Nos. 16-1140, 16-1146, 16-1153

In the
# Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, ET AL.,

*Petitioners,*

v.

XAVIER BECERRA, ET AL.,

*Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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(Additional Captions Listed on Inside Cover)

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, ET AL.,

*Petitioners,*

v.

XAVIER BECERRA,

*Respondent.*

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LIVINGWELL MEDICAL CLINIC, INC., ET AL.

*Petitioners,*

v.

XAVIER BECERRA, ET AL.,

*Respondents.*

## QUESTION PRESENTED

Whether three district courts abused their discretion in deciding not to preliminarily enjoin, before discovery in each case and before any record of enforcement, the implementation of a California statute that (1) requires licensed medical clinics to notify patients that information about state-funded prenatal care, family planning, and abortion services may be accessed by calling a county health department phone number and (2) requires facilities providing services such as pregnancy testing and ultrasound imaging to inform clients if the facility does not employ a licensed medical professional.

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## STATEMENT

States play a "significant role … in regulating the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Like other States, California maintains a comprehensive system for licensing and regulating healthcare institutions and professionals. *See, e.g.,* Cal. Bus. & Prof. Code §§ 2000 et seq. (physicians); *id.* §§ 2700 et seq. (nurses); *id.* §§ 4000 et seq. (pharmacists); Cal. Health & Safety Code §§ 1200 et seq. (clinics). This case concerns disclosures that are mandated as part of that system by California's Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, 2015 Cal. Stats. ch. 700, codified at Cal. Health & Safety Code §§ 123470 et seq.

1. Some 700,000 California women become pregnant each year, and over half of those pregnancies are unintended. NIFLA Pet. App. 76a-77a.[1] The Act addresses two problems that pregnant Californians can face.

a. First, many women cannot afford medical care on their own, and are unaware of the public programs that are available to them. NIFLA Pet. App. 76a-77a. Medi-Cal and the Medi-Cal Access Program provide low-cost prenatal care, delivery care, and

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[1] This brief is a combined response to three petitions. Citations to a particular petition or lower court document include the petitioner's name, abbreviating National Institute for Family and Life Advocates as NIFLA and A Woman's Friend as AWF. Unless otherwise indicated, statutory references are to the California Health & Safety Code.

newborn pediatric care.[2] The Medi-Cal Family Planning, Access, Care, and Treatment (Family PACT) Program provides family planning services, including contraception, preconception counseling, limited infertility services, sexually transmitted infection testing and treatment, and cancer screening.[3] And Medi-Cal covers abortion services.[4] "[C]are early in pregnancy is important," and "pregnancy decisions are time sensitive." NIFLA Pet. App. 77a. The state Legislature concluded that "[t]he most effective way to ensure that women quickly obtain the information and services they need" is to require licensed health care facilities that are unable to immediately enroll patients into state-funded programs to advise each patient at the time of her visit that the programs exist and give information on how they may be accessed. *Id.*

As a result, the Act imposes a notice requirement on "licensed covered facilit[ies]." A "licensed covered facility" is a clinic licensed under California Health & Safety Code Section 1204 (covering "primary care" clinics, "community" clinics, "free" clinics, and "specialty" clinics such as "surgical" clinics and "alternative birth center[s]"), whose "primary purpose is providing family planning or pregnancy-related services" and that satisfies two of six enumerated criteria. § 123471(a). The enumerated criteria are that

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[2] *See* http://mcap.dhcs.ca.gov/My_MCAP/Important_Information_Applicants.aspx.

[3] *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

[4] *See Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252 (1981).

the facility (1) "offers obstetric ultrasounds, obstetric sonograms, or prenatal care," (2) "provides, or offers counseling about, contraception or contraceptive methods," (3) "offers pregnancy testing or pregnancy diagnosis," (4) "advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling," (5) "offers abortion services," and (6) "has staff or volunteers who collect health information from clients." § 123471(a).[5]

The definition's cross-reference to section 1204 means that licensed covered facilities provide "[d]iagnostic, therapeutic, radiological, laboratory [or] other services for the care and treatment of patients for whom the clinic accepts responsibility," Cal. Code. Regs. tit. 22, § 75026, and that they must have "a licensed physician designated as the professional director" and have a physician, physician's assistant, or registered nurse present whenever medical services are provided, *id.* § 75027. The Act excludes from coverage clinics that are operated by the federal government. § 123471(c)(1). The Act also excludes Medi-Cal Family PACT providers, § 123471(c)(2), which are capable of enrolling pregnant women in state-sponsored programs on the spot, NIFLA Pet. App. 77a.

The Act requires licensed covered facilities to provide clients with a notice stating that:

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[5] An off-site, limited-hour "intermittent" clinic affiliated with a licensed primary care clinic is also a licensed covered facility if it has the primary purpose of providing family planning or pregnancy-related services and meets two of these criteria. §§ 123471(a), 1206(h).

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

§ 123472(a)(1).

Clinics may choose how to provide this information: by handing patients a printed notice in 14-point or larger type, providing a digital notice at the time of check-in or arrival, or posting a notice in the waiting room. § 123472(a)(2). Clinics may issue the notice separately, or combined with other disclosures. § 123472(a)(3). However provided, the notice must be in English and in the county's primary threshold languages for Medi-Cal beneficiaries. § 123472(a). For clinics that choose to comply with the requirement by posting the notice in the waiting room, the posting must be at least 8.5 inches by 11 inches and written in 22-point or larger font. § 123472(a)(2)(A).

Violations are punishable by a civil fine of $500 for a first offense or $1,000 for subsequent offenses. § 123473(a). No enforcement proceeding may occur unless the government attorney has previously notified the facility of noncompliance and given it 30 days to correct the violation. *Id.*

b. The second problem the law responds to is confusion among certain women as to whether the care and advice they receive comes from medical professionals. Licensed medical professionals and insti-

tutions are required, by professional standards and governmental regulation, to give medically accurate information. Laypeople and unlicensed organizations, however, are not under similar mandates. The Legislature reviewed evidence about so-called "crisis pregnancy centers," finding that they frequently provide women with medically inaccurate information.[6] At the same time, some facilities offer services such as pregnancy testing and ultrasound examinations, which can lead women to believe they are receiving treatment in a medical setting. These circumstances caused the Legislature to conclude that it is "vital" for pregnant women to know if they are receiving pregnancy-related services from a facility or individual that is not licensed to provide actual medical care. NIFLA Pet. App. 77a.

The Act therefore imposes a separate notice requirement on "unlicensed covered facilit[ies]." Such a facility is one whose "primary purpose" is "providing pregnancy-related services," but which is not licensed by the State and where no licensed medical provider provides or supervises the clinic's services. § 123471(b). To be treated as an unlicensed covered facility, the facility must also satisfy two or more from a list of four criteria: (1) offering obstetric ultrasounds or sonograms, or prenatal care to pregnant women; (2) offering pregnancy testing or diagnosis; (3) advertising or soliciting patrons with offers to provide prenatal sonography, pregnancy tests, or "pregnancy options counseling"; or (4) collecting health information from clients. *Id.*

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[6] *See* Rep. of Cal. Assem. Health Comm. on A.B. 775, Apr. 14, 2015, at 3-4.

Such a facility must provide to clients, on site and in any print and digital advertising materials, a notice stating that:

> This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

§ 123472(b). The notice must be provided in English and in the county's primary threshold languages for Medi-Cal beneficiaries. *Id.* The on-site notice must be on a sign measuring at least 8.5 by 11 inches and written in 48-point or larger type, and the advertising-material notice must be "clear and conspicuous," § 123472(b)(2), (3). Violations are governed by the same penalty provisions that apply to licensed covered facilities. *See* p. 4, *supra*.

2. Before the Act's January 2016 effective date, the three sets of petitioners in these cases brought separate actions, seeking to declare the Act unlawful under the First Amendment and to enjoin its enforcement. In each case, the petitioners requested a pre-enforcement, pre-discovery preliminary injunction barring enforcement of the Act against them.

a. The NIFLA plaintiffs filed suit in the U.S. District Court for the Southern District of California against California's Governor and Attorney General, the County Counsel for San Diego County, and the City Attorney of El Cajon. NIFLA Pet. App. 84a-85a. The complaint states that one plaintiff is licensed by the State as a community clinic and clinical laboratory and employs licensed physicians and nurses. *Id.* at 91a-92a. It provides "[m]edical" and "clinical" ser-

vices such as ultrasound examinations, health provider consultation, information on natural family planning, and prenatal vitamins, as well as non-medical services such as peer counseling, maternity clothes, and support groups. *Id.* Another plaintiff is an unlicensed covered facility, which provides pregnancy test kits, educational programs, and maternity clothes, and which contracts with a licensed provider to provide ultrasound services at a separate facility. *Id.* at 92a. The final plaintiff is a non-profit organization comprised of both medical and non-medical centers that provide "pro-life information services" to women with unplanned pregnancies. *Id.* at 93a. NIFLA's motion for a preliminary injunction relied on the plaintiffs' complaint alone without any supporting declarations. *Id.* at 47a n.2. The motion relied exclusively on Free Speech and Free Exercise arguments, not on additional statutory and state constitutional claims also included in the complaint. NIFLA D. Ct. Doc. 3, at 2 n.1 (Motion); NIFLA Pet. App. 116a-117a.

The district court concluded that the NIFLA plaintiffs were not likely to succeed on the merits of their federal constitutional claims. NIFLA Pet. App. 56a-69a. With respect to the licensed facility provisions, the court noted that, while "the Act requires medical providers to advise their patients of various types of treatment available so patients are fully informed," it was "neutral as to any particular view or opinion," did not make any recommendation, and did not preclude plaintiffs from openly expressing disagreement. *Id.* at 61a, 64a-65a. Given that the definition of "licensed covered facilities" encompassed only state licensed medical institutions providing specific medical services, *id.* at 61a-62a, the court concluded

that the licensed facility requirements were no broader than necessary and survived intermediate scrutiny, *id.* at 64a-65a. The court further concluded that the Act's unlicensed facility requirements could withstand "any level of scrutiny," because disclosure of a facility's unlicensed status was narrowly tailored to achieve the compelling interest of ensuring that women know whether or not they are receiving care from a licensed professional. *Id.* at 65a-67a. With respect to the Free Exercise claim, the court found "no evidence to suggest the Act burdens only conduct motivated by religious belief." *Id.* at 68a. Rather, the Act was "neutral," "generally applicable," and constitutional. *Id.* Finally, the court found that the balance of hardships and public policy interests favored not granting an injunction. *Id.* at 69a-71a.

b. The AWF plaintiffs sued the California Attorney General in the U.S. District Court for the Eastern District of California. AWF C.A. E.R. 333 (Amended Complaint). The plaintiffs are three licensed covered facilities that are licensed as community clinics. *Id.* at 335-336. They provide "medical consultations" and services, including pregnancy testing, ultrasound examinations, referrals to other medical providers, and information on prenatal care and fetal development. *Id.* Patients typically meet with a registered nurse for administration of a pregnancy test, estimation of a due date and conception date, collection of medical history and vital signs, medical evaluation, advice on collecting health insurance benefits, instruction on prenatal care and development, and an ultrasound examination. AWF Pet. App. 19-20. AWF's motion for a preliminary injunction was based on declarations in addition to the complaint. AWF C.A. E.R. 270-305 (Declarations).

The district court concluded that the AWF plaintiffs were unlikely to succeed on the merits of their claims. AWF Pet. App. 44-89. The court reasoned that the Act's licensed clinic provision "regulates speech within the confines of a professional relationship," *id.* at 64, providing "information relevant to patients' medical decisions," *id.* at 61. Although some cases had interpreted *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as requiring only rational basis review for government-mandated speech directed to women considering whether to terminate a pregnancy, the court applied the more demanding standard of intermediate scrutiny under the professional-speech doctrine. *Id.* at 65-68. The licensed facility requirement passed that test, given the limited nature of the required notice and given the State's interests in regulating the medical profession, assuring safe healthcare, and ensuring that pregnant women are informed of their healthcare options. *Id.* at 70-71; *id.* at 72 ("The notice provides the information in neutral language and does not incorporate ideological commentary or convey an opinion. Although it includes the word 'abortion,' the word appears in the context of a list describing the full spectrum of reproductive health care services available in California."). Indeed, given the evidence "at this stage" of the case, the court deemed it likely that the statute would pass even strict scrutiny. *Id.* at 73-78. The court also considered the balance of hardships and the public interest, concluding that neither factor would change the outcome even counting the ultimate merits question as close. *Id.* at 89-97. With respect to the Free Exercise claim, the court upheld the Act as "a neutral law of general applicability" which "'regulate[s] all

pregnancy centers,'" not just those opposed to abortion, in a "'uniform manner.'" *Id.* at 79, 86.

c. The *Livingwell* case was filed in the U.S. District Court for the Northern District of California against the California Attorney General, the Director of the California Department of Public Health, three county counsels, and three city attorneys. Livingwell C.A. E.R. 78 (First Amended Complaint). The plaintiffs are three clinics licensed as primary care, free, or community clinics. *Id.* at 79-80. They based their motion for a preliminary injunction on their complaint and on brief declarations, which together provide limited detail about the clinics' activities—such as that they are morally opposed to abortion, that they do not charge patients for their services, and that they provide both medical services (such as pregnancy testing and verification, obstetrical ultrasounds, and sexually transmitted infection testing and treatment) and non-medical services (such as post-abortion healing retreats and material support through a thrift store). *Id.* at 71, 74, 77 (Declarations).

Noting the "limited record" before it, Livingwell Pet. App. 31, 32, the district court concluded that the plaintiffs were unlikely to succeed on the merits of their claims, *id.* at 25-37. In the court's view, "further discovery [would be] needed" for the court to evaluate whether the speech at issue was commercial speech. *Id.* at 31-32. As a regulation of professional speech, however, the law was permissible, because the plaintiffs had "accept[ed] the responsibility of providing medically-supervised treatment for patients," and the statute required them to provide "only factual and incontrovertibly true information

about the range of pregnancy-related public health services available." *Id.* at 37. The court also held that the plaintiffs had not demonstrated irreparable injury and that the balance of equities did not weigh in their favor. *Id.* at 38.

2. Two motions panels of the court of appeals denied motions by the Livingwell and AWF plaintiffs seeking injunctions pending appeal, concluding that the plaintiffs were "not likely to succeed on their claim that the district court abused its discretion in holding that they do not meet the preliminary injunction standard." Livingwell Pet. App. 5-6; *see also* AWF C.A. Doc. 11.[7]

A merits panel then affirmed the district courts' denials of injunctive relief, issuing a published opinion in *NIFLA* and unpublished summary opinions in *Livingwell* and *AWF*. NIFLA Pet. App. 1a-43a; AWF Pet. App. 1-3; Livingwell Pet. App. 1-4.

In its lead opinion, the court reasoned that the Act did not discriminate based on viewpoint. NIFLA Pet. App. 20a. Indeed, "[o]ther than … two narrow exceptions unrelated to viewpoint, the Act applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services." *Id.* at 21a. Although the Act mandated the provision of notices with particular content, that did not require strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). NIFLA Pet. App. 23a. With respect to professional speech, this Court had upheld certain state compelled notices by physicians

[7] The NIFLA plaintiffs did not move for an injunction pending appeal.

in *Casey*. *Id.* at 23a-24a. Although some courts, relying on *Casey*, had imposed a mere "'reasonableness' test when determining whether an abortion-related disclosure law violated physicians' First Amendment rights," *id.* at 25a (citing Fifth and Eighth Circuit decisions), the court of appeals concluded that it was appropriate to apply here the same test that it would apply to other regulations of professional speech. *Id.* at 26a-27a; *see id.* at 28a-33a (applying professional speech test from *Pickup v. Brown*, 740 F.3d 1208 (9th Cir.), cert. denied, 134 S. Ct. 2871, and 134 S. Ct. 2881 (2014)). Application of that test was appropriate because "clients go to the clinic precisely because of the professional services it offers" and "reasonably rely upon the clinic for its knowledge and skill," and because the notice applicable to licensed clinics contained information relating to the clinics' professional services and was "part of the clinics' professional practice." *Id.* at 30a-31a.

As a regulation of professionals, the licensed clinic notice requirement was not subject to rational basis review, because it did not regulate "therapy, treatment," or other conduct. Pet. App. 31a. Nor did strict scrutiny apply, because the notice governed only professional relationships with patients—the clinics were not "engaging in a public dialog when treating their clients." *Id.* As a result, the court applied intermediate scrutiny. *Id.* at 31a-32a. The statute served the State's substantial interests in promoting health and regulating the practice of the profession. *Id.* at 34a. And the notice was "narrowly drawn," in that it did not "contain any more speech than necessary" to alert women to the existence of state-funded services, and did not "encourage, suggest, or imply that women should use those … ser-

vices." *Id.* This last point distinguished California's law from laws struck down in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir.), cert. denied, 135 S. Ct. 435 (2014), and *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (en banc), each of which had concerned notices that went beyond merely supplying information in a neutral manner. *See* NIFLA Pet. App. 36a ("unlike … the regulations before the Second and Fourth Circuits, the [California notice] does not use the word 'encourage,' or other language that suggests the California Legislature's preferences regarding prenatal care").

The court also found no abuse of discretion in the *NIFLA* district court's decision to deny an injunction as to enforcement of the notice requirement that applied to unlicensed facilities. NIFLA Pet. App. 36a-39a. The court found no need to decide whether the medical nature of some of the unlicensed facilities' services (such as pregnancy tests) could make them subject to lesser scrutiny under the professional speech doctrine. *Id.* at 37a. Even if strict scrutiny applied, "California has a compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state." *Id.* That interest was "particularly compelling" given the Legislature's findings about the existence of clinics "which often present misleading information to women about reproductive medical services." *Id.* And the Act's one-sentence notice was "narrowly tailored" to achieve its goal—a conclusion consistent with decisions by the Second and Fourth Circuits. *Id.* at 37a-38a (citing *Evergreen*, 740 F.3d at 246-247, and *Centro Tepeyac*, 722 F.3d at 190).

Finally, the court found no merit in the plaintiffs' Free Exercise claim. NIFLA Pet. App. 40a-42a. Unlike the ordinance struck down in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Act did not single out clinics that were motivated by religious belief. NIFLA Pet. App. 40a. Instead, it "applies to all covered facilities, and is indifferent to the basis for any objection." *Id.* The two exemptions merely recognized the State's inability to regulate federal clinics, and the lack of any need to compel notice about public funding options at clinics that were already able and motivated to enroll patients in those options themselves. *Id.* at 41a.

The plaintiffs' petitions for rehearing en banc were denied without dissent. NIFLA Pet. App. 72a-73a; AWF Pet. App. 98; Livingwell Pet. App. 41-42.

## ARGUMENT

The court of appeals' decisions upholding the district courts' denials of petitioners' requests for preliminary relief conflict neither with this Court's precedents nor with the decisions of other lower courts. The notice that licensed facilities must give under the FACT Act falls well within the First Amendment's tolerance for the regulation of the practice-related speech of licensed professionals. The notice that unlicensed facilities must give is a permissible means to ensure that women are not misled about whether they are under the care of medical professionals, as courts reviewing similar laws have concluded. And the Act poses no substantial Free Exercise question. There is no reason for review by this Court, particularly at the preliminary stage of this ongoing litigation.

1. All petitioners argue that the FACT Act's provisions requiring disclosures by licensed facilities violate the Free Speech Clause of the First Amendment. NIFLA Pet. 17-30; AWF Pet. 15-31; Livingwell Pet. 14-38. The court of appeals' decision that the petitioners were unlikely to succeed on that claim is consistent with this Court's precedents, and creates no conflict with decisions of other lower courts. NIFLA Pet. App. 18a-36a.

a. This Court has recognized that, for First Amendment purposes, requirements imposed on a licensed professional's speech in the course of professional practice present substantially different questions than similar requirements imposed on a non-professional.[8] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion), for example, the Court considered a Pennsylvania statute that, among other things, required a physician or qualified non-physician to inform women seeking abortions about the availability of state-prescribed printed materials that described the fetus and gave information about paternal child-support, adoption, and other alternatives to abortion. *Id.* at 881. *Casey* rejected a First Amendment challenge to this requirement, because "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to

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[8] AWF proposes (Pet. 30) that certiorari should be granted to determine whether a special category of professional speech exists at all. But AWF did not contest the existence of a special category of professional speech regulation in the lower courts. It argued only that the Act fell outside the professional speech doctrine's boundaries and that compelled speech always receives strict scrutiny. AWF C.A. Br. 18-26; AWF C.A. Reply Br. 3-6.

reasonable licensing and regulation by the State." *Id.* at 884 (citations omitted). *See also Lowe v. SEC*, 472 U.S. 181, 207-208 (1985); *id.* at 227-233 (White, J., concurring).

Petitioners suggest that *Casey*'s reasoning does not extend to the FACT Act, because California allows the delivery of the notice during check-in procedures or by a posted sign in the waiting room, rather than requiring disclosures of information in one-on-one conversations with physicians. NIFLA Pet. 27-28. But the notice requirement applies only to clinics licensed under section 1204. Such clinics provide "[d]iagnostic, therapeutic, radiological, laboratory and other services for the care and treatment of patients for whom the clinic accepts responsibility," Cal. Code. Regs. tit. 22, § 75026, thus "tak[ing] the affairs of [the patient] personally in hand and purport[ing] to exercise judgment on [the patient's behalf] in the light of [her] individual needs and circumstances," *Lowe*, 472 U.S. at 232 (White, J., concurring).[9] Nor can *Casey* support a rule limiting professional disclosures to speech by particular professionals rather than by the licensed institution at which the professionals work. The statute upheld in *Casey* required that certain disclosures be made by the physician or a qualified nonphysician. 505 U.S. at 881. Indeed, by allowing the clinic to *choose* whether to make its disclosure by a printed notice (delivered by the physician or otherwise), a digital notice, or a sign on clinic

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[9] Although NIFLA argues (Pet. 28) that the licensed clinics also engage in activities such as offering clothing and diapers, the record at this stage does not show that such services predominate over the provision of personalized medical services.

walls, California's Act imposes a lesser burden on both the speaker and the listener than would be imposed if the disclosure had to be made in a one-on-one conversation with a particular person.

*Casey* likewise cannot be read as limiting the regulation of medical professionals' speech to pre-surgery informed consent. NIFLA Pet. 27. Many of the disclosures at issue in *Casey* went far beyond informing a woman as to the nature and health consequences of a surgical procedure. *See, e.g.,* 505 U.S. at 883 (upholding required dissemination of information regarding "the assistance available should [the woman] decide to carry the pregnancy to full term"). Like the law at issue in *Casey*, the FACT Act recognizes that licensed medical institutions and professionals have specialized knowledge not only about the technical aspects of medicine, but also about related financial and regulatory questions.[10] Indeed, petitioners encourage their patients to depend on such expertise. *See* AWF Pet. App. 20 (AWF's nurses advise on collecting health insurance benefits). California's law seeks to ensure that pregnant women have access to information that is relevant to the variety of health decisions they face, much as the *Casey* disclosures aimed to "ensure that a woman apprehend the full consequences of her decision" so that

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[10] *See also, e.g.*, Cal. Health & Safety Code § 1204.3(a)(5) (alternative birthing centers must provide to patients a summary of state child-car-seat laws and list of public car-seat programs); Cal. Code Regs., tit. 16, § 1355.4 (physicians' offices must provide notice, by posted sign or otherwise, stating that physicians are "licensed and regulated by the Medical Board of California" and giving the Medical Board's phone number); Cal. Code Regs., tit. 16, § 1707.6 (pharmacies must post notice that interpreter services and large-font drug labels are available).

she does not "discover later, with devastating psychological consequences, that her decision was not fully informed." 505 U.S. at 882.[11]

b. NIFLA contends (Pet. 21-23) that certiorari should be granted to determine whether, under *In re Primus*, 436 U.S. 412 (1978), strict scrutiny applies whenever the State regulates the speech of professionals who do not charge for their services. In *Primus*, an attorney was disciplined for informing a forced-sterilization victim that the ACLU might represent her for free. *Id.* at 416-421. This Court concluded that the case was controlled by *In re Button*, 371 U.S. 415 (1963), which had forbidden Virginia from punishing the NAACP for soliciting potential plaintiffs to file suit with the NAACP as counsel. *Primus*, 436 U.S. at 422-426. In each case, the "solicitation of prospective litigants … for the purpose of furthering [the organization's and its members'] objectives" fell squarely "within the right to engage in association for the advancement of beliefs and ideas."

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[11] NIFLA argues (Pet. 30) that the Ninth Circuit's application of the professional speech doctrine based on *Casey* conflicts with the Eleventh Circuit's decision in *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc). As NIFLA notes, *Wollschlaeger* observed that *Casey* did not "'hold sweepingly that all regulation of speech in the medical context merely receives rational basis review.'" *Id.* at 1311 (quoting *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014)). But the Ninth Circuit did not apply rational basis review. Instead, although mentioning that some courts have applied such review with respect to regulations of medical professionals' speech, the Ninth Circuit rejected that standard in favor of intermediate scrutiny. NIFLA Pet. App. 25a-28a. That is consistent with *Wollschlaeger*. *See Wollschlaeger*, 848 F.3d at 1311 (rejecting rational basis review in favor of "heightened scrutiny").

*Id.* at 423-424 (footnote and internal quotation marks omitted). Any prohibition on that solicitation was subject to "'exacting scrutiny,'" requiring a "'compelling'" interest and a restriction "'closely drawn to avoid unnecessary abridgment of associational freedoms.'" *Id.* at 432.

Under *Primus* and *Button*, interference with a nonprofit's associational right to attract members and allies for collective action through litigation receives strict scrutiny. *See United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (*Button* concerned the "right to group legal action").[12] But those cases do not hold that a State's ability to regulate professional conduct depends on whether the professional charges for his or her services. Neither *Primus* nor *Button* suggest that a pro bono attorney's advice to clients on the conduct of their litigation would be subject to anything other than the ordinary rules regulating the profession. And exempting medical professionals from ordinary regulations in their advice to non-paying patients would create a vast population vulnerable to abuse and neglect.[13]

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[12] For nonprofit litigating organizations, the client is not only a recipient of legal services but also a necessary participant in the lawsuit that propounds the organization's advocacy message to the public and to courts. A medical clinic's patient, in contrast, receives confidential medical services. California does not restrict petitioners' efforts to recruit staff or volunteers—the activity most analogous to the practices at issue in *Button* and *Primus*.

[13] *See* Centers for Disease Control, NCHS Data Brief No. 38 (May 2010) (roughly 20% of emergency room patients under age 65 are uninsured), available at http://www.cdc.gov/nchs/data/databriefs/db38.pdf.

NIFLA claims (Pet. 22-23) that the Ninth Circuit's rejection of its argument conflicts with *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013). But *Moore-King* addressed the regulation of "'fortune-teller[s], palmist[s], astrologist[s],'" "'clairvoyant[s],'" "'prophet[s]'" and other practitioners of the "'occult sciences.'" *Id.* at 563. Its recognition that States have greater latitude to regulate such a person's advice to "'a paying client'" (NIFLA Pet. 23) does not imply converse restrictions on the States' ability to regulate the pro bono services of professionals such as doctors and lawyers. *Cf. Polk County v. Dodson*, 454 U.S. 312, 323 (1981) (legal ethics rules constrain public defenders' advocacy); *Barker v. Capotosto*, 875 N.W. 2d 157, 167 (Iowa 2016) (attorneys who serve indigent clients are subject to ordinary malpractice law).

c. Livingwell (Pet. 35) and NIFLA (Pet. 18) argue that, regardless of any professional context, compelled speech should receive strict scrutiny as content-based regulation under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). But *Reed* did not extinguish the categorically lower levels of scrutiny that apply to certain kinds of speech, such as commercial speech and speech in the context of a professional relationship. The Ninth Circuit's recognition of this point is consistent with other lower courts' post-*Reed* decisions. *E.g., Kiser v. Kamdar*, 831 F.3d 784, 788 (6th Cir. 2016) (applying intermediate scrutiny test of *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), to content-based restriction on dentist's advertising). It is also consistent with recent actions by this Court. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (remanding for consideration of whether a statute governing price-disclosures should

be reviewed as a commercial speech regulation under *Central Hudson*, or whether it should be "upheld as a valid disclosure requirement" under *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985) (allowing disclosure requirements that are "reasonably related" to the State's interest in preventing deception of consumers)).

AWF contends (Pet. 18-20) that certain lower court decisions interpret *Reed* as mandating strict scrutiny for *all* speech regulations that are content-based. But AWF's cases say nothing about *Reed*'s effect on speech in categories for which this Court had previously established a lesser standard of review. *Free Speech Coalition, Inc. v. Attorney General*, 825 F.3d 149, 176 n.7 (3d Cir. 2016), cited without criticism several post-*Reed* decisions continuing to apply intermediate scrutiny to content-based commercial-speech laws. Two of AWF's strict-scrutiny cases concerned core political speech. *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 508 (D.C. Cir. 2016); *Wagner v. Garfield Heights*, 2017 WL 129034, at *1 (6th Cir. 2017) (per curiam). Another posed the same question as *Reed* itself. *See Central Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016) (sign ordinance with exemptions for particular content was not a time-place-manner restriction). And *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), applied strict scrutiny to an ordinance that barred oral requests for money. Nothing in those decisions demonstrates any need for further review in this case.

d. Petitioners contend that the Ninth Circuit's decision conflicts with lower court decisions regarding abortion-related disclosures in particular. That is not correct.

NIFLA argues (Pet. 24) that the Ninth Circuit's decision conflicts with the portion of *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), that considered a New York City ordinance which required pregnancy centers to make several disclosures, including one about whether or not each center would provide, or provide referrals for, abortion, emergency contraception, or prenatal care. *Id.* at 238. The Second Circuit affirmed the district court's preliminary injunction against that particular mandated disclosure, holding that the requirement could not survive strict or intermediate scrutiny because it "overly burden[ed]" the centers' speech. *Id.* at 249. But the ordinance in *Evergreen* applied only to centers that were *not* "'licensed … to provide medical or pharmaceutical services'" and that did *not* "have a licensed medical provider on staff." *Id.* at 239. *Evergreen* thus did not consider or decide the questions concerning professional speech regulation that the Ninth Circuit addressed here.

Petitioners contend that the Ninth Circuit's decision conflicts with *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). *See* Livingwell Pet. 20-24; NIFLA Pet. 29; AWF Pet. 25. *Stuart* concerned a North Carolina law that required a doctor or technician to perform a sonogram on any woman seeking an abortion, to display the sonogram so that the woman would see it unless she "avert[ed] her eyes," to offer the woman the ability to hear the fetal heartbeat, and to give a detailed description of the fetus's "'presence, location, and dimensions'" and "'the presence of external members and internal organs.'" *Stuart*, 774 F.3d at 243. The Fourth Circuit in *Stuart*, like the Ninth Circuit here, rejected rational basis review and in-

stead applied a "heightened intermediate scrutiny standard." *Id.* at 248.[14] The statute in *Stuart* did not survive that scrutiny because "the context surrounding the delivery of [the state-mandated message] promote[d] the viewpoint the state wishe[d] to encourage." *Id.* at 253. "[U]nusual" features of the North Carolina disclosure requirement reinforced that its purpose was not to provide neutral information, but to make the discussion of abortion distasteful. *Id.* at 254-255. Moreover, unlike the law in *Casey* and California's law here, the North Carolina statute required the physician herself to speak the message, rather than simply "[i]nforming a patient that there are state-issued materials available." *Id.* at 253. Nothing in *Stuart* implies that the Fourth Circuit would have come to a different conclusion than the Ninth Circuit on the quite different facts of this case.

e. Finally, the State argued below that at least some of the activities of the licensed facilities were commercial speech and could be regulated as such. *See, e.g.,* Livingwell Pet. App. 31-32 (district court decision noting the commercial speech question). Although the court of appeals rejected the argument, NIFLA Pet. App. 18a n.5, it would provide an independent basis for sustaining the judgment below if the Court were to grant review in this case.

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[14] Because the decision below upheld California's notice requirement for licensed facilities under intermediate scrutiny, this case does not implicate AWF's view that a standard of review that is even lower should apply to other kinds of abortion-disclosure regulations. AWF Pet. 25-26 (citing *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012), and *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008)).

2. The court of appeal also correctly affirmed the denial of a preliminary injunction with respect to NIFLA's Free Speech challenges to the notice that unlicensed facilities are required to give. NIFLA Pet. App. 36a-39a.

The notice requirement for unlicensed facilities applies only to facilities whose characteristics—such as the provision of ultrasound examinations and pregnancy tests, *see* p. 5, *supra*—could mislead visitors into believing that they are receiving care under the supervision of licensed medical professionals. The Act requires disclosure only of the fact that the facility "is not licensed as a medical facility by the State of California and has no licensed provider who provides or directly supervises the provision of services." *See* p. 6, *supra*. The court of appeals concluded that the disclosure was likely to survive strict scrutiny, because it is narrowly tailored to achieve the State's compelling interest in ensuring "that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state." NIFLA Pet. App. 37a-38a.

As NIFLA concedes (Pet. 25 n.4), the Second Circuit in *Evergreen* also upheld, under strict scrutiny, a requirement for unlicensed centers to "disclose whether or not they 'have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center.'" 740 F.3d at 246.[15] *Evergreen* reasoned that

[15] This Court denied the *Evergreen* plaintiffs' petitions (continued…)

such a disclosure "is the least restrictive means to ensure that a woman is aware of whether or not a *particular* pregnancy services center has a licensed medical provider at the time that she first interacts with it." *Id.* at 247. *Evergreen* rejected an argument that New York should instead have barred only purposeful deception. A woman is harmed if a center's attributes lead her to believe erroneously that she is receiving care from licensed professionals, even in the absence of any active deception. *Id.*

NIFLA contends (Pet. 31-36) that the decision below is inconsistent with *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). *Riley* invalidated a North Carolina requirement that a nonprofit's paid fundraisers disclose to potential donors "the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months." *Id.* at 786. The Court rejected North Carolina's attempt to defend the law as necessary to prevent donors from giving money under a mistaken assumption about how much would go to the soliciting charity. *Id.* at 798. But part of *Riley*'s reasoning for why that disclosure was unnecessary was that a separate provision of North Carolina law, which the plaintiffs had not challenged, *id.* at 786, "require[d] professional fundraisers to disclose their professional status to potential donors," *id.* at 799. *Riley* thus "suggest[s] that a requirement that solicitors disclose their professional status is 'a narrowly tailored requirement [that]

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for certiorari on that issue. *See* 135 S. Ct. 435 (2014) (denying certiorari in Case Nos. 13-1462 and 13-1504).

would withstand First Amendment scrutiny.'" *Evergreen*, 740 F.3d at 248.[16]

In its question presented and elsewhere (Pet. i, 1, 10, 16, 32-33), NIFLA now focuses on the Act's requirement that notices be provided in Medi-Cal threshold languages, which NIFLA says would require it to use 13 languages in Los Angeles County and six languages in San Diego County. Neither that argument nor any supporting evidence was presented to the district court. Indeed, NIFLA's district court pleadings regarding its motion for a preliminary injunction did not raise the multiple-language issue at all. *See* NIFLA D. Ct. Doc. 3 (Motion); NIFLA D. Ct. Doc. 17 (Reply); NIFLA Pet. App. 85-122a (Com-

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[16] NIFLA contends (Pet. 32 n.5) that the Ninth Circuit's ruling as to notices by unlicensed providers conflicts with *Centro Tepeyac v. Montgomery County*, 5 F. Supp. 3d 745 (D. Md. 2014). But the *Centro Tepeyac* ordinance required that a disclosure about lack of medical personnel be made by *every* "'organization, center or individual'" that "'has a primary purpose to provide pregnancy-related services'" and "'provides information about pregnancy-related services'" without a licensed professional on staff. *Id.* at 748. California's requirement applies only to facilities with certain characteristics that could create a misimpression about whether they are in fact medical clinics. And the *Centro Tepeyac* ordinance required a covered facility to disclose not only that it "'does not have a licensed medical professional on staff,'" but also that "'the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.'" *Id.* The district court decision cited by NIFLA did not decide whether it would have violated the First Amendment to require only the first disclosure. *Id.* at 754. When the Fourth Circuit considered the two provisions separately at an earlier stage of that case, it upheld the denial of a preliminary injunction as to the first disclosure. *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 189-190, 192 (4th Cir. 2013) (en banc).

plaint). NIFLA belatedly raised a form of the argument at the court of appeals, based on more limited (and inconsistent) assertions. *See* NIFLA C.A. Opening Br. 17 (arguing that law would require notice to be provided "in up to four languages"); *id.* at 54 (five languages). NIFLA's accusation (Pet. 15) that the lower courts failed to address the Act's multiple language requirement simply underscores NIFLA's failure to properly present or preserve the issue. There is no reason for this Court to address the language requirement in the first instance, in a preliminary injunction posture, on a nonexistent record.

The same is true of NIFLA's claims about how the Act's language and type-size requirements would interact with newspaper rates to make advertising "cost prohibitive" (Pet. 1, 16, 25, 32-33)—assertions that likewise were not presented to the courts below. And although NIFLA alleged generally at the district court that web advertisements on services such as Google "have limits on their size, such as in the number of characters that can be used," NIFLA Pet. App. 100a, NIFLA's submissions to the lower courts did not provide specific allegations about what those limits are or about how members' advertisements would be affected.[17] Even if NIFLA intends to provide further information to support its claims at a later stage, the district court did not abuse its discretion in withholding a preliminary injunction given the record before it. And the absence of proper argument

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[17] *See* NIFLA D. Ct. Doc. 51, at 20 (Jan. 28, 2016, Tr.) (court's observation about the absence of information in the record regarding "what [the plaintiffs'] advertisements say and how they might be impacted by the disclosure required by the statute").

and evidence in the courts below makes this case ill-suited for review of any related issue, at least in its current posture.[18]

3. AWF (Pet. 31-35) and NIFLA (Pet. 36-38) also challenge the lower courts' rejection of their requests for preliminary relief based on the Free Exercise Clause. NIFLA Pet. App. 39a-42a.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const., amend I. It prevents "governmental regulation of religious beliefs as such." *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis omitted). But the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879. Thus, a neutral law of general application need not be justified by a compelling interest, even if it has the incidental effect of burdening a particular religious practice. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

A law is neutral for these purposes if its object, as determined by its text and operational effect, is something other than the infringement or restriction of religious practice. *Lukumi*, 508 U.S. at 532-533, 535. A law is generally applicable if it does not "im-

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[18] That is particularly so because the Act's severability clause, *see* NIFLA Pet. App. 82a-83a, would require the Court to assess not only the combined effect of the Act's language, advertising, and other requirements, but also the separate effect of each individual provision.

pose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877. The FACT Act, which makes no distinction based on a particular licensed or unlicensed facility's religious affiliation, beliefs, or position on abortion, meets these tests.

Relying on *Lukumi*, NIFLA claims (Pet. 37-38) that the Act was designed to target antiabortion facilities, and that most such facilities are religiously motivated. The argument fails. *Lukumi* considered the constitutionality of ordinances that interfered with the Santeria religion's practice of ritual sacrifice. 508 U.S. at 526. The ordinances outlawed "'sacrific[ing]'" or killing animals "'for any type of ritual.'" *Id.* at 527. Most other kinds of animal killings were permitted, including hunting, fishing, meat production, pest extermination, and euthanasia. *Id.* at 536-537. In effect, the ordinances applied only to the Santeria Church. *Id.* at 537-538. The Court held that these "gerrymandered" ordinances were not neutral or generally applicable. *Id.* at 542.

Nothing similar can be said here. The unlicensed notice requirement applies to *all* unlicensed facilities that primarily provide pregnancy-related services and that meet two or more of the criteria in section 123471(b). Thus, a commercial facility that is neutral toward or supportive of abortion could be subject to the notice requirement as a consequence of advertising and offering ultrasounds. § 123471(b)(1), (3).[19]

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[19] *See* Cari Romm, FDA Warning: Stay Away From "Keepsake" Ultrasounds, *The Atlantic*, Dec. 16, 2014 (discussing businesses that offer "medically unnecessary scans … administered by people with no healthcare training"), available at https://www.theatlantic.com/health/archive/2014/12/fdawarning

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Licensed facilities, too, are subject to the Act's requirements based on criteria that are neutral as to religious motivation or stance on abortion. *See* § 123471(a).

Nor do the Act's exemptions amount to evidence of a "gerrymander" in the *Lukumi* sense. The exemption for clinics "conducted, maintained, or operated by the United States or any of its departments, officers, or agencies," § 123471(c)(1), simply recognizes that the State may lack power to regulate such entities. And the exemption for licensed clinics that are already "enrolled as a Medi-Cal provider and a provider in the Family [PACT] Program," § 123471(c)(2), recognizes that there is no reason to mandate notice of a phone number for accessing free or low-cost public services at facilities that are able to (and have the incentive to) enroll eligible patients in those very programs themselves. See NIFLA Pet. App. 77a.[20] It

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-stay-away-from-keepsake-ultrasounds/383816/.

[20] NIFLA now claims that the exemption for Family PACT participants "is the method by which the State excludes all others but the pro-life centers" and thus "forces only those centers that oppose abortion to speak the State's message." NIFLA Pet. 8-9; *see also id.* at 18, 20-21. At the court of appeals, however, NIFLA pointed to this exemption not as evidence of an anti-religious or viewpoint-discriminatory gerrymander, but only as something that "undermines the alleged importance of [the State] interest" in informing women. NIFLA C.A. Br. 47. Livingwell claims (Pet. 23) that the exemption for Medi-Cal Family PACT providers results in viewpoint discrimination because Family PACT providers are not required to inform women of alternatives to abortion. But Medi-Cal providers commonly cover the alternatives to abortion: prenatal care and live birth. *See* pp. 1-2, *supra*.

does not function to exempt abortion providers.[21] Indeed, offering abortion services is one of the factors that may make a licensed clinic subject to the notice requirement, § 123471(a)(5), and notice by such a provider would alert women to the availability of an alternative: prenatal care. *See* pp. 3-4, *supra*. NIFLA argues (Pet. 38) that groups opposed to abortion generally cannot participate in the Family PACT program because participants must "supply contraceptives [that such groups] believe work as abortifacients." But at least at this stage of the litigation, NIFLA has not introduced evidence of how broadly that belief is held among such entities, or that the exemption, in intent or operation, effectively singles out religious groups opposed to abortion.

4. Finally, these petitions concern only denials of motions for preliminary injunctive relief, which were litigated (by petitioners' choice) before discovery. Discovery in *Livingwell* has been completed in the interim, and it could be completed quickly in the other cases as well. Nothing bars petitioners from renewing their arguments in the lower courts on a full record. At this stage of the proceedings, however, review by this Court would be at best premature.[22]

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[21] Abortion is not a covered service under the Family PACT program, though it is covered under other Medi-Cal programs. *See* p. 2, *supra*.

[22] Moreover, NIFLA's complaint asserts that the notice requirement governing licensed clinics violates a federal statute and that the requirements imposed on both licensed and unlicensed facilities violate the California Constitution's Liberty of Speech Clause. NIFLA Pet. App. 116a-117a (asserting claims based on 42 U.S.C. § 238n and Cal. Const., art. I, § 2(A)). A pending state-court lawsuit, in which discovery has been com-

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## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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May 24, 2017

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pleted, challenges the Act based on three provisions of the California Constitution. *Scharpen Foundation, Inc. v. Becerra*, No. RIC1514022 (Riverside Cty. Super. Ct., filed Nov. 25, 2015). The State intends to defend against these challenges, but any plaintiff's success in enjoining the statute's enforcement on statutory or state constitutional grounds would make it unnecessary to consider the federal constitutional issues petitioners press here.