Christiana Holcomb (CA Bar No. 277427)
cholcomb@ADFlegal.org
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
202-393-8690
202-347-3622 Fax

Kevin H. Theriot* (AZ Bar No. 030446)
ktheriot@ADFlegal.org
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, Arizona 85260
480-444-0020
480-444-0028 Fax

Denise M. Harle* (GA Bar No. 176758)
dharle@ADFlegal.org
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE, Suite D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
(770) 339-6744 Fax

Attorneys for Plaintiff
Right to Life of Central California

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RIGHT TO LIFE OF CENTRAL CALIFORNIA,

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendant.

Case No. 1:21-cv-01512-DAD-SAB

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case concerns the State of California's content and viewpoint-based speech restriction on substantial amounts of public and private property across the state—namely, within 30 feet of anyone within 100 feet of the thousands of retail establishments and health care facilities in California that administer any type of vaccine. Labor speech is exempted. Worse yet, California's discriminatory law is vague and broadly sweeps in a wide variety of expressive activity on public and even private property. As a result, Right to Life of Central California's employees and volunteers are now subject to criminal fines of up to $1,000 and imprisonment for up to six months simply for engaging in peaceful free speech, like carrying a sign on the sidewalk in front of Right to Life's own building.

Right to Life is a charitable outreach organization that advocates for the sanctity of human life primarily by offering free material support and services to women facing an unplanned pregnancy. The new speech law, SB 742, bans, punishes, and chills a substantial portion of Right to Life's outreach efforts. It forces Right to Life to initiate conversations from more than 30 feet away, which would require shouting, making quiet conversation and leafletting impossible. And, because Right to Life's Outreach Center is located next door to a Planned Parenthood abortion clinic that offers the human papillomavirus (HPV) vaccine, SB 742's floating 30-foot buffer zone extends even in front of and onto Right to Life's own property. California thus compels Right to Life to either (a) undergo imprisonment and onerous fines, or (b) abandon its primary free speech activities as a mission-based organization.

Currently, Right to Life is in the midst of 40 Days for Life, its biannual outreach event headquartered in its Outreach Center. During 40 Days for Life, Right to Life engages in even greater advocacy efforts with significantly more sidewalk advocates and extended hours of outreach. This Court's immediate intervention is urgently needed to prevent Right to Life's irreparable loss of its liberty. Right to Life respectfully requests that the Court issue a temporary restraining order enjoining SB 742's application to Right to Life or any other speaker while this Court reviews the merits.

STATEMENT OF FACTS

Right to Life is a nonprofit organization serving women facing unplanned pregnancies or suffering the grief of abortion. Ver. Compl. ¶ 11. To further its mission, Right to Life provides outreach, material support, educational resources, medical care, and counseling to women in need. *Id.* Right to Life offers a variety of resources to those it serves, directly and through collaborations with several local charitable organizations. *Id.* ¶ 18. Right to Life provides expectant mothers with baby clothes, car seats, baby toys, diapers, formula, strollers, and other baby supplies. *Id.* ¶ 20. Through its community partnerships, Right to Life also offers pregnancy tests, ultrasounds, food, clothing, housing, parenting classes, pregnancy counseling, adoption and foster care options, spiritual support, and job and life skills training. *Id.* ¶ 19.

Right to Life's sincere belief is that every human life is valuable and worthy of protection, from conception to natural death. Its employees and many of its volunteers are motivated by the biblical belief that God creates each human being in their mother's womb. All of Right to Life's outreach efforts are designed to further its charitable mission to engage the community by presenting pro-life messages with clarity and compassion, and to embrace individuals facing an unplanned pregnancy and those hurt by abortion.

Right to Life's primary method of charitable outreach to parents facing unplanned pregnancies is through its Outreach Center at 616 N. Fulton Street in Fresno, located next door to Planned Parenthood Mar Monte's main abortion clinic at 650 N. Fulton Street ("Planned Parenthood Fulton"). *Id.* at ¶¶ 26, 28. Right to Life's staff and volunteers speak on the sidewalks in front of those locations, carrying signs with positive and encouraging messages, offering written literature on pregnancy support resources, and providing counsel and conversation to women facing pregnancy decisions. *Id.* ¶¶ 29–31. Right to Life's representatives often invite women to come into the Outreach Center for further conversation and to discuss how Right to Life can assist her and her baby through material resources and other support. *Id.* at ¶ 45. Its interactions are peaceful; in fact, all volunteers sign a Statement of Peace, agreeing not to engage in aggression, harassing behavior, or civil disobedience. *Id.* ¶¶ 36–38. Close, caring, quiet conversation is the preferred method. *Id.* ¶¶ 30, 43, 45, 47. Yelling or raising one's voice, however,

makes outreach less effective. *Id.* ¶¶ 30, 161. But that is what SB 742's 30-foot bubble zone requires. *Id.* ¶ 161.

Twice a year, during 40 Days for Life, Right to Life significantly increases its presence outside the Outreach Center, with as many as 10 volunteers per shift praying, displaying signs, and offering counsel and information to women going in and out of Planned Parenthood Fulton. *Id.* ¶ 48. 40 Days for Life is currently running September 22 through October 31, 2021. *Id.* at ¶ 49. Through this biannual event and Right to Life's ongoing regular outreach outside Planned Parenthood Fulton, Right to Life has assisted many women in choosing life for their babies and welcoming them into this world with support. *Id.* at ¶ 52.

SB 742, which went into immediate effect upon Governor Newsom's signature on October 8, creates a floating 30-foot buffer zone around individuals within 100 feet of any facility providing vaccinations of any sort. *Id.* at ¶¶ 56, 58. If those individuals are seeking to enter or exit a vaccination site and are on a sidewalk or public way—whether on foot or in a vehicle—no speaker may "knowingly approach" them "without consent" to proffer a leaflet, offer education or counsel, or even display a sign. *Id.* ¶¶ 58–60. Doing so subjects a speaker to up to $1,000 in criminal fines, up to six months imprisonment, or both. *Id.* at ¶ 81. Speakers who wish to communicate about "a labor dispute" are completely exempt. *Id.* at ¶ 72.

Next door to the Outreach Center, Planned Parenthood Fulton offers the HPV vaccine. *Id.* ¶ 77. Accordingly, SB 742's buffer zone surrounds Planned Parenthood Fulton. Because Planned Parenthood and Right to Life share adjacent parking lots and a continuous sidewalk, SB 742's floating buffer zone extends well into the public sidewalks (on both sides of the street) where Right to Life does its advocacy. *See id.* ¶¶ 29, 32–33, 40. And because SB 742 on its face applies to speakers on private property, Right to Life is also subject to the law's speech restrictions even when staff and volunteers are standing on Right to Life's own private property. *See id.* ¶¶ 2, 40–41, 88, 91–92, 97, 137

STANDARD OF REVIEW

"Temporary restraining orders are governed by the same standard applicable to preliminary injunctions." *Immigrant Legal Res. Ctr. v. City of McFarland*, 472 F. Supp. 3d 779, 783 (E.D. Cal. 2020) (cleaned up). "A temporary restraining order is available to an applicant for a preliminary injunction when the applicant may suffer irreparable injury before the court can hear the application for a preliminary injunction." *El-Shaddai v. B. Wheeler*, No. CIV S-06-1898 FCD EFB P, 2008 WL 4736915, at *1 (E.D. Cal. Oct. 28, 2008).

To obtain a preliminary injunction, a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Immigrant Legal Res. Ctr.*, 472 F. Supp. 3d at 783 (citing *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). This Court may weigh Plaintiff's showing on these elements using a sliding-scale approach, such that a strong showing on equitable elements, for example, can offset "a slightly weaker showing of success on the merits." *Martinez v. Cenlar FSB*, No. SA CV 12-1880-DOC (RNBx), 2012 WL 12895697, at *2 (C.D. Cal. Nov. 19, 2012). Put differently, "as long as Plaintiff demonstrates the requisite likelihood of irreparable harm and shows that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in Plaintiff's favor." *Habtemariam v. Vida Cap. Grp., LLC*, No. 2:16-cv-01189-MCE-GGH, 2017 WL 3226862, at *2 (E.D. Cal. July 31, 2017).

ARGUMENT

I. Right to Life is extremely likely to succeed on the merits of its claims.

A. SB 742 violates Right to Life's freedom of speech because it is content and viewpoint-based.

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits California from enacting any law "abridging the freedom of speech." U.S. Const. amend. I. Sidewalks and public ways "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (quoting

United States v. Grace, 461 U.S. 171, 180 (1983). The government's ability to restrict speech in these traditional public fora is "very limited." *Id.* (quoting *Grace*, 461 U.S. at 177).

Even more suspect is a speech restriction that discriminates based on content by exempting certain speakers and topics but not others. "The guiding First Amendment principle that the government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum." *Id.* at 477 (citation and internal quotation marks omitted) (emphasis supplied). A law like SB 742 that "[o]n its face . . . is a content-based regulation of speech . . . is subject to strict scrutiny." *Reed v. Town of Gilbert*, 576 U.S. 155, 164–65 (2015); *see also ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 797 (9th Cir. 2006) (law restricting speech in a public forum is content based and facially unconstitutional when "labor-related activities are exempted from the ordinance's reach").

Moreover, SB 742 is facially viewpoint discriminatory because it permits speech and expressive activity from a labor perspective while banning the same expressive activity on the same topics from non-labor viewpoints. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993). For example, criticizing Walgreens' employee benefit plan for not covering surgical abortion is exempted, but warning women entering the store to purchase Plan B that it ends the life of a human being is restricted.

SB 742 therefore triggers strict scrutiny under the Free Speech Clause by prohibiting free speech in quintessential public fora and discriminating based on content and viewpoint. Even more egregious is that according to its plain terms, it prohibits speech on private property also. It cannot overcome strict scrutiny because it is far from narrowly tailored to any compelling interest.

1. SB 742 unlawfully bans Right to Life from engaging in several forms of protected free speech.

The First Amendment's purpose is to maintain "an open marketplace" of ideas "about political, economic, and social issues," in which differing perspectives "can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) (citation omitted). It therefore "protects the right of every citizen to 'reach the minds

of willing listeners[,] and to do so there must be opportunity to win their attention.'" *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The First Amendment protects Right to Life's right to counsel, distribute literature, and display signs about abortion. "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *McCullen*, 573 U.S. at 489. That is precisely what SB 742 does here: it inhibits Right to Life from expressing its beliefs and ideas in public, on pain of prison time and substantial fines.

While "[s]igns, pictures, and voice itself can cross an 8–foot gap with ease," *Hill*, 530 U.S. at 729, the same is not true for a 30-foot distance. Starting with vocal communications, Right to Life offers much of its outreach through one-on-one communications initiated by making conversation with someone arriving at Planned Parenthood Fulton. Right to Life's staff and volunteers speak in a normal, conversational volume to offer support and information. From 30 feet away, as SB 742 mandates, Right to Life's representatives would have to shout—which is not conducive to peaceful conversation, distracts from Right to Life's message, and contradicts Right to Life's own policies and practices. Ver. Compl. ¶ 30, 36–38, 43–44.

The same goes for signs and pictures. As Right to Life has long operated, its representatives regularly carry positive and encouraging signs to attract the attention of individuals who may want or need their services. Ver. Compl. ¶ 31, 39. From a normal distance of a few feet away, the signs are visible and readable. But SB 742 bans Right to Life from silently walking on public and private property while holding signs, if they happen to step toward an individual who is 30 or fewer feet away, is within 100 feet of Planned Parenthood Fulton, and is seeking to enter or exit. From that distance, Right to Life's signs become much more difficult to read, and their visual messages are weakened—if not entirely suppressed. Declaration of John Gerardi ¶¶ 5-6.

Right to Life's fundamental right of public leafletting is crippled, too. "[H]anding out leaflets in the advocacy of a politically controversial viewpoint"—abortion, for example—"is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). In fact, "[n]o form of speech is entitled to greater constitutional protection[.]" *Id.* Because SB 742 bans Right

to Life from offering literature from closer than 30 feet of a person (without somehow obtaining prior "consent"), the proffer is all but useless. It is exponentially more difficult for a passerby to take educational literature when it requires traveling several yards to grab the leaflet, as opposed to a simple arm's reach. Gerardi Dec. ¶ 7; *McCullen*, 573 U.S. at 488 (striking down 35-foot "buffer zones [which] have also made it substantially more difficult for petitioners to distribute literature to arriving patients"); *Hill*, 530 U.S. at 727 (noting that "the burden on the ability to distribute handbills is more serious because it seems possible that an *8-foot interval* could hinder the ability of a leafletter to deliver handbills to some unwilling recipients") (emphasis supplied).

The 30-foot gap further requires Right to Life to yell in order to obtain consent to approach or describe the materials offered. The law thus "impairs [Right to Life]'s opportunity 'to win the attention' of all uncommitted 'listeners.' *Van Nuys Publ'g Co. v. City of Thousand Oaks*, 489 P.2d 809, 826 (Cal. 1971). As the Supreme Court noted when striking down a 35-foot buffer zone for similar reasons, peaceful sidewalk advocates like Right to Life "will typically initiate a conversation this way: 'Good morning, may I give you my literature?,'" while maintaining "a caring demeanor, a calm tone of voice, and direct eye contact[.]" *McCullen*, 573 U.S. 472–73; *see also* Ver. Compl. ¶¶ 39–39. But a caring demeanor, calm tone of voice, and direct eye contact—essential to Right to Life's advocacy—are unattainable when offering literature from a 30-foot distance.

In short, SB 742 radically hampers Right to Life's quintessential expressive activity in a public forum.

2. SB 742 is a content-based regulation of speech, and its application is presumptively invalid.

"Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*,, 576 U.S. at163. SB 742 is a content-based speech restriction because it "on its face draws distinctions based on the message a speaker conveys." *Id.* (citation and internal quotation marks omitted).

"Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000).

Indeed, any "[g]overnment action that stifles speech on account of its message . . . pose[s] the inherent risk that the [g]overnment seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). "Discrimination against speech because of its message is [thus] presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). It must overcome strict scrutiny, which SB 742 cannot, for it neither advances a compelling government interest nor does so in the least restrictive manner.

a. California lacks a compelling interest in a 30-foot bubble zone.

California's stated interest behind SB 742 is "an overwhelming and compelling interest in ensuring its residents can obtain and access vaccinations." SB 742 Sec. 1(a)(9). Even if such a broad aspiration for public health could ever be a compelling government interest, it is not one here, where the government is allowing other activity to undermine the interest while at the same time insisting on regulating speech. As the U.S. Supreme Court has explained, "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993). And "[a] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring). SB 742 permits, for example, massive labor protests to congregate outside as many vaccination sites as union workers would like—even just a few feet from the doors.

The Legislature's claimed concerns about the spread of disease are likewise undercut by other measures California is not taking. In June 2021, three months before signing SB 742 into law, Governor Newsom lifted the remaining statewide orders on physical-distancing and crowd-capacity limits.[1] His

[1]STATE OF CALIFORNIA, EXEC. ORDER NO. N-07-21 (June 11, 2021), available at https://www.gov.ca.gov/wp-content/uploads/2021/06/6.11.21-EO-N-07-21-signed.pdf.; STATE OF CALIFORNIA, EXEC. ORDER NO. N-08-21

executive orders rescinding those prior orders announced that "the effective actions of Californians over the past fifteen months have successfully curbed the spread of COVID-19," and that "given the current outlook, it is appropriate to reevaluate existing public health directives to allow for a full reopening of California."[2] Governor Newsom boasted of the percentage of Californians who were by then fully vaccinated from COVID-19, cheered the "level of overall immunity in the State," and proclaimed that these accomplishment were "the result of . . . the successful and ongoing distribution of COVID-19 vaccines."[3] He certainly never indicated that free speech was causing a problem for vaccine access.

In any event, months after substantial social-distancing mandates were scrapped, SB 742's blunt tool makes no sense. The previous 6-foot physical distancing requirements California put in place even when the pandemic was rampant were far less restrictive than SB 742's new 30-foot mandate.

b. Far from being narrowly tailored, SB 742 is both overbroad and underinclusive.

Viruses aside, SB 742's 30-foot provision is far from narrowly tailored. The Court need only look to clear U.S. Supreme Court precedent on buffer zones. While the Supreme Court upheld an 8-foot buffer zone in *Hill v. Colorado*, its opinion was explicitly based on the fact that eight feet (i) permits a "normal conversational distance" allowing the speaker to communicate without approaching, 530 U.S. at 726–27 (citation omitted), (ii) would "not have any adverse impact on the readers' ability to read signs displayed," *id.* at 726, and (iii) permits speakers to "proffer[] their literature," *id.* at 727 n.33, by reaching out in a normal manner. Not so with a 30-foot buffer zone. Right to Life would have to raise their voices to a shouting volume to obtain consent to approach and proffer literature, and Right to Life's signs would be inscrutable to the individuals to whom they wish to display the signs.

For this very reason, the U.S. Supreme Court struck down a 35-foot buffer zone in *McCullen v. Coakley*. In doing so, the Supreme Court emphasized the importance of one-on-one communication and

---

(June 11, 2021), available at https://www.gov.ca.gov/wp-content/uploads/2021/06/6.11.21-EO-N-08-21-signed.pdf.

[2] STATE OF CALIFORNIA, EXEC. ORDER NO. N-07-21 (June 11, 2021).

[3] *Id.*

leafletting under the First Amendment and noted that the 35-foot zone puts sidewalk counselors so far away that they can't even tell who is approaching the abortion clinic until it's too late to communicate. The Court's conclusion that the speech restriction was not narrowly tailored applies with full force to California's SB 742: "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interest, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 495. Of course, California cannot demonstrate that less burdensome measures would be insufficient because it tried no less restrictive measures before enacting this sweeping speech ban. If anything, as Governor Newsom himself noted, California seemed to have great success with vaccine access for its citizens while there was no buffer zone in place at all.

For similar reasons, the Ninth Circuit struck down a 30-foot floating bubble zones in public parks as failing narrow tailoring. *Berger v. City of Seattle*, 569 F.3d 1029, 1055–56 (9th Cir. 2009) ("[E]ven if the City's purported interest in protecting certain park-goers from communications by others were substantial—which it is not—Rule G.4 is not narrowly tailored to meet that interest" because "[n]o governmental interest—and certainly not an interest in protecting public park-goers from unwanted communications—could justify such a sweeping [30-foot speech] ban").

Finally, SB 742's complete exemption for labor speech further shows that it is not narrowly tailored. While *Hill* and *McCullen* both involved content-neutral restrictions, SB 742 criminalizes speech only on non-labor subjects and views, making it underinclusive to achieve the asserted government interest. The law is thus both "overbroad and underinclusive in substantial respects," and this "absence of narrow tailoring suffices to establish the invalidity of the [regulation]." *Church of the Lukumi Babalu*, 508 U.S. at 546 (1993). Right to Life is likely to succeed on its free speech claim.

B. Banning Right to Life from freely and publicly sharing their faith violates its fundamental right to free exercise of religion.

"[B]elief and action cannot be neatly confined in logic-tight compartments." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). The Free Exercise Clause "safeguards the free exercise of the chosen form of religion." *United States v. Ballard*, 322 U.S. 78, 86 (1944) (citation omitted). Freely exercising one's

religion includes engaging in private speech endorsing one's religious beliefs, *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990), and, of course, prayer.

The Free Exercise Clause uniformly forbids a body of government from imposing "special disabilities on the basis of religious views or religious status." *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Applying SB 742 to Right to Life violates their free exercise rights in this way. Because Right to Life wishes to communicate its religiously motivated beliefs about the sanctity of human life, as opposed to opinions on a labor dispute, Right to Life is specially disabled from engaging in its religious exercise and expression.

The Free Exercise Clause subjects laws that burden religiously-motivated conduct to strict scrutiny if they are either not generally applicable or not religiously neutral. *Church of the Lukumi Babalu*, 508 U.S. at 546. SB 742's application to Right to Life is unlawful under this standard. First, unlike most "across-the-board criminal prohibition[s] on a particular form of conduct," *Smith*, 494 U.S. at 884, SB 742 does not apply generally to all members of society in the same way. It contains a categorical exception for labor picketers. Cal. Penal Code § 594.39(d). Such exemptions "are of paramount concern when a law has the incidental effect of burdening religious practice," which SB 742 unquestionably does here. *Church of the Lukumi Babalu*, 508 U.S. at 542; *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (explaining that concerns regarding the discriminatory effects of "individualized exemptions" are magnified by "categorical" exclusions). The government cannot refuse to extend a system of exemptions "to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884 (citation omitted).

California, in this instance, has no legitimate reason—compelling or otherwise—for granting a wholesale exemption from SB 742's criminal penalties to labor expression, but denying one to religiously motivated speakers like Right to Life. Granting labor groups an exception from SB 742 "endangers [the government's] interests" in preventing the spread of airborne disease to an identical degree. *See Church of the Lukumi Babalu*, 508 U.S. at 543 (concluding a law lacks general applicability when it "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree"). Hence, SB 742 is not generally applicable and is subject to strict scrutiny as applied

to Right to Life.

Regardless of whether a law is neutral and generally applicable, it triggers strict scrutiny under the Free Exercise Clause if it burdens the free exercise of religion "in conjunction with other constitutional protections, such as freedom of speech[.]" *Smith*, 494 U.S. at 881. "[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated—that is, a fair probability or likelihood, but not a certitude of success on the merits." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (citation and internal quotation marks omitted).

Right to Life has amply made that showing here. As explained above, SB 742 violates Right to Life's free speech rights by restricting its expressive activities of freely carrying signs, handing out leaflets, and speaking in public to individuals about pregnancy and abortion, *Smith*, 494 U.S. at 881–82 (discussing hybrid-rights examples "involv[ing] freedom of religion"), and by discriminating against its religious (as opposed to labor) viewpoint about pregnancy and abortion. As explained below, SB 742 violates Right to Life's substantive due process rights and equal protection guarantees, too. Strict scrutiny thus applies, and, as explained above, the Defendant cannot show that applying SB 742 to Right to Life satisfies that demanding test. *See supra* Part I.A.2. Right to Life is likely to succeed on its free exercise claim.

C. Applying SB 742 to Right to Life violates its due process right to be free from impermissibly vague laws.

The Due Process Clause requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and do not "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). The Ninth Circuit has struck down laws, or proposed constructions of laws, that require the enforcing officer to look at a "myriad of factors" to determine whether a person's intent was to attract the attention of others in order to determine whether that person was in violation of the law. *See Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998); *Berger*, 569 F.3d at 1047–48. Such laws create "the danger that a police officer might resort to enforcing the

ordinance only against" violators "whose messages the officer or the public dislikes." *Foti*, 146 F.3d at 639.

SB 742 fails to provide an ordinary person with reasonable notice of what conduct is prohibited for a similar reason. An ordinary person wishing to approach within 30 feet of someone who is within 100 feet of an entrance to a vaccine site would have to discern whether the person she wished to approach was "seeking to enter or exit a vaccination site" and even whether a person in a motor vehicle within 100 feet of an entrance was "seeking entry or exit" to the site. Cal. Penal Code § 594.39(a) (2021). Given the wide area covered by the buffer zone and the array of businesses covered by SB 742, it is impossible for a person of ordinary intelligence who is handing out flyers or is engaged in educational advocacy or counseling to know who she can or cannot approach. Like the police officers in *Foti* and *Berger*, an advocate would have to discern the intent of the person she wished to approach. And although that does not implicate the concern of discriminatory enforcement as in *Foti* and *Berger*, it implicates the concern that the law's vagueness will chill speech well beyond the speech the law actually covers. *See Grayned*, 408 U.S. at 109.

It is easy to see how this law's vagueness would lead to an extremely broad chilling effect. An advocate seeking to hand out flyers about her chosen cause in the parking lot of a local shopping center would have to discern whether another person walking towards a group of businesses was seeking to enter the CVS, rather than any of the other businesses, because CVS provides flu shots. And because they are 90 feet away from any of the businesses, and the advocate is refraining from approaching closer than 30 feet away from the other person, it is impossible for the advocate to tell which business that person is approaching at that point. Rather than risk approaching someone who was in fact going to CVS, the advocate sits still at her table, where no one approaches on their own, so she is unable to further her message in a meaningful way. That scenario could play out in any number of settings, so long as an advocate is within 100 feet of any location that provides any vaccine. The vague requirement that an advocate discern the intent of the person she wishes to approach therefore creates an extremely broad chilling effect on speech in large swaths of public spaces throughout California.

Similarly, and more specifically to Right to Life, SB 742's definition of "[h]arrassing" is impermissibly vague because a person of ordinary intelligence cannot discern whether it applies when he is on private land and the person he is approaching is on public land, or only when they are both on public land. *See* Cal. Penal Code § 594.39(c)(1) (2021). That section prohibits "knowingly approaching . . . within 30 feet of another person or occupied vehicle for the purpose of," for example, "passing a leaflet or handbill to . . . that other person in a public way or on a sidewalk area." *Id*. That wording is completely ambiguous as to whether "in a public way or on a sidewalk area" applies to the person doing the approaching, the person being approached, or both. Without first shouting for permission, a person of ordinary intelligence will refrain from approaching closer than 30 feet from a person who is in a public way or on the sidewalk to engage in education or counseling, even though he himself is standing on his own private property and the person he wishes to approach is only a few feet from his property line. Specifically, Right to Life's employees and volunteers who are standing on Right to Life's own property in its parking lot will refrain from approaching within 30 feet of women on the sidewalk directly adjacent to the parking lot who are seeking to enter Planned Parenthood Fulton in order to engage those women in educational or counseling conversations. This chilling effect on Right to Life's and other potential speaker's speech on their own private property demonstrate that SB 742's vague definition of harassment violates due process guarantees.

Finally, the statute's vague requirement that the speaker "knowingly approach" another person "for" one of a set list of "purpose[s]" implicates the same discriminatory enforcement concerns as *Foti* and *Berger*. The officer seeking to enforce the statute must discern not only what the speaker knows but also what his intent is. And although the Supreme Court in *Hill* found that the "knowingly approach" requirement was not unconstitutionally vague, *see Hill*, 530 U.S. at 732, the broader 30-foot bubble zone at issue here contributes to the law's vagueness in a way that the 8-foot zone at issue there did not. Specifically, an officer will have to take into account an array of factors to figure out whether someone walking toward another person at a distance of 25 feet both knows that she is in fact approaching that other person and is doing so for the specific purpose of speaking to that person in one of the prohibited manners. Considering that a person does not even need to actually engage in one of the prohibited types

of speech to "harass" another in violation of the statute (but rather is in violation merely by "knowingly approaching" for a prohibited "purpose[]"), this language lends itself to discriminatory enforcement. *See* Cal. Penal Code § 594.39(c)(1) (2021). An officer who disfavors the pro-life message could arrest a Right to Life volunteer who is holding flyers about Right to Life's services simply because she walks from 35 feet to 25 feet away from a woman entering or exiting Planned Parenthood Fulton. And it would be left up to that speaker to prove that she did not intend to engage in conversation with or hand a flyer to that particular woman. SB 742 is thus distinguishable from the statute in *Hill* because once someone is within 8 feet of another person, it is much easier to tell whether he is approaching that person, is aware he is doing so, and is doing so for the purpose of handing that person a flyer or speaking to her.

For each of the above reasons, Right to Life is likely to succeed on its claim that SB 742 is impermissibly vague, in violation of the Due Process Clause.

D. SB 742 violates Right to Life's guarantee of equal protection of the laws.

The Equal Protection Clause is "implicated" by laws that permit "some forms of protected speech but prohibit[] other forms of protected speech[.]" *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997). The Supreme Court and the Ninth Circuit have both made clear that a law that restricts speech in a particular forum, yet exempts labor-related picketing from that restriction, must be "finely tailored to serve substantial state interests" in order to pass muster under the Equal Protection clause. *Carey v. Brown*, 447 U.S. 455, 461 (1980). *See also*, *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95–99 (1972); *Grayned*, 408 U.S. at 107; *ACLU of Nev.*, 466 F.3d at 799–800.. Further, "the justifications offered for any distinctions [the law] draws must be carefully scrutinized." *Carey*, 447 U.S. at 461–62. When the government's asserted justifications for a law are just as likely to be undermined by the labor picketing the law exempts as by the types of speech the law restricts, the law is not finely tailored and therefore violates the Equal Protection Clause. *See Mosley*, 408 U.S. at 100–02.

Here, SB 742 exempts "lawful picketing arising out of a labor dispute" from its speech restrictions. Cal. Penal Code § 594.39(d) (2021). This is the same type of exemption that the Supreme Court found impermissible in *Mosley*, *Carey*, and *Grayned*, and that the Ninth Circuit found

impermissible in *ACLU of Nevada*. SB 742 must therefore be finely tailored to a substantial government interest. But there is no ostensible difference between labor-related picketing, which is permitted under the law, and holding a sign, handing out printed materials, educating, or counseling another person about a non-labor-related topic, which is restricted under the statute, with respect to the government's purported interests. Labor picketers are no less likely to inhibit access to a vaccine site or to spread airborne disease than persons speaking on a non-labor-related topic.

Similarly, labor picketers are no less likely to inhibit access to a vaccine site or to spread airborne disease than Right to Life's employees and volunteers who engage with the women who seek to enter Planned Parenthood Fulton. The law's distinction is based solely on the content of the speech at issue, while the content of that speech has no effect on whether the speech will impede access to a vaccine site or facilitate the spread of airborne disease. Right to Life is likely to succeed on its claim that SB 742 violates the Equal Protection Clause.

II. SB 742's severe infringement of Right to Life's First and Fourteenth Amendment rights establishes a clear showing of irreparable harm.

"It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (citation and internal quotation marks omitted). This specifically includes "[t]he loss of First Amendment freedoms, for even minimal periods of time[.]" *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (citation omitted). As established above, Defendant's enforcement of SB 742 deprives Right to Life of its First Amendment rights to freedom of speech, free exercise of religion, and expressive association, as incorporated through the Fourteenth Amendment, as well as its Fourteenth Amendment rights to equal protection of the law and procedural due process. The deprivation of those constitutional rights is an irreparable injury.

Further, SB 742 came into effect in the middle of the Right to Life's participation in the biannual 40 Days for Life campaign, increasing the irreparable harm to Right to Life. Normally, Right to Life employees and volunteers stand outside its facility throughout this campaign, compassionately reaching

out to the women who pass by seeking to enter Planned Parenthood Fulton. But each day of the campaign during which SB 742 is in effect is a day that Right to Life's employees and volunteers cannot approach women who are seeking to enter Planned Parenthood Fulton to engage with them at a normal, conversational distance to invite them into a conversation or offer them printed materials. Right to Life will never get back the opportunity to reach each woman who enters Planned Parenthood Fulton during this time without hearing Right to Life's message.

III. The balance of the equities and the public interest tip decidedly in Right to Life's favor.

"The balance of equities and the public interest . . . tip sharply in favor of enjoining" a law that "infringes on the free speech rights not only of [the Plaintiff] but also of anyone seeking to express their views in" a particular manner. *Klein*, 584 F.3d at 1208.

First, as to the balance of the equities, any potential hardship on the government with respect to protecting persons seeking to receive the COVID-19 vaccine is outweighed by Right to Life's "First Amendment rights being chilled" by a law that "imposes criminal sanctions for failure to comply." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). "Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech." *Id.* (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004)).

Further tipping the equities in its favor, Right to Life has an immediate interest in continuing its normal interactions as part of its ongoing 40 Days for Life campaign. It is currently suspending its normal interactions that involve approaching within thirty feet of any woman seeking to enter Planned Parenthood Fulton out of fear of criminal prosecution. Ver. Compl. ¶ 94. The equities favor an immediate injunction to allow Right to Life to continue its 40 Days for Life campaign unimpeded.

Conversely, any interest that the government could assert in upholding SB 742 is insufficient to justify the extent of the law's speech restrictions. In passing SB 742, the government asserted only broad interests in stopping the spread of airborne diseases and in protecting Californians' access to vaccine sites. *See* SB 742 Sec. 1(a)(9). But SB 742 creates a much greater distance between speaker

and listener than the six feet recommended by the CDC to prevent the spread of COVID-19.[4] SB 742's much larger mandated distance is especially unjustified with respect to speakers like Right to Life, whose employees and volunteers engage with the women seeking to enter Planned Parenthood Fulton while outdoors and only at a normal conversational volume—not yelling or otherwise projecting their voices. And SB 742 applies to all places that distribute any type of vaccine without any evidence that all such locations face an ongoing or realistic potential threat to their patrons' ability to safely access their facilities.

Right to Life's immediate, tangible "extraordinary harm" of having its speech chilled during its 40 Days for Life campaign under threat of criminal prosecution therefore outweighs the government's purported interests undergirding the enactment of SB 742 and tips the balance of the equities in favor of enjoining the law.

Second, the court must also consider the public interest, an inquiry which "primarily addresses impact on non-parties rather than parties." *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional [law] . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people' subjected to the same restrictions." *Klein*, 584 F.3d at 1208 (quoting *Sammartano*, 303 F.3d at 974). It has even gone so far as to say that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).

Here, the potential chilling effect on non-parties weighs heavily in favor of finding that an injunction would be in the public interest. As explained above, Right to Life's speech has been chilled by SB 742 and its threat of criminal prosecution for conduct covered by the core of the First

[4] *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *How to Protect Yourself & Others* (August 13, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

Amendment's speech protection. That same threat risks chilling not only Right to Life's speech, but also broadly threatens to chill any speech (other than labor related speech) that one might seek to approach another person to convey at a normal conversational distance, if the speaker is within 100 feet of any business that happens to provide a vaccine of any type. The risk of chilled speech is therefore not only severe because of the criminal penalties at issue but also extremely broad in the amount of speech that may be chilled. Further, as explained above, the government's asserted public interests do not adequately support the extremely broad speech restriction that it enacted through SB 742.

Because of the importance and immediacy of Right to Life and other Californians' First Amendment rights and the governments' lack of sufficient justification for its broad new law, both the balance of the equities and the public interest weigh heavily in favor of enjoining SB 742.

CONCLUSION

SB 742 squelches Right to Life's speech based on content and viewpoint, and chills additional speech because it is vague and overbroad. Enforcement will deprive Right to Life of its fundamental constitutional rights. Moreover, every day that SB 742 stays in effect is a day Right to Life's staff and volunteers face jail time and fines for even moving toward another individual on public (or their own private) property. Within a few short days, Right to Life could be facing thousands of dollars in fines and the wrongful arrests of its employees if this Court does not act. Plaintiff therefore respectfully requests that the Court issue a temporary restraining order enjoining SB 742's enforcement against them, or any other speaker, without delay.

Respectfully submitted this 20th day of October, 2021.

By: */s/ Christiana Holcomb*
CHRISTIANA HOLCOMB
California Bar No. 277427
cholcomb@ADFlegal.org
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
202-393-8690
202-347-3622 Fax

KEVIN H. THERIOT*
Arizona Bar No. 030446
ktheriot@ADFlegal.org
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, Arizona 85260
480-444-0020
480-444-0028 Fax

DENISE M. HARLE*
Georgia Bar No. 176758
dharle@ADFlegal.org
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE, Ste. D-1100
Lawrenceville, Georgia 30043
770-339-0774
770-339-6744 Fax

Attorneys for Plaintiff

**admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2021, I filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to all attorneys of record. I also emailed this document to Kristin A. Liska, Deputy Attorney General and counsel for Defendant.

/s/ Christiana Holcomb
Christiana Holcomb

Attorney for Plaintiff