15-17517

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, et al.,

Appellants,

v.

KAMALA HARRIS, Attorney General of the State of California, in her Official Capacity,

Appellee.

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

No. 2:15-02122-KJM-AC
The Honorable Kimberly J. Mueller, Judge

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

Assembly Bill No. 775, also known as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, requires medical clinics licensed by the State of California that provide pregnancy-related medical services to give notice to their patients that publicly-funded family-planning programs (including contraception, prenatal care, and abortion) are available to patients at low or no cost.[1]

Appellants are licensed medical clinics that provide pregnancy-related medical services, and so are subject to the Act. They are opposed on religious grounds to providing the notice required by the Act. Appellants sought an injunction preventing the Act from taking effect until after this action is fully litigated, claiming that mandated distribution of the notice would infringe upon their rights under the First Amendment. The district court denied the motion, holding that Appellants were unlikely to succeed on the merits of their First Amendment claims. ER 33-54.

[1] Licensed primary care clinics that are enrolled as Medi-Cal providers and as providers in the Family Planning, Access, Care, and Treatment (Family PACT) program are exempt from the Act's notice provisions, because such clinics themselves provide the relevant services at public expense. Assem. Comm. on Judiciary, Analysis of Assembly Bill No. 775, at 4, 8-9; ER 172, 176-177.

Appellants now seek rehearing and rehearing en banc. Because the panel's opinion is a correct application of controlling authority, Appellants cannot demonstrate that rehearing or rehearing en banc is warranted.[2]

ARGUMENT

Panel rehearing serves a very limited purpose: "to ensure that the panel properly considered all relevant information in rendering its decision." *Armster v. United States Dist. Ct.*, 806 F.2d 1347, 1356 (9th Cir. 1986); *see* Fed. R. App. P. 40(a)(2) (petition for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended" resulting in an erroneous decision). Because the panel decision did not misapprehend any material fact or point of law, rehearing before the panel would be unwarranted.

Rehearing en banc is "not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question

[2] Similar petitions for rehearing (and responses by the Office of the Attorney General of California) have been filed in *Nat'l Inst. of Family and Life Advocates* (*NIFLA*) *v. Harris*, No. 16-55249, and *LivingWell Medical Clinic v. Harris*, No. 15-17497. The Court consolidated those cases and this case for oral argument. The Court's memorandum opinion relied for its analysis on the panel opinion issued in *Nat'l Inst. of Family and Life Advocates* (*NIFLA*) *v. Harris*. Unless otherwise noted, references to the "panel opinion" or "panel decision" refer to the decision in the *NIFLA* case.

of exceptional importance." Fed. R. App. P. 35(a). "En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases." *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993). None of the decisions which Appellants identify as sources of intra-circuit conflict are incompatible with the panel decision, and the panel decision creates no ambiguity for district courts. The panel's decision is a correct and well-reasoned application of controlling Supreme Court and Ninth Circuit authority. There is no reason for the matter to be reheard by the panel, or by the en banc court.

I. PANEL REHEARING IS NOT WARRANTED

Appellants make two arguments in support of rehearing: (1) that the panel failed to consider evidence submitted to the district court in support of the motion for preliminary injunction that demonstrates that the Act is unconstitutional as applied to their medical clinics (Pet. 2-4); and (2) that the panel failed to address all the factors in a preliminary injunction analysis. (Pet. 7-8). Neither argument has merit. The Legislature justified the Act's notice provisions as necessary to counteract deceptive practices by some crisis pregnancy centers. Appellants' evidence corroborates rather than refutes the Legislature's concerns. Additionally, the panel correctly

determined that Appellants had failed to demonstrate a likelihood of success on the merits of their First Amendment claims and, likewise, failed to raise serious questions going to the merits of those claims. Accordingly, further analysis of Appellants' entitlement to relief under the *Winter* factors or the alternative test set forth in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), was unnecessary.

A. Appellants' Evidence Corroborates the Legislative Findings That the Goal of Some Crisis Pregnancy Centers Is to Interfere with Women's Ability to Exercise Their Reproductive Rights

The purpose of the Act is to ensure that California residents making reproductive health care decisions have adequate information concerning the full range of health care services available to them. ER 207-208.

The Legislature observed that millions of California women who are in need of reproductive health care services are unaware of the publicly-funded services available to them. ER 207-208. Because pregnancy decisions are time-sensitive, women should be made aware that publicly-funded family-planning programs are available at low or no cost. ER 215. The need for such information could be particularly acute in the case of medical clinics whose goal is to interfere with women's pregnancy-related decisions by

providing some but not all of the relevant medical information patients should have in making pregnancy-related decisions. ER 215.

The evidence Appellants submitted in support of their motion for preliminary injunction justifies the Legislature's concern that women seeking pregnancy-related medical services from some crisis pregnancy clinics do not receive all of the medically relevant information to which they are entitled. For example, Appellant Alternative Women's Center (AWC) is a state-licensed medical clinic, and "is nationally accredited through the Accreditation Association for Ambulatory Healthcare." ER 275. Notwithstanding its licensure, AWC's stated objective is to provide pregnant women with a biblically-guided response to pregnancy. ER 274. AWC does not support abortion "as an acceptable option available to pregnancy, including pregnancy resulting from rape or incest." ER 274. Consequently, AWC provides women only with what it deems "responsible" information about abortion and believes that the "informed" woman will then be capable of making "an informed decision" regarding her pregnancy options. ER 274. This evidence demonstrates that AWC will not voluntarily inform its patients concerning the availability of free or low cost reproductive health services, regardless of whether those services are medically appropriate.

B. The Panel Correctly Applied the Standard for Preliminary Injunctions

Appellants contend that rehearing is warranted because the panel failed to address all of the factors to be considered in analyzing a motion for preliminary injunction. Pet. 7-8. Rehearing is not warranted on that basis.

A party seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is an extraordinary remedy that is never awarded as a matter of right. *Id*., at 24. Thus, Appellants must establish each of the necessary elements by a "clear showing." *Id*., at 22. Here, the panel correctly determined that Appellants had not demonstrated a likelihood of success on their First Amendment claims. Where the party seeking an injunction fails to establish a likelihood of success on the merits, the motion may be denied without considering other factors. Thus, rehearing for the purposes of further analysis of the *Winter* factors, or the alternate test in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011), is not warranted.

II. REHEARING EN BANC IS NOT WARRANTED

Appellants fail to demonstrate any need for rehearing en banc. The panel opinion does not misapply or conflict with the professional speech doctrine of *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). Nor does it conflict with this Court's Free Exercise jurisprudence, or with the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). Finally, the panel decision does not create an inter-circuit conflict regarding the proper standard applicable to abortion-related disclosures.

A. There is no Conflict Between the Panel Opinion and this Court's Decision in *Pickup v. Brown*

Appellants argue that the panel's decision effectively applies the professional speech doctrine to all speech at a facility featuring a professional, whereas *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), applied the doctrine only to the professional's own speech.

For purposes of the professional speech doctrine, it is immaterial whether the disclosure required by the Reproductive FACT Act is provided by clinic staff or by a physician. *Cf. Stuart v. Camnitz*, 774 F.3d 238, 243 (4th Cir. 2014) (applying professional speech analysis to law that compelled doctors or technicians to speak). What *is* material is the exercise of professional judgment on behalf of individual patients. Here, Appellants

acknowledge that they exercise judgment on behalf of their patients in a variety of ways. They offer their patients pregnancy testing and verification, limited obstetrical ultrasounds, pregnancy options education and consultation, STI/STD testing, education and treatment, and counseling and support, both emotional and material. ER 275-278. Appellants' own evidence demonstrates that the professional nature of their relationship with their patients extends beyond any treatment a patient might receive from a doctor or nurse within a clinic examination room. The panel's determinations that Appellants exercise professional judgment on behalf of their patients and that the Act's notice requirement should be analyzed under the professional speech doctrine is thus consistent with *Pickup*.

B. The Panel Decision Is Consistent with Ninth Circuit Free Exercise Jurisprudence

The panel considered all relevant facts and law in determining that Appellants were unlikely to prevail on their First Amendment free exercise claim because the Act is operationally neutral and generally applicable.

A rationally based, neutral law of general applicability does not violate the right to free exercise of religion even where the law incidentally burdens a religious belief or practice. *Employment Division v. Smith*, 494 U.S. 872,

879 (1990); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

As the panel determined, the Act is a rationally based, neutral law of general applicability. It requires licensed covered facilities to provide factual information about the availability of pregnancy-related public health services. The rational basis for the Act cannot seriously be doubted: 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.

The Act exempts some licensed clinics from its notice provisions. Those exemptions do not, however, undermine its general applicability. The Act exempts clinics operated by the United States and licensed primary care clinics enrolled as a Medi-Cal provider and a provider in the Family PACT program. A licensed primary care clinic that is both a Medi-Cal provider and a Family PACT provider already offers the full continuum of health care services at public expense. ER 231. A notice telling such clinics' patients how to find those services would serve little purpose.

Appellants contend that the Legislature impermissibly focused on religious entities, specifically "crisis pregnancy clinics," singling them out

for their refusal to perform abortions or provide referrals for such services. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 546 (if "the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and must undergo the most rigorous scrutiny"). But where *Church of the Lukumi Babalu Aye* concerned a "religious gerrymander" that drew a fence around a particular religious practice without regard to the legislation's otherwise neutral purposes, the Act here applies to all licensed facilities, regardless of religious affiliation, that have a primary purpose of providing family planning or pregnancy-related services, and that are not otherwise capable of enrolling women in the State's Medi-Cal program. *Cf. Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene* (2d Cir. 2014) 763 F.3d 183, 186 (finding a Free Exercise violation where the regulation applied only to specific religious conduct associated with a small percentage of infection cases and did not address secular conduct associated with a larger percentage of infection).

C. There Is no Conflict Between the Panel Opinion and the Supreme Court Decision in *Reed v. Town of Gilbert*

Appellants contend that the panel's opinion conflicts with the Supreme Court case *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which,

according to Appellants, requires the application of strict scrutiny to any content-based regulation. There is, however, no conflict with *Reed*.

Reed, which concerned restrictions on signs and billboards aimed at the general public, 135 S. Ct. at 2224, did not involve any questions regarding the regulation of speech within a professional relationship such as that between a physician and her patient.

In any event, in applying *Reed*, this Court has recognized that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny." *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016). In *Swisher*, intermediate scrutiny was applied to a content-based statute prohibiting wearing an unauthorized military medal. 811 F.3d at 315-17.

The panel's application of intermediate scrutiny to the Act's notice requirement is consistent with other Circuits' precedents, which have not required strict scrutiny of abortion-disclosure regulations, even where the regulations at issue required far more intrusive, viewpoint-directed disclosures than the California regulation here. *See, e.g.*, *Stuart v. Camnitz*, 774 F.3d 238, 252 (4th Cir. 2014) (applying intermediate scrutiny to provision requiring physicians to perform ultrasound, display sonogram, and describe fetus to woman seeking abortion, "even if the woman actively 'avert[s] her eyes' and 'refus[es] to hear'"); *Planned Parenthood Minn.*,

N.D., S.D. v. Rounds, 530 F.3d 724, 741 (8th Cir. 2008) (applying reasonableness test to informed-consent law "compel[ling] doctors to declare to their patients that 'the abortion will terminate the life of a whole, separate, unique, living human being'"). Cases like these, in turn, are consistent with Supreme Court precedent holding that the First Amendment permits the state leeway to regulate professional speech, including such speech in an abortion-related context, to protect the health and general welfare of its citizens, even where the state's regulation has an incidental effect on protected speech. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992) (upholding requirement that doctors disclose "truthful, nonmisleading information about the nature of the procedure").

D. The Panel Opinion does not Create an Inter-Circuit Conflict

Appellants contend that review is justified because the panel opinion conflicts with decisions from the Second and Fourth Circuits regarding the context in which abortion-related speech requirements should be evaluated.

The ordinance at issue in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2nd Cir. 2014), required pregnancy centers to provide three disclosures: (1) a status disclosure that required pregnancy centers to

disclose whether or not they have a licensed medical provider on staff who provides or directly supervises the provision of services (the status disclosure), *id*. at 246; (2) a services disclosure that required pregnancy centers to disclose whether or not they provide or refer for abortion, emergency contraception or prenatal care (the services disclosure), *id*. at 249; and (3) a disclosure 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." (government message), *id*. at 250.

The pregnancy centers were required to provide the disclosures at their entrances and waiting rooms, on advertisements, and during telephone conversations. *Id*. at 238. New York City enacted the ordinance in order to regulate the practices of crisis pregnancy centers, which provided non-medical pregnancy-related services and are opposed to abortion. *Id*. at 239.

The Second Circuit struck down the services disclosure, under either strict scrutiny or intermediate scrutiny, as insufficiently tailored to the government's interests. "When evaluating compelled speech, we consider the context in which the speech is made." *Id*. at 249 (internal citations omitted). The court determined that the services disclosure failed even under intermediate scrutiny because it required centers to address abortion, emergency contraception and prenatal care at the beginning of their contact

with potential clients thus altering the centers' political speech by mandating the manner in which the discussion of the issues begins. *Id*. at 249-50.

The context in which disclosures were required in *Evergreen* demonstrates that no conflict exists with the panel's opinion. First, the *Evergreen* services disclosure requirement expressly exempted providers of medical services. *Id*. at 239. By contrast, the Act's notice regarding the availability of publicly-funded reproductive health services is required to be given only by licensed covered facilities—medical clinics licensed by the California Department of Public Health. Thus, California's Act is governed by a doctrine—the professional speech doctrine—which provides additional latitude for regulation. Second, the New York City ordinance required a different type of disclosure and provided little flexibility in how the disclosures were made to the centers' clients. Here, the Act requires only a general notice that further information about certain services is available by calling a specific government contact, and it permits licensed covered facilities leeway in when and how the notice is provided to their patients.

The panel opinion likewise does not conflict with the decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). In *Stuart*, the Fourth Circuit held that a statute that required doctors to perform an ultrasound, display the sonogram image, and describe the fetus to women seeking abortions violated

the physicians' rights under the First Amendment. *Stuart v. Camnitz*, 774 F.3d 238, 255-56 (4th Cir. 2014). In striking down the statute, the Fourth Circuit determined that the law compelled speech that conveyed a particular opinion about abortion, namely, to convince women seeking abortions to change their minds about terminating the pregnancy. *Id*. at 246.

Here, the panel correctly determined that the provision applicable to licensed covered facilities contains no opinion regarding whether the woman receiving the notice should take advantage of any of the publicly-funded reproductive health care services enumerated in the notice. Thus, unlike the statute in *Stuart*, the Act's notice applicable to licensed covered facilities is content-based, but does not discriminate based on viewpoint.

CONCLUSION

For the foregoing reasons, the Court should deny Appellants' petitions for rehearing and rehearing en banc.

Dated: November 22, 2016

Respectfully submitted,

s/ *Noreen P. Skelly*

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15-17517

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A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, et al.,

Appellants,

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KAMALA HARRIS, Attorney General of the State of California, in her Official Capacity,

Appellee.

STATEMENT OF RELATED CASES

The following related cases are pending:

1. *Nat'l Inst. of Family and Life Advocates (NIFLA) v. Harris*, Case No. 16-55249; and,

2. *LivingWell Medical Clinic, et al. v. Harris*, Case No. 15-17497.

Dated: November 22, 2016

Respectfully submitted,

s/ *Noreen P. Skelly*

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CERTIFICATE OF COMPLIANCE

PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR 15-17517

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

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November 22, 2016
Dated

s/ *Noreen P. Skelly*
Noreen P. Skelly
Deputy Attorney General

Certificate of Service

Case Name:	**A Woman's Friend Pregnancy Resource Clinic, et al. v. Kamala Harris (APPEAL)**	No.	**15-17517**

I hereby certify that on November 22, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

RESPONSE TO PETITION FOR REHEARING EN BANC

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

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C. McCartney	s/ *C. McCartney*
Declarant	Signature

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