2] While *Button* predated the Supreme Court's "more recent formulations of strict scrutiny," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015), the language of "narrow specificity" has been used by this Court in the

stated in *Pickup*, "under *Conant*, content- or viewpoint-based regulation of communication *about* treatment must be closely scrutinized. But a regulation of only *treatment itself*—whether physical medicine or mental health treatment—implicates free speech interests only incidentally, if at all." 740 F.3d at 1231 (emphasis in original).

Here, while the Act does not *condemn* the expression of a particular viewpoint, it *mandates* the content of what licensed facilities must say; it *mandates* the expression of the government's viewpoint, *i.e.*, that abortion is an appropriate alternative to carrying a child to term. Indeed, there can be no serious dispute that the Act is a regulation mandating speech *about* available pregnancy services, not a regulation of those *services themselves*. Just as the policy in *Conant* had to survive strict scrutiny under the First Amendment, so too must the Act, and it was legal error for the lower court to conclude otherwise.

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context of applying strict scrutiny. *See*, *e.g.*, *United States v. Alvarez*, 617 F.3d 1198, 1215-16 (9th Cir. 2010); *Humanitarian Law Project v. United States DOJ*, 352 F.3d 382 (9th Cir. 2003). *See also*, *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000) (noting that the narrow specificity requirement "analysis has always been reserved for a court's strict scrutiny of a statute").

Returning to the *Pickup* continuum, in light of the foregoing, it is clear that Plaintiffs are entitled to the full measure of First Amendment protection. Plaintiffs must play the part of a ventriloquist's dummy, speaking content dictated by the government and expressing the viewpoint of the government regarding the provision of abortion services. Though Defendants maintain that the message contains only factual information and is untainted by ideology, Def. Br. at 18-20, the foregoing discussion of the context in which that speech must take place shows this to be false. *See*, *supra*, Section II.

Finally, Defendants' attempt to squeeze the Act's message into the context of a doctor-patient relationship fails according to the language of the Act itself. Defendants state that "the notice is required *only* in the context of the provision of services to women *seeking professional medical attention* from licensed medical providers." Def. Br. at 15 (emphasis added). This is untrue. The Act requires that the message be disseminated in one of three ways: (1) by means of a "public notice posted in a conspicuous place where individuals wait"; (2) a "printed notice distributed to *all clients* in no less than 14-point type"; or (3) a

"digital notice distributed to *all clients* that can be read at the time of check-in or arrival." EOR 68-69, § 123472(2)(a)-(c) (emphasis added).

According to the clear words of the Act, any man or woman visiting one of Plaintiffs' clinics for goods or services, such as to obtain diapers for a newborn child or education about how to put one on, must be told that the State of California offers free abortion services for eligible women. Defendants do not dispute this clear meaning of what the Act requires; they only say that this "does not change their character as licensed medical facilities, in the same way that the presence of a gift shop does not negate the authority of the state to regulate a hospital." Def. Br. at 17. Plaintiffs do not claim, however, that the Act changes the medical nature of the facilities. What Plaintiffs claim, and Defendants do not reasonably refute, is that the breadth of the Act goes well beyond the personal, one-to-one, professional relationship between a patient and her doctor which the professional speech doctrine addresses.

The purpose of the Act is not to regulate the medical profession, and its clear effect is to force "crisis pregnancy services" like Plaintiffs to say something they would not otherwise say; in fact, to say

something contrary to what they do and who they are. As far as Plaintiffs are concerned, the Act encumbers their speech as much as a regulation forcing churches to advise their congregants that they can visit other places of worship or that they need not worship at all.[3]

In sum, the professional speech doctrine is inapplicable to the case at bar and Defendants do not persuasively argue otherwise. The lower court's application of the doctrine was legal error.

B. The district court's failure to apply at all the second prong of a two-pronged test cannot be ignored.

Having found (erroneously) that the speech at issue in this case was "professional speech," the court below proceeded to apply the two-pronged "intermediate scrutiny" test. Under this test, "the State must show at least that the statute directly advances a substantial governmental interest *and* that the measure is drawn to achieve that

[3] For this reason, Defendants' suggestion that LivingWell's objection to speaking the message of the Act is somehow contradicted by its advising prospective patients of its refusal to perform or refer women for abortion services is unfounded. Def. Br. at 18-19. First, LivingWell maintains that is up to LivingWell, not the government, to decide how best to inform its clients of the services they do and do not provide. Second, LivingWell voluntarily tells its clients that it does not provide or refer for abortion services; they do not go further, as the Act requires, and tell their clients how they might be able to obtain a free or low cost abortion. *See* EOR 71-72, ¶ 8.

interest." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-68 (2011) (emphasis added). The Ninth Circuit has recently reaffirmed that "intermediate scrutiny" is a "demanding" test, *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 2016 U.S. App. LEXIS 140, *19 (9th Cir. 2016), the second prong of which requires that, in seeking to advance a "substantial government interest," the government is limited to using "a means narrowly tailored to achieve the desired objective." *Id.*, at *20 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

But one searches in vain in the district court's decision for any discussion of the second, "narrow tailoring," prong of the intermediate scrutiny test. Order, EOR 20-21. And the Appellees fail to respond to this significant lacuna. [4] 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. It is simply not there. That being the case, it cannot be said that on this issue—an issue central to

[4] Defendants do take a stab at their own "narrow tailoring" analysis. Def. Br. at 22-24. But this Court, of course, must review the sufficiency of the district court's analysis, not Defendants'.

the decision below—the court "got the law right." *Cottrell,* 632 F.3d at 1131.

In fact, under *Reed v. Gilbert*, the lower court should have applied strict scrutiny to the Act, even if it is characterized as regulating professional speech. *See* Pl. Br. at 40-41. In *Reed*, the Supreme Court declared, unequivocally so, that content-based laws warrant strict scrutiny. 135 S. Ct. 2218 at 2226 ("[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." (emphasis added).

The Court was clear that even where the government might have a "benign motive" or "content-neutral justification" for the law, that law is subject to strict scrutiny if it is content based on its face. 135 S. Ct. at 2228.

Even the concurrences in the judgment, which thought that majority's decision went too far, understood the sweeping nature of the majority's decision: "In my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an *automatic strict scrutiny trigger*." *Id*. at 2234 (Breyer,

J., concurring in the judgment) (emphasis added); *id.* ("to use the presence of content discrimination *automatically* to trigger strict scrutiny . . . goes too far") (emphasis added) "[T]he majority insists that applying strict scrutiny to *all* [content-based laws] is 'essential' to protecting First Amendment freedoms." *Id.* at 2237 (Kagan, J., concurring in the judgment) (emphasis added).

In *Sarver v. Chartier*, No. 11-56986, No. 12-55429, 2016 U.S. App. LEXIS 2664 (Feb. 17, 2016), this Court suggested that *Reed*'s teaching would not apply to "commercial speech or speech that falls within one of a few traditional categories which receive lesser First Amendment protection." *Id.* at *24, n.5. As described *infra*, however, the Act does not regulate commercial speech. In addition, and most relevant here, the Supreme Court has not recognized professional speech as a traditional category of speech that warrants less protection under the First Amendment, even if the lower courts have done so. *See Serafine v. Branaman*, 810 F.3d 354, 2016 U.S. App. LEXIS 449, *5 (5th Cir. 2016) ("The Supreme Court has never formally endorsed the professional speech doctrine.").

Defendants respond that *Reed* "casts no doubt on precedents holding that the First Amendment permits the state leeway to regulate professionals to protect the health and general welfare of its citizens, even where the state's regulation has an incidental effect on protected speech." Def. Br. at 12. But, relying on *NAACP v. Button*, *Reed* held that the Court had previously and "rightly rejected the State's claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment." 135 S. Ct. at 2229.

In this context, Defendants place too much emphasis on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion). In the words of the Fourth Circuit in *Stuart*, "*Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech." *Stuart*, 774 F.3d at 249. [5]

Because the lower court held the Act to be content-based, it should have applied nothing less than strict scrutiny under *Reed v. Gilbert*.

[5] Plaintiffs discuss *Casey* further at Pl. Br. at 37-39.

IV. The Act Does Not Regulate Commercial Speech.

Defendants fail in their efforts to explain how the mandated message Plaintiffs must speak "does *no more* than propose a commercial transaction." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)) (emphasis added); *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (stating that the proposal of a commercial transaction test is "the test for identifying commercial speech"). They fail to explain how the Act mandates "expression related *solely* to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (citations omitted) (emphasis added).

The message Plaintiffs must disseminate is that the State of California has public programs that provide free or low cost access to abortion services, among other services. That is hardly a proposal of a commercial transaction. It is a public service announcement calling public attention to a free or low cost public service, *i.e.*, abortion, that *Plaintiffs do not even provide*, based on their religious beliefs.

In fact, and most critically, *the Act does not regulate advertising at all*. It does not regulate the manner in which licensed facilities must advertise their services to the general public, but compels them to speak the government's message within their own offices and to clients who have already walked through the front door. Indeed, the Act requires a non-exempt licensed facility to speak the government message whether or not it advertises it services at all.

For this reason, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), is inapposite. The contraceptive pamphlets held to be commercial in *Bolger* were "conceded to be advertisements," "reference[d] a specific product," and were sent with "an economic motivation." *Id.* at 66-67. The law under review in *Bolger*, however, unlike the Act under review here, directly regulated the advertisements that constituted the commercial speech, "prohibit[ing] the mailing of unsolicited advertisements for contraceptives." *Id.* at 61.

Fargo Women's Health Org. v. Larson, 381 N.W.2d 176 (N.D. 1986), is also inapposite. The underlying law at issue in *Larson* regulated the manner in which the defendant pro-life center advertised its services in such media as newspapers and the yellow pages. *Larson*

was thus a *false advertising case* in which "the trial court's order was narrowly drawn, focusing *only upon* the prohibition of deceptive or misleading activity" during the pendency of the action. *Id.* at 179 (emphasis added). The Act Plaintiffs challenge here, however, does not regulate advertising, nor does it prohibit false or deceptive speech. In fact, the *Larson* court struck down part of the injunction against the pro-life center that required the center to state in any advertisements using the term abortion that the center does not perform abortions. *Larson*, 381 N.W.2d at 179.

If the Act regulated advertising (it does not) or regulated false and deceptive speech (it does not), cases like *Bolger* and *Larson* might have some relevance. Because, however, Plaintiffs must speak the mandated message whether they advertise or not, or whether or not they engage in false or misleading speech, these cases are no more than a red herring.

Defendants also fail to provide any accurate record evidence to support the notion that Plaintiffs could in any way be characterized as engaging in commercial activities. Contrary to Defendants' assertion, the record does not "strongly suggest[] that the clinics also sell clothes

and baby supplies through their thrift stores." Def. Br. at 30. The record doesn't suggest that at all. The declaration submitted on behalf of LivingWell states that "[o]ur *services* include . . . material support through our Thrift Store." EOR 71, ¶ 4 (emphasis added). And two paragraphs later, that same declaration states that "[a]ll *services* are *free* to clients and LivingWell never asks a client for a donation." *Id.* at ¶ 6 (emphasis added).

The idea, too, that Plaintiffs have "*commercial* interests in securing financial support from benefactors who measure the clinic's success by the number of commercial abortion and contraception transactions the clinic forestalls," is pure speculation. Def. Br. at 30 (emphasis added). Defendants cite to a declaration to support their assertion, EOR 71, but not a word in that declaration says anything supporting Defendants' contention.

A nonprofit homeless shelter that provides free room and board for the needy might have an interest in securing donations from benefactors based on the number of individuals who are given shelter, but that is surely not a *commercial* interest. To suggest otherwise would make the word all but meaningless, eradicating a common sense

distinction between what is, and what is not, commercial in nature. "[I]t is important that the commercial speech doctrine not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012) (quoting *Central Hudson*, 447 U.S. at 579) (Justice Stevens, concurring)).

In fact, by stating that the goods and services provided by Plaintiffs "*substitutes* for goods and services that other operators provide in the commercial marketplace," Defendants reveal just how overly broad they think the word "commercial" is. Def. Br. at 28. Just because goods or services *can* be sold (here, pregnancy related services), does not ineluctably lead to the conclusion that the commercial speech doctrine applies—especially where, as here, there is *undisputed* testimony that goods or services are not being sold, and clients are not being asked for donations in exchange for these goods and services. A religious soup kitchen that provides free food and drink does not become a commercial enterprise because clients can obtain a hamburger and soda at a McDonald's across the street. *See Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011) (An organization

does not propose a "commercial transaction" simply by offering a good or service that has economic value). Indeed, under Defendants' expansive view of commercial speech, "a domestic violence organization advertising shelter to an abuse victim would find its First Amendment rights curtailed, since the provision of housing confers an economic benefit on the recipient." *Id.* *See also*, *Bolger*, 463 U.S. at 67 ("[T]he reference to a specific product does not by itself render the pamphlets [circulated by Plaintiff] commercial speech."); *In re Primus*, 436 U.S. 412, 437-38 & n.32 (1978) (the offering of free legal services did not constitute commercial speech where the services were offered for the purpose of the "advancement of [the attorney's] beliefs and ideas" rather than for commercial gain).

Finally, even if there are some commercial elements to Plaintiffs' activities (despite all evidence to the contrary), Defendants fail (as did the district court) to explain, or even mention, how those elements are not intertwined with the indisputable noncommercial activities and overarching noncommercial mission of the Plaintiff clinics. *Riley* is clear that where commercial and noncommercial speech are intertwined, the appropriate First Amendment response is to treat all of

the speech as fully protected, and to apply exacting scrutiny. *See id.* at 796 (1988). *See also*, *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 632 (1980) (even "soliciting financial support" for charitable causes does not constitute "purely commercial speech," because it is "characteristically intertwined with informative and perhaps persuasive speech"); *Dex Media West, Inc.*, 696 F.3d at 957-59; *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1991). Thus, even assuming (counterfactually) that Plaintiffs offer any commercial services, those services are inextricably intertwined with their non-commercial religious activities, identity, and mission.

In sum, the commercial speech doctrine does not apply in this case and the district court erred in concluding otherwise.

V. THE LOWER COURT APPLIED THE INCORRECT STANDARD UNDER A COMMERCIAL SPEECH ANALYSIS.

Even if the constitutionality of the Act is to be measured under a commercial speech rubric, the lower court applied the incorrect standard for measuring its constitutionality. Less than a month after the district court denied Plaintiffs' motion for a preliminary injunction, this Court held that 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*." *Retail Digital Network, LLC,* 810 F.3d 638, 2016 U.S. App. LEXIS 140, *18 (emphasis added). The district court, however, which correctly held that the Act is content-based, only applied rational basis to measure the Act's constitutionality. Order, EOR 17-18. Under *Sorrell* and *Retail Digital Network*, that application of rational basis, instead of heightened scrutiny, was erroneous as a matter of law.

Defendants' reliance on *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) and *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) is misplaced. At issue in those cases was the direct regulation of "advertising pure and simple." *Zauderer*, 471 U.S. at 637. Recognizing the "'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," *Zauderer* approved a professional conduct rule requiring attorneys "who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses," because the regulation took "the form of a requirement that appellant include in his *advertising* purely

factual and uncontroversial information." *Id.* at 650-51 (emphasis added). Similarly, *Milavetz* upheld a disclosure in advertisements for bankruptcy services by debt relief agencies, including certain law firms, where the parties "parties agree[d] . . . that the challenged provisions regulate only commercial speech." 559 U.S. at 249. Neither case holds that attorneys may be required to disclose government mandated information in their offices completely divorced from their advertisements. And neither case supports the idea that where the government is free to regulate one's advertising, it is also free to regulate—let alone compel—everything else one says.

Defendants' attempt to avoid the heightened scrutiny required under *Sorrell* fails. Defendants assert that that the Act "requires *all* licensed medical clinics providing pregnancy-related services to provide the pertinent notice." Def. Br. at 33 (emphasis in original). However, *in the very next sentence*, Defendants contradict their emphatic assertion by acknowledging that the Act does *not* apply to "all" such facilities. *Id.* Facilities that agree with the "forward thinking" of the government, EOR 42, by offering the services the government wants to encourage, *i.e.*, facilities that are enrolled as Medi-Cal or FPACT providers, do not

have to bear the burden of speaking the mandated message. Defendants cannot dispute that *on its face* the Act compels some licensed facilities to speak the mandated message while, at the same time, exempting others. EOR 68, § 123471(c)(1)-(2). Indeed, the Act "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Sorrell*, 564 U.S. at 2665.

Whether for a "good reason" or not, Def. Br. at 33, the Act's wholesale exemption of certain licensed facilities renders the statute content-based, and under *Sorrell*, the Act must meet heightened scrutiny. *Id.* at 2664. For these reasons, the lower court erred in applying rational basis to the Act under the commercial speech doctrine.

VI. DEFENDANTS FAIL TO ADDRESS THE LOWER COURT'S MISTAKEN IRREPARABLE INJURY ANALYSIS.

In addition to the foregoing, Defendants completely ignore an egregious mistake in the district court's analysis. The court incorrectly reasoned that, because Plaintiffs—based on the record evidence as interpreted by the court—appeared to be disposed not to comply with the challenged Act's requirements, they could not be said to be "irreparably harmed" by the Act. The court cited no authority

whatsoever for its novel view that, in order to show that they face "irreparable harm" from a law infringing upon their First Amendment liberties, Plaintiffs must allege "self-censorship." Order, EOR 21. Indeed, there is none.

On the contrary, as this Court's decisions make clear, Plaintiffs are not required to demonstrate "self-censorship" in order to show that they are 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.").

The district court's error may have been prompted by the fact that many challenges brought against arguably speech-infringing laws are indeed premised on a plaintiff's allegations of "self-censorship." Yet, as Plaintiffs have pointed out, the seminal compelled speech case of *Wooley v. Maynard* involved challengers who were, in fact, violating New

Hampshire's "Live Free of Die" license plate requirement on a daily basis. The *Wooley* plaintiffs had been repeatedly cited for violating the law and, the Court noted, "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." 430 U.S. at 712.

There is simply no support in controlling law for the district court's application of the second *Winter* factor. Defendants ignore this error, yet it constitutes the entirety of the district court's analysis of the second of the four *Winter* factors. *Winter v. Natural Res. Def. Council, Inc., v. Hubbard*, 555 U.S. 7, 20 (2008). Order, EOR 21-22. As such, it was a clear abuse of discretion requiring reversal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to reverse the judgment of the court below.

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Dated: March 4, 2016

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Reply Brief of Appellants:

1. Complies with the type-volume limitation of Fed. R. App. P. 28.1(e). This brief contains 6,702 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: March 4, 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 March 4, 2016; I also served it upon the following CM/ECF participants, or by Federal Express if not ECF registered:

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