15-17497

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIVINGWELL MEDICAL CLINIC, INC., et al.,

Plaintiffs and Appellants,

v.

KAMALA HARRIS, et al.,

Defendants and Appellees.

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

No. 4:15-cv-04939-JSW
The Honorable Jeffrey S. White, Judge

RESPONSE TO PETITION FOR 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 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]

The information contained in the notice is not subject to factual dispute, and does not promote or disparage any particular practice or form of reproductive health care. The Legislature found that the notice is "[t]he most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions."[2]

[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 services at public expense. Assem. Comm. on Judiciary, Analysis of Assembly Bill No. 775, at 4, 8-9. ER 42, 46-47.

[2] Assem. Bill No. 775, § 1(a)-(d). ER 66-67.

Appellants are state-licensed medical clinics that provide pregnancy-related services, and so are subject to the Act.[3] 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 for preliminary injunction, holding that Appellants were unlikely to succeed on the merits. Additionally, the district court determined that an injunction would cause harm by undermining California's legislative efforts to ensure that women possess information necessary to make informed reproductive health care decisions in a timely manner. ER 18-21.

In a memorandum opinion, this Court affirmed the district court's order denying Appellants' motion for preliminary injunction.[4] Appellants now

[3] Similar petitions for rehearing (and responses by the Office of the Attorney General) have been filed in *Nat'l Inst. of Family and Life Advocates* (*NIFLA*) *v. Harris*, No. 16-55249, and *A Woman's Friend Pregnancy Resource Clinic v. Harris*, 15-17517. The Court consolidated those cases and this case for oral argument.

[4] 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.*

(continued…)

seek rehearing en banc. Because the panel's opinion is a correct application of controlling authority, and does not conflict with decisions in other circuits or the Supreme Court, rehearing en banc is not warranted.

ARGUMENT

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 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). The Ninth Circuit decisions identified by Appellants as sources of intra-circuit conflict were briefed before the panel. None of those decisions is incompatible with the panel decision. The panel's decision is a correct and well-reasoned application of controlling authority. There is no reason for the matter to be heard by the en banc court.

(…continued)
Harris. Unless otherwise noted, references to the "panel opinion" or "panel decision" refer to the decision in the *NIFLA* case.

I. THERE IS NO INTRA-CIRCUIT CONFLICT BETWEEN THE PANEL OPINION AND THIS COURT'S DECISIONS IN *CONANT V. WALTERS* OR *PICKUP V. BROWN*.

Appellants contend that rehearing en banc is necessary to resolve a conflict between the panel opinion and the decisions in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). Appellants acknowledge that the Act's notice does not condemn their objection to abortion, but claim it requires them to communicate the State's ideologically-driven "forward-thinking" message that abortion is an appropriate alternative to carrying a child to term. Pet. 11.

In *Conant*, this Court affirmed a district court order enjoining the federal government from investigating physicians or initiating proceedings against them only because they "recommended" the use of marijuana. *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002). The Court reasoned that the government policy "strike[s] at core First Amendment interests of doctors and patients. An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." *Id*. at 636; *see id*. at 640 (Kozinski, J., concurring) ("Those immediately and directly affected by the federal government's policy are the patients, who will be denied information crucial to their well-being, and the State of California, whose policy of exempting

certain patients from the sweep of its drug laws will be thwarted."). The Court also explained that the policy "condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Id*. at 637. The policy did not withstand heightened First Amendment scrutiny because it lacked "the requisite narrow specificity." *Id*. at 639. Indeed, the government was "unable to articulate exactly what speech [was] proscribed" (beyond a "recommendation" of marijuana). *Id*. The policy also left "doctors and patients no security for free discussion." *Id*. at 639.

Here, by contrast, the Act leaves covered facilities free to provide *any* manner of advice, without any contradiction by the notice. Doctors and patients alike are able to openly and candidly discuss all health care options. Also, unlike *Conant*, the Act is not a viewpoint-based regulation. More specifically, aside from two narrow exceptions that do not favor any particular speaker, the Act applies to all covered facilities irrespective of their opinion, point of view, or ideology concerning abortion or any other reproductive health issue. The Act is far less intrusive than the regulation enjoined in *Conant*. Thus, there is no conflict between the cases.

Appellants also contend that the panel opinion "radically expand[ed] the boundaries" of the professional speech doctrine and "cannot be squared"

with this Court's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). Pet. 20. Not so.

California has the authority to regulate licensed pregnancy centers. The Legislature permissibly concluded that those regulations should include a requirement of disclosures intended to ensure that patients are adequately informed of the availability of publicly-funded reproductive health care options in a timely and effective manner. Appellants accept responsibility for providing medically-supervised treatment for patients, pursuant to their California medical facility licenses. The panel properly held the notice to be a permissible regulation of professional speech, because it is required only in the context of the provision of services to women seeking professional medical attention from licensed medical providers.

Appellants argue that the Act cannot be a professional speech regulation because the notice is delivered to a woman before she meets a doctor or nurse. Appellants are incorrect for two reasons.

First, Appellants are not required to provide the written disclosure before a patient is seen by one of the clinic's health care professionals in an examination or consulting room. Rather, the Act permits Appellants the discretion to provide the disclosure to patients either in the waiting room or later in the course of a physician examination. ER 68-69.

Second, it is not dispositive for First Amendment purposes whether the disclosure 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). 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 70-77. Appellants' own evidence demonstrates that the professional nature of the relationship with their patients extends beyond the treatment a patient might receive from a doctor or nurse within a clinic examination room.

Appellants also contend that the notice is not professional speech because a notice in the waiting room would be viewed by all visitors to their medical clinics, not just patients. Pet. 20. The fact that visitors to Appellants' clinics may view the notice does not raise a First Amendment bar to requiring such notices for the benefit of professional clients. That is why the state may, for instance, require pharmacists to post notices alerting their patients to important consumer information, notwithstanding the notices' visibility to delivery personnel, cleaning staff, and others who are

not seeking prescriptions. *See, e.g.*, Cal. Business & Prof. Code § 4122(a) (requiring pharmacies to publicly post notice regarding, inter alia, "the availability of prescription price information" and "the possibility of generic drug product selection"); Cal. Code. Reg., tit. 16, § 1707.6 (requiring public notice about the availability of interpreter services and about the customer's right to receive large-font drug labels).

II. THERE IS NO CONFLICT BETWEEN THE PANEL OPINION AND THE SUPREME COURT DECISIONS IN *REED*, *IN RE PRIMUS*, OR *RILEY*.

Appellants contend that rehearing en banc is necessary to resolve a conflict between the panel opinion and the Supreme Court's decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), *In Re Primus*, 436 U.S. 412 (1978), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* 487 U.S. 781 (1988). But no conflict exists.

Appellants first contend that the panel's opinion conflicts with the Supreme Court case *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), which, according to Appellants, requires the application of strict scrutiny to any content-based regulation. However, this contention is incorrect.

As an initial matter, *Reed* concerned restrictions on signs and billboards aimed at the general public. 135 S. Ct. at 2224. Unlike the case here, it did

not involve any questions regarding the regulation of speech within a professional relationship such as that between a physician and patient.

Additionally, since the *Reed* decision was rendered, 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 was also consistent with cases that have applied less exacting scrutiny to content-based abortion-related disclosure regulations. *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 image, and describe results to women); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 741 (8th Cir. 2008).

Appellants also contend that the panel's opinion conflicts with the Supreme Court cases *In Re Primus*, 436 U.S. 412 (1978), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). Again, no conflict exists. There are at least three ways in which the *Primus* case is distinguishable from the panel opinion and thus not controlling.

First, *Primus* concerned a regulation of the professional speech of attorneys, *see* 436 U.S. at 421, not medical professionals. The *Primus* case is part of a separate line of cases concerning the regulation of attorney speech, including *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Because the Reproductive FACT Act is a regulation of speech by professionals in a licensed medical facility, a different line of cases applies, including *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). The two lines of cases do not follow the same analysis, and are not interchangeable with each other, as Appellants seem to suggest.

Second, the *Primus* case concerned a regulation that flatly forbade attorneys from soliciting potential clients, even with offers of free legal services. *See* 436 U.S. at 414-20. In contrast, the Act permits covered reproductive health care facilities to contact potential patients and offer them medical services. It also allows them to say whatever they want about abortion. Accordingly the *Primus* holding that "the First and Fourteenth Amendments prevent state *proscription* of a range of solicitation activities," *see* 436 U.S. at 426 (emphasis added), has no applicability here. The panel opinion (slip. opn. at 26-30), properly followed the professional speech doctrine, derived from *Pickup*, *supra*, and applied intermediate scrutiny.

Third, in *Primus*, the disciplined attorney was communicating with a potential client who had no immediate need for legal services, *see* 436 U.S. at 415-17. In contrast, the reproductive health care facilities covered by the Reproductive FACT Act are communicating with pregnant women who have immediate needs for health care services that cannot be understood to be optional in any meaningful sense.

Finally, Appellants assert that the Supreme Court's decision in *Riley v. Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 (1988), requires the application of strict scrutiny to any regulation of compelled speech, whether that speech is paired with commercial speech or political speech. The *Riley* case is also distinguishable from the Reproductive FACT Act cases and thus is not controlling.

The *Riley* case concerned a regulation of the professional speech at fundraisers for charities, *see* 487 U.S. at 787-88, not of professionals in a licensed medical facility. *Riley* is part of a line of cases concerning charitable fundraiser regulations, which include *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980), and *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). This line of cases contains a unique analysis that does not mirror professional speech doctrine,

and so is not applicable here. *See Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1056 (9th Cir. 2000).

III. THERE IS NO INTER-CIRCUIT CONFLICT

Appellants contend that the panel opinion conflicts with decisions from the Second and Fourth Circuits regarding the context in which abortion-related speech requirements should be evaluated and, thus, presents a question of exceptional importance. Pet. 2.

The New York City 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 the centers' services (the status disclosure), *Evergreen*, 740 F.3d 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 requiring the disclosures 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 because it was not sufficiently tailored to New York City's interests. "When evaluating compelled speech, we consider the context in which the speech is made." *Id*., at 249 (internal citations omitted). In *Evergreen*, the Second Circuit determined that the services disclosure failed even under intermediate scrutiny because it required pregnancy services 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 opinion. First, the *Evergreen* services disclosure requirement expressly exempted providers of medical services. *Id*. at 239. By contrast, the Reproductive FACT Act

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, the Act's notice is provided in the context of the provision of medical services, and so is a permissible regulation of professional speech. Second, the New York City ordinance required a different type of disclosure and provided little discretion in how the disclosures were made to the pregnancy centers' clients. Here, the Act requires only a modest and substantively neutral disclosure concerning the availability of free or low cost services or information from other sources, and permits licensed covered facilities leeway in when and how the notice is provided to their patients. ER 68-69.

The panel opinion is also distinguishable from the Fourth Circuit's decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). In *Stuart*, the Fourth Circuit held that a North Carolina 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 statute 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, by contrast, the panel correctly determined that the notice 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 services enumerated in the notice. Thus, unlike the statute in *Stuart*, the Act's notice is content-based, but does not discriminate based on viewpoint.

CONCLUSION

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

Dated: November 22, 2016

Respectfully submitted,

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FOR THE NINTH CIRCUIT

LIVINGWELL MEDICAL CLINIC, INC., et al.,

Plaintiffs and Appellants,

v.

KAMALA HARRIS, et al.,

Defendants and Appellees.

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. *A Woman's Friend Pregnancy Resource Clinic v. Harris*, Case No. 15-17517.

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 15-17497

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,839 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

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November 22, 2016
Dated

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

CERTIFICATE OF SERVICE

Case Name:	**LivingWell Medical Clinic, et al. v. Kamala Harris (APPEAL)**	No.	**15-17497**

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

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C. McCartney	S/ *C. McCartney*
Declarant	Signature

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