**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*

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## INTRODUCTION

The Appellees' Answering Brief (AB) is most remarkable for what it does not say. It does not so much as mention the principal authorities on compelled speech which are foundational to this appeal. Attorney General Harris accords other leading authorities a passing mention, albeit for propositions far removed from the central issue in this case. Harris even gives short shrift to the District Court opinion in her favor, asking this Court to fundamentally alter the lower court's reasoning. This approach will not suffice.

It has become clear that the Attorney General would much prefer to defend a statute markedly different than that adopted by the Legislature. Harris's leading premise is that AB 775 is a professional regulation, when the Legislature quite deliberately chose not to make it one.

The Attorney General's fallback argument is that the mandate could be alternatively classified as commercial speech, even though the District Court made a factual finding that Plaintiffs were not engaged in commercial speech for purposes of the mandate. Instead, the Legislature admitted it was enacting a content-based speech regulation. Settled law dictates that such restrictions are subject to strict scrutiny (as are most types of commercial speech under this Court's most recent rulings), but Harris insists this Court must apply something less.

Lastly, the Legislature admitted that it was targeting clinics based on their religiously-motivated beliefs. Yet, the Attorney General insists that such targeting has no implications for Free Exercise.

The course chosen by the Legislature was ill-advised and put it on a collision course with decisions of other Circuit Courts striking down similar mandates. But the awkward position in which the Legislature has placed the Attorney General does not permit the latter to rewrite the text and legislative history in order to save the law. The Reproductive FACT Act ("Act" or "AB 775") is an ideologically-driven coercion of speech that calls for the strictest scrutiny and the strongest repudiation.

## ARGUMENT

### I. HARRIS DOES NOT CONTEST THE DISTRICT COURT'S HOLDINGS THAT AB 775 IS RIPE FOR REVIEW, IT DOES NOT REGULATE CONDUCT, AND PLAINTIFFS-APPELLANTS WILL SUFFER IRREPARABLE HARM IF THE ACT IS NOT ENJOINED.

At the outset, Appellees' Brief clarifies what is no longer at issue. The District Court held, *inter alia*, that the challenge to AB 775 is justiciable under the ripeness doctrine; the mandate regulates speech and not conduct; and it will irreparably harm the Plaintiffs-Appellants (collectively "A Woman's Friend") if not enjoined. As these holdings favored A Woman's Friend, they were not appealed, and the State wisely does not seek to resurrect them. The arguments are

therefore waived, and the focus is squarely on the questions whether the Act regulates professional or commercial speech; what level of scrutiny is appropriate; and what are the implications to the Free Exercise Clause.

## II. AB 775 DOES NOT REGULATE PROFESSIONAL SPEECH.

In Appellants' Opening Brief (AOB), A Woman's Friend thoroughly explained the text, relevant statutory schemes, coverage, and legislative history that leave little doubt AB 775 was never intended to be a professional regulation.

In response, Harris cannot dispute these facts, so she instead constructs a much expanded theory of professional speech regulation that ignores the actual text and history of the Act, as well as leading professional speech cases.

Just last year, the Supreme Court declared that labeling something professional speech is not a license to control or coerce it: "[I]t 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 v. Town of Gilbert*, 135 S.Ct. 2218, 2229 (2015) (quoting *NAACP v. Button*, 371 U.S. 415, 438-439 (1963)). Harris fails to rebut or even mention *Reed* (which has larger implications for applying strict scrutiny), even though it was raised in the AOB.

Other courts' understandings of the professional speech doctrine are similarly unhelpful to Harris. "[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).

The Answering Brief confirms that AB 775 applies irrespective of whether there is personalized advice, a private setting, or a paying client. This is also a major problem for the Attorney General in seeking to apply commercial speech doctrine, as discussed *infra.*

The District Court placed AB 775 at the midpoint of the continuum described in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). In so doing, it misapprehended not only the relevant statutory scheme, but this Court’s description of that point, consistent with *King* and *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181 (1985), as governing speech “within the confines of a professional relationship.” *Pickup*, 740 F.3d at 1229 .

Harris responds that the mandate of AB 775 *could* be carried out by a doctor, in a private area of the clinic. AB at 13. This is a dubious claim, since the first and third options of the mandate require that the communication take place out in the waiting area or at the time of check-in, and the second option is silent on the point. Even if the mandate “could” be interpreted as having such an option, it is clearly

not the primary means designated by the Legislature for conveying the message. The thread linking AB 775 to professional speech is therefore thin indeed. Unlike the District Court, Harris does not address the Eleventh Circuit's decision in *Wollschlaeger v. Gov. of Fla.*, 2015 U.S.App.LEXIS 21573 at *98-106 (11th Cir. Dec. 14, 2015), where the court thought it was important that speech restrictions applied "almost exclusively" to discussions in examining rooms where the patient was a "captive audience"). *See also*, *Shea v. Bd. of Medical Examiners*, 81 Cal.App.3d 564 (Cal. App. 3d Dist. 1978) (upholding discipline of doctor for unwelcome, sexually explicit speech in examining rooms).

At bottom, Harris cannot stretch the professional speech doctrine, which has been applied cautiously and selectively by the courts, to a context where it has never been previously applied. The Attorney General's push to apply the doctrine to a situation where the Legislature was not regulating any particular profession, there was no paying client, there was no "captive audience," and no professional was speaking, prove too much. An expansion of the professional speech doctrine to generally cover an entire medical facility runs headlong into leading decisions evaluating speech in such contexts, including *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653 (2011); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002); and *Va. Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748 (1976).

This Court should follow the Supreme Court's lead in *Sorrell* and *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988), where the Court eschewed expansion of professional speech – even though it was dealing with regulations on the speech of professionals – in favor of a compelled speech analysis.

## III. HARRIS ATTEMPTS TO RESURRECT THE COMMERCIAL SPEECH DOCTRINE REJECTED BY THE DISTRICT COURT.

### A. The State Points To Nothing In The Record To Demonstrate That The District Court's Factual Finding As To Commercial Speech Was Clearly Erroneous.

The Attorney General's attempt to have this Court uphold the District Court's ruling – but not all of its underlying reasoning or key factual findings – is revealing.

The District Court made a factual finding that A Woman's Friend is engaged in noncommercial speech. ER 29-33. This finding was well supported by the three lengthy and explicit declarations filed by the respective Directors of the Plaintiffs-Appellants. Not all clinics may be so situated.[1] *Cf., Fargo Women's Health Org. v. Larson*, 381 N.W.2d 176, 180-81 (N.D. 1986) (clinic's advertising mentioned financial assistance and credit cards being accepted).

[1] Although calendaring this case with *Livingwell Medical Clinic, et al., v. Harris, et al.* (No. 15-17497) for oral argument makes sense, it is also appropriate that the respective cases are not consolidated. The records that the two District Court's had before them are quite distinct. The findings in this case regarding commercial speech (as well as irreparable harm) demonstrate the factual distinctions.

A party challenging a decision based upon facts in the record must show 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). However, Harris points to nothing in the record to carry her heavy burden of showing that this factual finding was clearly erroneous.

Instead, Harris misstates the record, claiming that A Woman's Friend provides "commercial goods and services" (AB at 24), when such description appears nowhere in the Declarations cited.[2] Harris also offers the novel theory that situating oneself in the commercial marketplace, and giving away items as charity that might be sold elsewhere, constitutes commercial speech. This unsupported proposition is curious, since the speech mandated by the State does not direct women from the non-profit clinics to commercial enterprise, but from the non-profit clinics to the County. How the Attorney General equates this conflict between the religious non-profit and government sectors to be essentially commercial defies explanation. Harris offers no limiting principle that would prevent her new theory from transforming virtually all speech into commercial speech.

[2] *See*, DeArmas decl. (ER 271-280), Dodds decl. (ER 281-295), and Gibbs decl. (ER 296-305).

### B. The Attorney General's Shift On What Constitutes Commercial Speech Is Telling.

Harris now shies away from her earlier acknowledgment that commercial speech is "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). This black-letter law does not support the Attorney General's new preferred theory of commercial speech, so she skips over it, as she does the rule in *Va. Bd. of Pharmacy* that commercial speech is "speech which does 'no more than propose a commercial transaction.'" *Va. Bd. of Pharmacy* , 425 U.S. at 762, quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1976).

In light of these precedents, the District Court could not accept the Attorney General's claim that the Act could be considered a regulation of *commercial speech*. ER 27-33. A comparison of the Eastern District's analysis below with that of the Northern District in *Livingwell Medical Clinic v. Harris*, (No. 15-17497) shows the former to be more thorough and better reasoned than the latter. For these definitional reasons, and those that follow, this Court should reach the same conclusion that commercial speech is not implicated by AB 775.

### C. *Bolger* Stands For Nearly The Opposite Premise As That Claimed By The Attorney General.

Nor does the Attorney General's reliance on *Bolger v. Young's Drugs Products*, 463 U.S. 60 (1983), help her in the least. In fact, *Bolger* holds nearly the opposite of Harris's cursory reading of it. *Bolger* did indeed hold that factors such as profit motive were not dispositive in the commercial speech analysis. Id. at 67. But the whole point of this statement was that a for-profit enterprise (like the defendants in that case) could still be engaged in fully-protected non-commercial speech. *Id.* This is nearly the opposite of the Attorney General's interpretation that absence of profit motive can be indicative of commercial speech. Further, even where *Bolger* applies and speech is thereby deemed commercial, this Court has explained that it may nevertheless be fully protected under *Riley* as being inextricably intertwined with non-commercial speech. *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012). The Court pointed out that newspapers and other media often have a profit or economic motive but are fully protected speech. *Id.* at 963-65.

### D. This Court's Decision In *Dex Media West* Thoroughly Rebuts The Attorney General's Theory Of Commercial Speech.

The Attorney General makes the mistake of arguing that a low level of scrutiny should be applied to AB 775 because it mandates only factual information, such as a County phone number. In reality, this Court has used phone directories

as an example of how just such information can be fully-protected, non-commercial speech. In *Dex Media W, Inc. v. City of Seattle*, 696 F.3d 952 (9th Cir. 2012), publishers of the Yellow Pages challenged several restrictions placed on them by the City of Seattle, including compelled speech. The City thought it was obvious that the phone directories included significant advertising and were thus commercial speech. This Court disagreed. Applying *Riley*, as A Woman's Friend has urged this Court and the District Court to do, the mandates were subjected to strict scrutiny, *id.* at 965, and struck down.

> [T]he yellow pages directories qualify for full protection under the First Amendment. Although portions of the directories are obviously commercial in nature, the books contain more than that, and we conclude that the directories are entitled to the full protection of the First Amendment. Id. _at 954. . . .Contrary to the City's view, publications like yellow pages directories and newspapers receive full First Amendment protection not only because their content is somehow inextricably intertwined, but because, as a threshold matter, they do not constitute commercial speech under the tests of *Virginia Pharmacy* and *Bolger*. Id. at 962.

This is, at least in part, because the directories contain "useful information" and are mandated by the State. *Id.* at 957.

To conclude this discussion of commercial speech, Harris does not seem entirely convinced of her own position. Arguing from the negative and ultimately concluding that AB 775 "could be" a regulation of commercial speech is hardly

enough to overturn the District Court's factual finding and its well-reasoned analysis on this point.

The Attorney General's attempts to resurrect commercial speech do not come close to countering the weight of authority presented in the AOB, and it is a far cry from the clearly erroneous standard Harris must meet to overturn the District Court's factual findings in this regard.

## IV. BY ANY APPROACH, THE COMPELLED SPEECH MANDATE OF AB 775 CANNOT SURVIVE STRICT OR LESSER 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. *Pacific Gas & Elec. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986); *Retail Digital Network LLC v. Applesmith*, 810 F.3d ___ (9th Cir. 2016) (applying strict scrutiny to most types of commercial speech).

The many other authorities set forth in the AOB explaining that compelled speech is content-based and therefore subject to strict scrutiny, from *Riley* to *Reed* to *R.A.V. v. City of St. Paul, Minn*., 505 U.S. 395; to *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 829 (1995) to this Court's decision in *Conant v. Walters*, 309 F.3d 629, 637-38 (9th Cir. 2002), are greeted with deafening silence.

In her brief, Harris does cite *Sorrell*, albeit without acknowledging the significant adjustment it brought about in commercial speech analysis. In that case, the Supreme Court suggested that much, if not most, commercial speech that is content- or speaker-based will be subjected to heightened scrutiny. The Court clarified that intermediate scrutiny under *Bigelow*, *Va. Bd. of Pharmacy*, 421 U.S. 809 (1975), and their progeny would apply if the given restrictions on speech were incidental. Very recently, since the decisions rendered below, this Court has separately determined that *Sorrell* means commercial speech restrictions will be subjected to strict scrutiny unless the speech is misleading. *Retail Digital Network, LLC v. City of Seattle,* 810 F.3d ___ (9th Cir. 2016). For the reasons explained below, the State's general aspersions and assertions that speech by some CPC's is misleading or deceptive falls far short of meeting this standard.

### A. Generalized Claims That A Category Of Speech Or Type Of Speaker Is Misleading Do Not Reduce The Level Of Scrutiny.

#### a. Even when upholding disciplinary action for misleading advertisements, the Supreme Court has eschewed broad prophylactic censorship or coercion.

The notion that AB 775 corrects misleading speech, and conversely that it mandates only factual and uncontroversial information, are equally fallacious and unsupported by the authorities cited. As an initial matter, the record is undisputed

that these three clinics do not engage in deceptive practices.[3] Further, there is nothing on the face of the text which addresses potential deceptive practices.

In support of her argument relative to misleading practices, Harris leans heavily on *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), in an attempt to invoke the rational basis test. In *Zauderer*, the Supreme Court held that an attorney could not be disciplined for using an illustration of a contraceptive to solicit clients who may have been injured by it. He could, however, be disciplined for misleading advertising when, in reference to his contingency fee arrangement, he promised no "fee" if the client did not prevail but was silent as to their liability for costs. The Court believed that many readers would not grasp the subtle distinction between these two words that could be synonymous to non-lawyers. At the same time, the Court rejected Ohio's argument that a prophylactic rule was the least restrictive means to prevent false and deceptive advertising, because it was "intrinsically difficult," to distinguish false and misleading legal advertising from truthful and helpful advertising. Id. at

[3] "[Alternative Women's Center] provides accurate evidence-based education to all their patients and does not now nor has it ever knowingly given false or inaccurate medical advice." ER 277; "Clients are never shamed or manipulated. In fact, it is a violation of [A Woman's Friend's] established ethical standards to judge or shame clients. Volunteers who violate this standard are released from service." ER 293; "[Crisis Pregnancy Center of N. Cal.] desire[s] that [a client] make an educated choice with the proper information. We do not use scare tactics, fear based suggestions/information, religious affiliation or beliefs to coerce her into making a particular decision." ER 303.

644-45. Pointing back to its decision in *In re R.M.J.*, 455 U.S. 191 (1982), the Court noted that, where potentially misleading information could be presented truthfully, it could not be censored (or for that matter, coerced). *Id.* at 203 *see also*, *Zauderer*, 471 U.S. at 644-45.

The Attorney General further relies on *Milavetz, Gallup & Milavetz, P.A. v. U.S.*, 559 U.S. 229 (2010), which applied a reasonableness standard to disclosure requirements for attorneys who handled bankruptcies and could be classified as "debt relief agencies." The parties stipulated that commercial speech was the standard; no public interest or debate was at issue. As with other types of disclosures, this regulation applied to the attorneys' advertising about their own services, not promotion of opposing services.

These are part of a long line of attorney speech and advertising cases, including *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978); *Florida Bar v. Went for It*, 515 U.S. 618 (1999), and many others. None of these cases require attorneys to send potential clients to their competitors, on the theory that the area of law in which the attorney is engaged (e.g. personal injury) is likely to be deceptive. Indeed, all of these cases focus on specific advertisements or solicitations adjudged to be deceptive. They do not presume that certain types of attorneys are more likely to be deceptive and therefore must steer clients away from themselves. Such rules would be

antithetical to the First Amendment, even under professional or commercial speech analyses. Nor do the attorney advertising cases involve compelled speech that is antithetical to the mission of the lawyer being compelled to utter it.

**b. Informed consent laws are likewise inapposite and do not reduce the level of scrutiny for AB 775.**

Harris continues to offer the same attenuated link between the speech mandates at issue here and informed consent mandates approved in decisions such as *Planned Parenthood of SE. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality).

The central problem regarding the mandate is that visitors to A Woman's Friend are not being asked, via the required posting, to consent to anything. In most if not all cases, informed consent involves the doctor or other professional conveying "specific Information" about the risks of the procedures or services being offered by that speaker. 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).

Even informed consent statutes have been invalidated on compelled speech grounds when they are suspected of being 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 sonogram and related disclosures to women contemplating abortion).

**c. Securities and tobacco cases only provide more reasons why Harris is on the wrong track.**

Not finding the support she needs in attorney advertising or informed consent cases, Harris ventures even further afield with *Nat'l Ass'n of Mfrs. V. S.E. C.*, 800 F.3d 518 (D.C. Cir. 2015) and *U.S. v. Philip Morris USA, Inc*., 566 F.3d 1095 (D.C. Cir. 2009).

As will be explained in a later subsection, *NAM* seriously undercuts the Attorney General's reliance on the "factual and uncontroversial" language of *Zauderer*. *NAM* held that this language had no application outside the narrow context of commercial advertising. As has already been thoroughly discussed, the speech mandate of AB 775 does not at all fit within the rubric of commercial advertising.

The *Phillip Morris* case cited by Harris is one of many such in that particular area. Suffice it to say that tobacco litigation has developed its own subset of compelled speech and products liability law; in the cited decision the tobacco companies had been adjudicated to have engaged in deceptive practices for decades in violation of federal racketeering laws. This was the basis of relief including injunctions affecting speech. If anything, this complements *Zauderer*'s

caution that restrictions on deceptive advertising should not be attempted prophylactically, but based on specific actions by specific bad actors. *Cf., Fargo Women's Health,* 381 N.W.2d at 180-816 (allowing limited injunction against clinic that was being sued for deceptive advertising in using a confusingly similar name to the plaintiff).

At the same time, members of this Court have warned against trying to apply limitations on tobacco products to the abortion debate. In *R.J. Reynolds Tobacco Co. v. Sherry*, 423 F.3d 906 (9th Cir. 2005), the Ninth Circuit upheld an excise tax on cigarettes that was used to fund part of an ad campaign against the tobacco industry. The court believed that allowing a challenge based on how the government chose to spend tax revenues could open the floodgates of litigation against other taxes. Such concerns are not implicated here. Instead, Judge Trott's warning in dissent, with which the majority partially agreed, pointed specifically to a situation like the present, where either side of the abortion debate might be coerced to promote the other side of the debate. Id. at 926.

The statute mandates that pro-life centers inform clients of the availability of free or low cost abortions and directs clients to government entities that can determine if clients qualify for the abortions.

### B. The Notion That It Is Uncontroversial To Require One Side In A Heated National Controversy To Promote The Opposing Side Of That Controversy Defies Description.

Here again, Harris's reliance on *Nat'l Ass'n of Mfrs. V. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015), is inexplicable – but instructive. *NAM* actually held that *Zauderer*'s "factual and uncontroversial" language had no application outside of the commercial advertising context. The *NAM* court opined at length about the First Amendment dangers of allowing the government to mandate disclosures by claiming they are "factual" or "uncontroversial." *Id.* At 526-30. *NAM* further noted that the Sixth Circuit has chosen to view this phrase as descriptive of the advertising at issue in *Zauderer* and not as any type of rule or standard for other courts to follow.

The Attorney General's further reliance on decisions involving judicial notice, like a football schedule (*Matthews v. National Football League Management Council*, 688 F.3d 1107 (9th Cir. 2012)) is baffling. At the same time, Harris downplays what the District Court here actually did judicially notice – the legislative record. ER 16. In this record, the Legislature acknowledged that its mandate was content-based.[4]

[4] 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.

As to controversy, the Second Circuit had no difficulty recognizing that a mandate very similar to the present is at 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). *See also*, *Bigelow*, 421 U.S. at 822; *Planned Parenthood of So. Nev. v. Clark County*, 887 F.3d 935 (9th Cir. 1989) (upholding school district's decision to exclude factual but controversial advertising by Planned Parenthood).

One cannot fairly read landmark abortion and contraceptive cases like *Roe v. Wade*, 410 U.S. 113 (1973), *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), *Rust v. Sullivan*, 500 U.S. 173 (1991), *Casey*, *Hill v. Colorado*, 530 U.S. 703 (2000), *Gonzales v. Carhart*, 550 U.S. 124 (2007), and dozens more and conclude that a law like AB 775 is "uncontroversial" or "not subject to debate." In sum, the notion that the mandate comprises uncontroversial factual information is about as Orwellian as the Attorney General's claim that the mandate simply leads to the "discovery of truth." AB at 27-28.

### C. The State's Creative Re-Ordering Of Compelled Speech To Be Of Little First Amendment Concern Places This Circuit On A Collision Course With The Second Circuit, Fourth Circuit, And Supreme Court.

Even if the mandate could be characterized as merely factual (which it cannot), this does not extricate the State from compelled speech, as was thoroughly explained in the AOB. The AB continues the Attorney General's pattern of failing

to acknowledge the problems posed to its position by directly contrary authority, most glaringly *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 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 435 (2014); and *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.

A Woman's Friend will not belabor the points, since these cases have been thoroughly briefed in the AOB. Astoundingly, Harris mentions the Fourth Circuit cases only in passing and does not mention the Second Circuit's cases at all. This refusal to deal with these significant appellate decisions striking down provisions with unmistakable similarities to AB 775 is a disservice to the Court.

The District Court was not so myopic, acknowledging the relevance of Supreme Court precedents strongly condemning compelled speech, including *Riley* (ER 18, 26, 28, 31-33) and *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). ER 32. This line of authority is grounded

in *Wooley v. Maynard*, 430 U.S. 705 (1977). *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

The state simply cannot create its own lower standards for compelled, content-based speech. For the reasons explained above, it cannot get to intermediate scrutiny via either professional or commercial speech, and it cannot get to rational basis by trying to link the Act to informed consent or disclosures. This content-based compelled speech is subject to strict scrutiny and is most onerous, not least restrictive. *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 965-66 (9th Cir. 2012) (compelling Yellow Pages to fund and advertise City's opt-out program was not least restrictive means).

### D. Harris Does Not Address The Missing Links Between The Mandate And Its Asserted Purpose.

The State's supreme overconfidence that the statute will be upheld, simply because it favors the pro-choice side of the abortion debate, may best explain its unwillingness to address so many of the points presented in the appeal. A further example of this is the Attorney General's dismissiveness toward the problems raised with respect to narrow tailoring. A Woman's Friend explained in some detail the incongruity of Harris's asserted need to inform women about their new options under the Affordable Act and Medi-Cal. Yet, the mandated speech does not direct women to these programs, or mention them at all. Harris treats this poor

fit with a shrug. Meanwhile, she repeats her mantra that coercing A Woman's Friend is the most effective means of conveying its message. This may well be true, but it raises its own considerable concerns.

> [R]equiring a company to publicly condemn itself is undoubtedly a more effective way for the government to stigmatize and shape behavior than for the government to have to convey its views itself. But that makes the requirement more constitutionally offensive, not less. *NAM*, 800 F.3d at 530 (internal citations and quotations omitted).

## V. HARRIS CONTINUES TO WRONGLY ASSERT THAT HYPERBOLIC, HYPOTHETICAL HARM OUTWEIGHS THE CONCRETE HARM TO A WOMAN'S FRIEND.

Taking balance of hardships and public interest together, Harris continues her pattern of offering exaggerated and elusive harm as a claimed counterweight to the pending threat to free speech. "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *United States v. Stevens,* 130 S.Ct. 1577, 1585 (2010).

Harris claims that millions of women will be harmed by an injunction. As a factual matter, the three Plaintiffs-Appellants sought an injunction applicable to themselves alone. While it is not known exactly how many women will enter their three facilities during the pendency of this litigation, it is most definitely not millions. Nor does the Attorney General have any idea how many women coming

into the three clinics at issue in this appeal are unaware of their options. Harris only knows that some pro-life clinics somewhere are allegedly deceptive, and therefore the First Amendment rights of the three Plaintiff-Appellants must be suppressed. Harris's conjecture cannot make up for the lack of any cited evidence from the record to support the District Court's pivotal holdings on public interest and balance of hardships. ER 56-59.

Just like the claim that enjoining these three clinics would harm millions, Harris overplays the hand she was dealt when she asserts that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." AB at 34 quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977). It begs credulity to claim that California will experience irreparable injury by not fining these three clinics $500 a piece for not posting the mandate during the pendency of this litigation.

Moreover, the Attorney General repeats the fallacy of the District Court that the compelled speech of AB 775 was balanced because A Woman's Friend can counter it with speech of its own. ER 43:24-26. The AOB explained that this type of reasoning has been soundly rejected by *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). 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). In response, Harris ignores *Miami Herald* but invokes *Stuart*, apparently not realizing that it rebuts her position.

She also offers *NAM,* which perfectly summarizes the problem of the State's position that AB 775's coercion is constitutional because it is effective: "[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). This is the gravamen of the State's argument – that, despite millions of dollars spent on its ad campaigns, some women are not responding to its messaging and are instead seeking out pro-life clinics. This reality does not allow the State to fill private waiting rooms with its own advertising.

## VI. HARRIS DOES NOT MEANINGFULLY ADDRESS AB 775'S DIRECT ATTACK ON FREE EXERCISE.

The Attorney General largely contents herself with repetition and general rule statements in response to the detailed discussion of the Free Exercise Clause in the AOB.

There is broad agreement that the parameters of Free Exercise are marked out by *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1992)

(*Smith II*); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); and *Stormans, Inc. v. Wiesman*.

Harris ignores the AOB's explanation of *Smith II*'s predecessor, *Employment Div., Dept. of Human Res. v. Smith*, 485 U.S. 660, 673-74 (1988) (*Smith I*), which clarifies the difference between a regulation that happens to sweep in religious conduct, largely as an unintended consequence, and a law like AB 775 that has its object the countering of concededly religious beliefs. As the District Court noted, "the Legislature perceived [that these Christian-based] beliefs lead CPCs to interfere with a woman's ability to be fully informed and exercise her reproductive rights… ." ER 7.

Harris misses the point of both *Church of the Lukumi Babalu Aye* and *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. It is no less true now than it was at the time that the

Legislature was well aware the exclusive effect of its prohibition would fall on the speech of religiously-motivated non-profits.[5]

In perhaps a Freudian slip, Harris acknowledges as much in the opening of her brief: the problem with the pro-life clinics was that they were believed to be undermining the State's own message. AB at 3.

Harris seeks to redirect the Free Exercise argument to exemptions and religious gerrymandering. While AB 775 certainly is susceptible because it exempts entities that are on board with the Attorney General's message, the heart of the issue is the blatant, unapologetic effort to coerce a certain class of clinics known to be "largely Christian." The Attorney General undoubtedly wishes the Legislature had not tipped its hand, but it is too late in the day to change the illegitimate and ill-conceived purpose of this statute.

Harris offers no principled reason why *Stormans, Inc. v. Wiesman*, applying mandates to for-profit pharmacies – with accommodations available for individuals – controls here where the mandate was deliberately aimed at religious non-profits, with no accommodations.

[5] 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).

"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 coercion of the religious non-profits who are the Plaintiffs-Appellants in this case was not incidental under *Smith*; it was intended, and it is impermissible and should be enjoined under the Free Exercise Clause.

## CONCLUSION

This appeal primarily concerns whether the mandate of AB 775 is compelled speech in violation of the First Amendment, and secondarily whether the mandate also violates the Free Exercise Clause. In its Answering Brief, Harris adopted the strategy of simply ignoring the Opening Brief, and to a large extent the District Court's opinion below. Not once does the Attorney General even mention the central issue in this case – compelled speech. Not once does she mention the Second Circuit's decision in *Evergreen Association* that the District Court grappled with. Not once does she mention the Supreme Court's considerable jurisprudence on compelled speech, such as *West VA. Bd. of Ed. V. Burnette.* Or *Wooley v. Maynard.* Or *Hurley.* Harris mentions two other leading authorities, *Riley* and *Greater Balt. Ctr.*, as an afterthought and does not come close to distinguishing their central, controlling premises that compelled speech dooms regulations of the type at issue here. The Attorney General would put this Court on a collision

course with the Second and Fourth Circuits, and arguably many other courts, without even acknowledging them.

As to professional speech, Harris offers an expansive and unsupportable doctrine while failing to meaningfully rebut the AOB's explanation that the Legislature manifested no intent to regulate a profession.

On commercial speech, Harris returns to her original position that the Supreme Court's parameters on this doctrine are of no moment. The Attorney General omits the District Court's inconvenient finding of fact that the three clinics before the court are not commercial. She also fails to explain why this Court should be the first Circuit to adopt the lowest level of scrutiny to commercial speech, when this Court has very recently held the opposite – that most commercial speech should be subjected to strict scrutiny.

On balance of hardships, Harris repeats her fallacy that the clinics can mitigate with counter-speech, ignoring the Supreme Court's directly contrary authority presented in the AOB. The Attorney General goes overboard by claiming "millions of women" will be harmed by an injunction favoring the three clinics who are Plaintiffs-Appellants here. And Harris does not at all deal with the lack of tailoring resulting from the fact that the mandated speech does not mention

Medi-Cal, Covered California, or the Affordable Care Act that Harris claims make it necessary.

Lastly, the Attorney General offers only a perfunctory rebuttal of the Free Exercise claims. Recitals of general principles will not do where, as here, the Legislature has specifically singled out religious groups for its mandates.

In sum, Harris has presented this Court with a defense of something other than the statute at issue, the issues on appeal, and the District Court's actual holdings. This approach is unpersuasive at best.

Date: March 1, 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.

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the body of the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains no more than 7,000 words. According to Microsoft Word's "Statistics," this document contains 6,461 words.

March 1, 2016 /s/ Kevin Snider

Kevin T. Snider

## CERTIFICATE OF SERVICE

I hereby certify that on March 2, 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