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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation**;** **PREGNANCY CARE CENTER d/b/a PREGNANCY CARE CLINIC**, a California corporation**;** and **FALLBROOK PREGNANCY RESOURCE CENTER**, a California corporation**;** **Plaintiffs,** **v.** **KAMALA HARRIS**, in her official capacity as Attorney General for the State of California; **THOMAS MONTGOMERY**, in his official capacity as County Counsel for San Diego County; **MORGAN FOLEY**, in his official capacity as City Attorney for the City of El Cajon, CA; and **EDMUND G. BROWN, JR.**, in his official capacity as Governor of the State of California; **Defendants.**	Case No. 3:15-cv-02277-JAH-DHB **COMBINED REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Hearing: Judge: Hon. John A. Houston Courtroom Number: 13B Date: January 11, 2016 Time: 2:30 p.m.

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INTRODUCTION[1]

This case is ripe and presents an imminent threat to Plaintiff Centers. As of January 1, 2015 the Act mandates that Plaintiffs speak the government's message regardless of whether they get a warning citation. Their pregnancy services alone trigger the mandatory disclosures. They clearly pled that they seek to continue those services, and that the disclosures violate their viewpoint. In the First Amendment context, speakers do not need to wait until they are prosecuted.

Plaintiff Centers have shown a likelihood of success on the merits. The Act forces them to recite messages supporting abortion and interfering in their sensitive communications. The Second Circuit struck down a mandate that pro-life centers speak about abortion, and the District Courts in Maryland and Texas issued summary judgment against laws forcing non-medical pro-life centers to recite disclosures. Cases that allow disclosures in order to obtain informed consent before abortion do not apply here, because the Act's disclosures are not part of obtaining consent for a procedure—the Act imposes government speech just because centers speak about pregnancy or serve pregnant women. The government cannot carry its burden to satisfy strict (or even intermediate) scrutiny and it has no sufficient evidence to mandate non-profit speech.

[1] Defendants filed three opposition briefs, totaling 44 pages. Rather than Plaintiffs filing three reply briefs, Plaintiffs have filed an application for leave to file this combined brief totaling 20 pages of content. Counsel for the State and County Defendants indicated they do not object to such a filing; counsel for Plaintiffs is not aware of having received a response from counsel for the City Defendant.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE RIPE BECAUSE THE ACT WILL CERTAINLY INJURE THEM BEGINNING JANUARY 1, 2016.

The Act will impose a constitutional injury on Plaintiff Centers starting January 1, 2016. On that day the Act will mandate, with no further precondition, that the Plaintiff Centers speak the government's messages—messages violating their expressive rights—solely because those centers engage in pregnancy-related speech and services and therefore meet the Act's definition of either licensed or unlicensed facilities. Nothing more needs to happen before the Act imposes its compelled speech—not a warning notice nor other third party action. Beginning January 1, Plaintiff Centers will be forced to violate either the Act or their beliefs.

Plaintiff Centers pled that they seek to continue engaging in pregnancy-related speech and services on January 1 and beyond, without reciting the disclosures since the disclosures offend their viewpoint and expression. Verified Complaint ("VC") at ¶ 124; *see also* VC at ¶¶ 63–71. 82–107.[2] Plaintiff Centers'

[2] Defendants incorrectly claim that Plaintiffs' complaint is not a verified affidavit because they added "to the best of our knowledge" to their verification formulation, which under 28 U.S.C. § 1746 needs only to be phrased in "substantially" the form proposed in that statute. The case on which Defendants rely was reversed on appeal on this very point. *See Cobell v. Norton*, 391 F.3d 251, 260 (D.C. Cir. 2004) (holding that "to the best of [my] knowledge, information or belief" clause satisfies § 1746). Multiple other cases also contradict Defendants' view. *See, e.g., Phillips v. Martin*, 2007 WL 4139646 at *1 (D. Kan. Nov. 16, 2007) (verification "to the best of my knowledge and ability . . . substantially complies with" § 1746); *Silva v. Gregoire*, 2007 WL 2034359 at *3 (W.D. Wash. July 3, 2007) ("to the best of my knowledge" clause satisfies § 1746); *United States v. Roberts*, 308 F.3d 1147, 1154–55 (11th Cir. 2002)

activity triggers the Act's requirements. There is no further precondition needed before the Act imposes a constitutional injury. "Laws that compel speakers to utter or distribute speech bearing a particular message are subject to" strict scrutiny. *Turner Broad. Sys. Inc. v. FCC* ("*Turner I*"), 512 U.S. 624, 642 (1994). As of January 1, the Act is such a law, even before any enforcement occurs.

Black letter First Amendment precedent shows that in a free speech challenge, the speaker does not need to wait until the police issue him a warning or citation before he can challenge a law that regulates his speech. "Especially where protected speech may be at stake, a plaintiff need not risk prosecution in order to challenge a statute." *Wolfson v. Brammer*, 616 F.3d 1045, 1059–60 (9th Cir. 2010) (citing *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), and *Bland v. Fessler*, 88 F.3d 729, 736–37 (9th Cir. 1996)).

Defendants rely primarily on an inapposite case, *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir 2000), to claim that Plaintiff Centers have failed to plead a "concrete plan" showing they will be in violation of the law. *Thomas* is distinct for the simple reason that in *Thomas*, the law prohibited landlords from discriminating against non-married applicants, but the landlord plaintiffs had no non-married applicants, nor could they predict when or under what circumstances such applicants might arise, and for that reason they had no "concrete plan" for violating the statute. *Id*. at 1139. In other words, when the law in *Thomas* went into effect, the landlords would be continuing their

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(declaration "to the best of my knowledge and belief" subjected declarant to perjury prosecution).

existing behavior in a fully legal manner.

The opposite is true here. The only precondition remaining for Plaintiffs is the date certain of January 1, 2016. Plaintiff Centers pled that as of January 1, they seek to engage in pregnancy speech and services, as they do today and have done for years, and by *that fact alone* they will be in violation of the Act, which will mandate that they recite the government's disclosures. There is no further precondition, much less one controlled by hypothetical third parties as in *Thomas*.

In contrast, *Wolfson* demonstrates a correct application of the "concrete plan" issue to this case. In *Wolfson,* the plaintiff challenged political speech restrictions but was not acting in violation of the law; rather, he said he planned to solicit contributions and endorse candidates in ways the law prohibited. *Wolfson*, 616 F.3d at 1059. The court held that standing concerns are satisfied "whether Wolfson has a concrete plan to violate the law" or not, if he "has established an intent to violate the law that is more than hypothetical." *Id.* Such intent exists when the plaintiff has "expressed a desire to" do what a statute plainly bans. *Id*. This is exactly what Plaintiff Centers plead. They currently engage in pregnancy speech and services without the Act's disclosures, they seek to continue to do so after January 1, the Act makes that behavior illegal as of January 1, and therefore Plaintiffs will be in violation of the Act or their expressive beliefs as of that date. Under *Wolfson*, that meets the "concrete plan" concern and confers standing.

To the extent Defendants are implying that the Act does not require disclosures until a center first gets a warning of violation, that is false on the face of the statute. The disclosures are mandated in Article 2.7, part 123472(a) & (b)

without any warning precondition. *See* VC Exh. A at 3–4. Imposition of fines occurs after a warning notice in part 123473, but illegality for failure to make disclosures exists independent of the fines. *Id.* at 4. It was equally true in *Wolfson* (as in nearly every law) that if the plaintiff endorsed candidates or solicited contributions he would suffer no penalty until the government pursued enforcement. Absent any enforcement or warning, Wolfson still had standing because he planned to behave in a manner that the statute deemed illegal.

The Act contains an inherent threat of persecution for its violators. "[T]he threat [of prosecution] is latent in the existence of the statute." *Wolfson*, 616 F.3d at 1059 (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003)). Recently enacted statutes impose a presumably reasonable fear of prosecution. *Bayless*, 320 F.3d at 1007 ("plaintiffs have standing where the 'State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise'" (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393(1987))). The Court is required to "relax the requirements of standing and ripeness" so that a plaintiff "need not await prosecution to seek preventative relief." *Wolfson*, 616 F.3d at 1060 (internal citations omitted). "Requiring [a plaintiff] to violate the Code as a precondition to bringing suit would . . . 'turn respect for the law on its head.'" *Id.* at 1061 (quoting *Bayless*, 320 F.3d at 1007); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (deeming it unnecessary for a plaintiff to expose herself to prosecution before challenging a statute that deters the exercise of her constitutional rights).

Prudential standing exists to challenge the Act because by its terms the Act

"requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id.* at 1060 (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009)). The Act imposes a Hobson's Choice on Plaintiff Centers as of January 1, under which they must either recite the disclosures or violate the law. Plaintiffs "have sufficient standing [when] the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; [and] if they fail to observe the [] rule they are quite clearly exposed to the imposition of strong sanctions." *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967); *cf. Hotel Emp & Rest. Emp's Int'l Union v. Nevada Gaming Comm'n*, 984 F.2d 1507, 1512 (9th Cir. 1993). Claims are especially ripe when one must "choose between refraining from core political speech" or risking enforcement. *Susan B. Anthony List v. Driehaus*, 134 S. Ct 2334, 2347 (2014).The court should recognize standing when the inquiry into plaintiff's claims "is primarily legal and does not require substantial further factual development." *Wolfson*, 616 F.3d at 1060 (involving a free speech challenge to restrictions on political solicitation and endorsements). This is true here because the Act will stand or fall primarily based on the Act's language and the government's alleged justifications, not on facts pertaining to enforcement.

II. PLAINTIFFS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THEIR CLAIMS.

Plaintiffs have demonstrated that the Act is subject to strict scrutiny, and fails even scrutiny applicable to professional or commercial speech.

A. State Defendants demonstrate that the Act's purpose and justification are based on the content and viewpoint of speech.

The State Defendants' own stated rationales for the Act demonstrate it is subject to strict scrutiny for being content and viewpoint discriminatory. The Supreme Court recently clarified that laws must pass strict scrutiny even if they are facially content neutral, "when the purpose and justification for the law are content based." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The State Defendants' brief admits that the Act's purpose and justification are to target "crisis pregnancy centers," that "aim to discourage and prevent women from seeking abortions," by "deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women." State Defs.' Brief at 23. This is a content and viewpoint based purpose and justification. The Act aims to counteract the viewpoint of "crisis pregnancy centers," which are—by definition—pro-life centers, not abortion clinics or even centers that favor abortion. The Act's explicit purpose is to regulate against speech that discourages and "prevents" women from seeking abortion, by persuading them not to do so. The Act openly justifies itself based on the content of (noncommercial) advertising that the State labels "deceptive". The Act targets the content of counseling that the State deems confusing, misinforming and "intimidating." To "misinform" is to *speak*—to provide *information*—that the government disagrees with. The Act's legislative history, of which the State asks in a footnote that the Court take judicial notice, is replete with statements much the same, and

explanations showing that when the Act aims at "deception" and "misinforming," what it means is that if you say negative things about abortion's psychological, physical, or social effect, you have spoken in a way the government believes is untrue. By definition and concession, therefore, the Act's purpose and justification are content and viewpoint based. Under *Reed*, strict scrutiny applies.

The Supreme Court recognized similar legislative content targeting—and consequently struck down speech restrictions—in a medical/pharmaceutical context in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). Regarding regulations imposed on the speech of pharmaceutical manufacturer contractors called "detailers," the court observed that "legislative findings . . . confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs." *Id.* at 2663–64. Furthermore, "the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that 'are often in conflict with the goals of the state.' The legislature designed [the statute] to target those speakers and their messages for disfavored treatment." *Id.* (quoting 2007 Vt. No. 80, § 1(3)) Thus, based on "the legislature's expressed statement of purpose," the statute went "beyond mere content discrimination, to actual viewpoint discrimination." *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). The same conclusion is inescapable here. The State has openly regulated because of certain speakers: pro-life centers ("crisis pregnancy centers") here, detailers in Vermont. It has openly expressed disagreement with the content of their speech, including "discourag[ing] . . . women from seeking abortion" and "counseling [that]

misinform[s].” And by specifying that various messages pro-life centers convey are in conflict with the State’s goals, California targeted their *viewpoint* in a way indistinguishable from Vermont’s viewpoint targeting in *Sorrell*. “*Any doubt* that [the Act] imposes an aimed, content-based burden on detailers is dispelled by the record and by formal legislative findings.” *Id.* at 2663 (emphasis added).

B. The Act does not regulate commercial speech, and Plaintiff Centers are not commercial speakers.

This is not a commercial speech case. The Supreme Court defines commercial speech as that which does no more than “propose a commercial transaction,” or that “relates solely to the economic interests of the speaker and its audience.” *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–62 (1980). The Ninth Circuit follows this rule by affirming that “commercial speech is that ‘which does no more than propose a commercial transaction.’” *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

The Act contains no element that regulated centers, licensed or unlicensed, are only those proposing commercial transactions, nor does it only impose disclosures in contexts related solely to their economic interests. Moreover, Plaintiff Centers themselves lack those commercial elements, both in general and in the context where the disclosures occur. Plaintiff Centers are non-profit groups, engaged in expressive advocacy, and they provide their speech and services free of charge. VC ¶ 2. They are not in any way commercial.

Other courts confronting this issue have held that laws regulating pregnancy centers such as Plaintiffs are not commercial in nature. In *Centro Tepeyac v. Montgomery County*, the court held that a disclosure law similar to the Act did not regulate commercial speech because the pregnancy center there was "motivated by social concerns" rather than profit, and its speech "does not propose a commercial transaction." 779 F. Supp. 2d 456, 463–64 (D. Md. 2012) (internal citations and quotations omitted), *aff'd* 722 F.3d 184 (4th Cir. 2011). The District Court reached a similar conclusion in *Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011), *aff'd in part and rev'd in part on other grounds*, 740 F.3d 233 (2d Cir. 2014).

In *Riley v. National Federation. of the Blind of N.C., Inc.,* 487 U.S. 796 (1988), the Supreme Court declared that even when a non-profit charitable organization solicits money, it is still not engaged in commercial speech. The Act is not focused on, or applicable at all, to solicitation or receipt of funds. Instead it imposes disclosures outside of any context of a commercial transaction or economic interest. Plaintiff Centers testify that they have no economic interest in offering their speech and services. The Ninth Circuit deemed a speech regulation not to be a commercial speech law where "the Ordinance regulates a yellow pages phone book as a whole, not simply the individual advertisements contained therein." *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 957 (9th Cir. 2012). The Act lacks even that remote element of commerciality within those it regulates.

The State Defendants argue that because Plaintiffs offer various pregnancy services of value (though for free), their speech is commercial. However, "an

organization does not propose a 'commercial transaction' simply by offering a good or service that has economic value." *Evergreen Ass'n*, 801 F. Supp. 2d at 205; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) ("[R]eference to a specific product does not by itself render the [advertisements circulated by Plaintiff] commercial speech."). The Supreme Court has required a compelling governmental interest for the regulation of professional speech if it is non-profit, advocacy-based, and pro-bono. In *In re Primus*, 436 U.S. 412 (1978), the Court held that the offering of free legal services did not constitute commercial speech where the services were offered for the purpose of the "advancement of [the attorney's] beliefs and ideas" rather than for commercial gain. *Id.* at 437–38 & n. 32 . The Court required the government to show a "compelling" interest and "close" tailoring. *Id.* at 432; *see also id.* at 433–39 (striking down the speech law for failing to prove actual harm by the regulated).

Under *Fox*, *Central Hudson*, and *Valle Del Sol*, *supra*, the proper commercial speech inquiry is not whether services have value, but whether there actually is a commercial purpose or sole economic interest for a transaction. *See also Evergreen*, 801 F. Supp. 2d at 205. Plaintiffs' pro-life pregnancy speech and services are for the advancement of religious, moral, and social values—and are free. The State Defendants cite a host of inapplicable cases for the proposition that "[t]he Supreme Court has classified offers to provide pregnancy-related goods and services to consumers as commercial speech." State Defs.' Brief at 18. All those cases involved goods for sale, unlike the Act or the Plaintiffs. *See, e.g.*, Bolger, 463 U.S. 60, 62 (concerning advertisements for products sold by a drug

company); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700–01 (1977) (concerning advertisements for sale of contraceptives); *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975) (concerning advertisements for sale of abortion services).

First Resort v. Herrera, 80 F. Supp. 3d 1043 (N.D. Cal. 2015), is both inapplicable and, as the State interprets it, incompatible with Ninth Circuit precedent. (*First Resort* is currently on appeal to the Ninth Circuit. *See* No. 15-15434 (9th Cir. filed Mar. 10, 2015)). First, the ordinance in *First Resort* is vastly different than the Act. It does not impose prophylactic disclosures; it "prohibits the use of false or misleading advertising." *Id.* at 1047. The Act, in contrast, claims to ameliorate deceptive advertising but applies its disclosures to centers that need not be engaged in any false statements, because making such statements is not an element of being regulated under the Act.

First Resort is also distinct due to centrally relying on another inapplicable case, *Fargo Women's Health Center v. Larson*, 381 N.W. 2d 176 (N.D. 1986). There, a particular pregnancy center had been found to have engaged in false advertising, and "the trial court's order was narrowly drawn [to] focus[] only upon the prohibition of deceptive or misleading activity." *Id.* at 179. Moreover, in *Fargo* the advertisements were for compensated services. *See id.* at 180 ("the Help clinic advertisements expressly state that financial assistance is available and that major credit cards are accepted"). Thus *Fargo* regulated commercial advertisements, but only those advertisements, by a center already found to have spoken falsely. The Act does neither. To the extent that *First Resort* means that if a non-profit center offers only free services, it is converted into a "commercial"

speaker merely by "advertising" its free services truthfully, *First Resort* cannot be reconciled with the definition of commercial speech in *Fox*, *Central Hudson*, and *Valle Del Sol*. This Court is bound to follow the latter.

Likewise, the Fourth Circuit did reach the holding the State urges, in its companion cases *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 286 (4th Cir. 2013), and *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189 (4th Cir. 2013). The holding in these cases was simply that discovery might uncover whether or not pregnancy center plaintiffs are or are not commercial (as in *Fargo*, offering services where major credit cards are accepted). The Fourth Circuit's speculation beyond that issue is dicta. The Fourth Circuit actually affirmed the preliminary injunction granted in *Centro Tepeyac*, 779 F. Supp. 2d at 463–64, where the court had concluded that the center and the ordinance were not commercial. After discovery, the District Court in *Centro Tepeyac* enjoined the entire statute there—including the disclosure of non-licensed status—and said it was not a commercial regulation. *Centro Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d 745, 759–60 (D. Md. 2014). Again, the Supreme Court and Ninth Circuit definitions of commercial speech control here over the State's unwarranted extension of other cases.

C. The Act compels speech, and is not a mere regulation of conduct.

Defendants contend that with respect to the licensed Plaintiff Centers, the Act merely burdens professional conduct, not speech, under *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). This misreads *Pickup*. The law in that case banned certain treatment: mental health professionals could not provide sexual orientation

change treatment to children. *Id*. at 1229. The Act here has a twofold difference. It is not a ban: it is a command to recite disclosures, which are speech. And the disclosures are not treatment, nor are they imposed in the midst of treatment. The disclosures are, by definition, speech. The Act's signs force licensed Plaintiffs to tell women in a waiting room where to get discount or free abortions elsewhere. The forced speech happens before and disconnects with actual treatment, and happens even if no treatment ever occurs (indeed, with the apparent government intent that women go elsewhere to receive different treatment). *Pickup* therefore in no way deems the Act a mere conduct regulation. On the contrary, *Pickup* emphasizes that communications by professionals to their clients *are speech* under the First Amendment. "[D]octor-patient communications about medical treatment receive substantial First Amendment protection," even though the government "has more leeway to regulate conduct necessary to administering the treatment itself." *Id*. at 1227. The Act's mandated disclosures are speech under *Pickup*.

D. The Act is not an "informed consent" law.

Defendants further misapply *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to the licensed Plaintiff Centers. First, *Casey* actually undermines Defendants' argument from *Pickup*, because *Casey* recognizes that a compelled disclosure is speech and "First Amendment rights not to speak are implicated." *Id.* at 884. *Casey* upheld its particular informed consent disclosure as a prerequisite to performing an abortion, but this Act is fully distinct.

Casey's plurality gave two reasons for upholding the requirement that an abortion provider give a patient certain information in order to obtain her

necessary informed consent before performing an abortion on her. First, *Casey* deemed it part of obtaining informed consent to any surgical action: "as with any medical procedure, the State may require a woman to give her written informed consent." *Id.* at 881. Second, the disclosure in *Casey* was allowed as a restriction on abortion itself, albeit not an "undue" burden, in service of "a State['s desire] to further its legitimate goal of protecting the life of the unborn." *Id.* at 883.

Both justifications from *Casey* fail to support this Act. The Act's compelled disclosures are not part of informed consent before performing a procedure. They happen because of a facility's generic focus on pregnancy speech and services, and occur in the waiting room even if a client gets no procedure (indeed, the disclosure's goal is that women leave and obtain their free abortions elsewhere, instead of proceeding to receive the pregnancy center's assistance). The disclosures are not uttered as a precondition to any particular procedure as in *Casey*, and thus do not serve a state's interest that "as with any medical procedure, the State may require a woman to give her written informed consent." *Id.* at 881. To wit: the Act does not require women be told of the State's free abortion program as part of obtaining her informed consent to an ultrasound, a pregnancy test, or some specific service. The State may have reasons it chose not to do this: perhaps because requiring such consent makes no sense, or would apply far beyond pro-life pregnancy centers that the State wishes to target. Regardless, by drafting the Act as a generic notice and not an informed consent measure, *Casey*'s rationale simply does not justify what the Act does.

Likewise, the Act is not supported by *Casey*'s recognition that a state can

burden abortion, as long as the burden is not "undue," "to further its legitimate goal of protecting the life of the unborn." *Id.* at 883. The Act's disclosures do not burden abortions; they support abortion. *Casey* allowed states to impose non-undue burdens on abortion in recognition of the constitutional limits on the right of abortion as such due to the harm it causes the unborn. The Supreme Court's upholding of informed consent prior to abortion constitutes a limit on abortion itself due to "the legitimate interest of the Government in protecting the life of the fetus that may become a child." *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Here, the Act essentially makes unborn-protecting medical practice illegal, by forcing all pro-life pregnancy care clinics to promote abortion. This contradicts their philosophy and theology of medicine, and deprives California women of the ability to choose clinics that would never promote the "free" killing of unborn patients. Abortion is now legal, but that does not mean medical practices committed to the centuries-old Hippocratic Oath against abortion can be made to violate their beliefs. *Casey* in no way justifies such a result, and federal law bans forcing Plaintiffs to refer or arrange referrals for abortion. 42 U.S.C. § 238n.

E. The Act fails First Amendment scrutiny.

The Act fails strict scrutiny, and would also fail intermediate scrutiny for professional or commercial speech.

The State Defendants cite only legislative findings in an attempt to show a compelling interest and narrow tailoring. As argued in Plaintiffs' opening brief, these findings are far too generic, unscientific, and anecdotal to justify compelled speech. *See also Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2739 (2011)

("[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology" (quoting *Video Software Dealers Ass's v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. 2009)); *id.* at 2738 ("The State must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard." (quotation marks and internal citations omitted)).

Moreover, there is no sufficient nexus between the Act and the State's alleged interests, because the Act does not require a center to be engaged in the alleged wrongdoing ("pose as full-service women's health clinics" or engage in "intentionally deceptive advertising and counseling") as an element of the statute before they are subject to the disclosures. All pregnancy centers, even ones fully innocent of these trumped up charges, are swept into the State's prophylactic speech mandate (but abortion clinics are effectively exempt as Medi-Cal and family planning program participants). The State offers mere argument, but no evidence, that it cannot serve its interests in other ways. The Supreme Court demanded, in *Riley*, that the government pursue its own channels of speech to the general public despite insisting that it must insert its speech into the actual conversation it objected to. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 487 U.S. at 800 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Even if intermediate scrutiny is used, precedent shows the Act should be

struck down. The Second Circuit held, after presuming without deciding that intermediate scrutiny applied, that forcing a pro-life center to utter front-end disclosures about abortion violates the First Amendment because "the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the law] provide alternatives. '[E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values.'" *Evergreen Ass'n*, 740 F.3d at 249 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). The Ninth Circuit has clarified that even when a law regulates commercial speech, if the law regulates truthful speech rather than focusing on false speech, it is subject to "rigorous review." *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1096 (9th Cir. 2001).

As mentioned above, the Supreme Court required a compelling government interest for regulating pro-bono, advocacy-oriented professional speech. *See In re Primus*, 436 U.S. at 432. The Court struck down that regulation for failing to be targeted at actual wrongdoers. It declared that the state had failed to put forward "proof"—not just recitation or anecdote—of the "evils" the state pointed to. *Id.* at 434. The Court specified that while it might suffice for a state to show a "potential danger" to regulate licensed attorney speech for compensation, "appellant may not be disciplined unless her activity *in fact* involved the type of misconduct at which [the state's] broad prohibition is said to be directed." *Id.* at 434. The State cannot "regulate in a prophylactic fashion" when dealing with professional speech performed pro bono for expressive, associational purposes;

instead the state must prove that its evils "actually occurred in this case." *See id.* at 435–37. The Act here falls under the same rationale: it imposes prophylactic disclosures on centers without any element requiring that they actually be engaged in false, punishable speech that actually harms specific persons. The First Amendment does not allow such imprecision in a professional context with respect to *pro bono* advocacy: "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *Id.* at 434.

Sorrell, too, held that even in a pharmaceutical commercial context, "heightened judicial scrutiny is warranted," and it ruled against Vermont's law as being insufficiently drawn to achieve the government's interests. *Id.* at 2663, 2668. Similarly, the Act here does not actually target its regulation only at centers that engage in allegedly harmful practices. The Supreme Court is not lenient with such speech restrictions. "Vermont may be displeased [with] detailers. . . . The State can express that view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction." *Id.* at 2671 (internal citations omitted).

Even if the Act penalized only "deceptive" speech (it does not), there is no "general exception to the First Amendment for false statements." *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (striking down a law punishing false speech). Much of the state's alleged "deception" is simply a view that if anything

negative is said about abortion (such as that it correlates with psychological, medical or social problems), the speech is "false" and therefore the government can burden the speakers with compelled disclosures. Legitimizing the Act on such grounds "would endorse government authority to compile a list of subjects about which false statements are punishable. . . . Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* at 2547.

To the extent the Second Circuit in *Evergreen* held that a disclosure requiring unlicensed facilities to declare they do not have medical providers survives strict scrutiny, that holding is unpersuasive. As discussed, strict scrutiny is rigorous, and *Reed* is intervening precedent showing the Act is content based.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction against enforcement of the Act.

Respectfully submitted on this 20th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2015, I electronically filed the foregoing paper with the Clerk of Court using the ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I declare under penalty of perjury that the foregoing is true and correct.

Dated November 20, 2015

s/ Matthew S. Bowman
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