No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FREEDOM X AND CRISIS PREGNANCY CLINIC OF SOUTHERN CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. What is the proper level of scrutiny for reviewing a state law requiring pro bono pregnancy centers to disseminate information undermining their pro-life message?

2. Does the state unduly chill a center's First Amendment rights when its engaging in protected speech triggers an obligation to disseminate an unwanted message?

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INTEREST OF *AMICI CURIAE*[1]

Amicus Freedom X is a public interest law firm dedicated to protecting the freedom of religious, political and intellectual expression. Freedom X and its donors and supporters are vitally interested in the outcome of this case inasmuch as they believe that the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act) requires pregnancy centers to promote a message that directly conflicts with their *raison d'etre* – protecting the lives of the unborn, discouraging abortion and fostering a respect for the right to life enshrined in America's founding principles.

The FACT Act burdens the expressive rights of pregnancy centers over one of America's most contentious political and religious policy issues by compelling them to promote by words and action the very evil they are established to counter. This is precisely the type of attack on political and religious expression Freedom X works to resist.

Amicus Crisis Pregnancy Clinic of Southern California (CPCSC), the first established clinic of its kind in the state, is registered with the IRS as a 501(c)(3) charitable non-profit operating facilities in Hollywood and Glendale, California. CPCSC exists to provide alternatives to women with unplanned

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[1] Counsel for all parties received at least 10 days notice of the intent to file this brief. Counsel for all parties have consented to the filing of this *amici* brief. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

pregnancies free of charge. CPCSC provides women with tens of thousands of dollars annually in maternity and healthcare financial assistance. The outcome of this case will have a direct impact on CPCSC's ability to help women successfully carry their pregnancies to term. The FACT Act prevents CPCSC from demonstrating results necessary to raise donations to finance its operations and conflicts with its mission statement and deeply held religious and philosophical beliefs.

SUMMARY OF THE ARGUMENT

"The First Amendment protects the right of individuals to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The Ninth Circuit's decision in *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016), upholds a regulation compelling pregnancy centers to promote a message entirely inconsistent and incompatible with their reason for existing – to discourage women from taking the life of their unborn children. Two hundred centers operate in California alone, and similar facilities operate in other states, as do laws regulating their speech. *Id*. at 829. The frequency with which this case's constitutional issues will recur warrants review.

Lower courts need guidance in determining which standard of review to apply to these regulations. The Ninth Circuit's rejection of strict scrutiny conflicts most directly with decisions from the Second and Fourth Circuits authorizing such rigorous review. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d. Cir. 2014); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (en banc). This conflict alone supports review. Argument IA, post.

The decision applying lesser scrutiny additionally deviates from this Court's precedents. This Court has distinguished between (1) professionals acting pro bono to "advance 'beliefs and ideas'" (warranting strict scrutiny) and (2) commercial speech designed to advance the professional's commercial interests (where intermediate scrutiny is adequate). *In re Primus*, 436 U.S. 412 (1978). Argument IB, post.

This Court has also distinguished between (1) professional conduct involving "personalized advice attuned to a client's concerns," (warranting intermediate scrutiny) and (2) advice that is not "individualized" or addressed to a "client's particular needs" (warranting strict scrutiny). *Lowe v. SEC*, 472 U.S. 181, 208 (1985). Argument IC, post. Strict scrutiny applies to the "three P's": personalized advice in a private setting to a paying client. (*Moore-King v. Cnty. of Chesterfield, VA*, 708 F.3d 560, 569 (4th Cir. 2013). None applied here.

As this case involves a free clinic seeking to advance the pro-life idea, not commercial interests, and the compelled speech is a standardized legal notice (which may be posted by someone other than a medical professional) about the availability of state-subsidized abortion, rather than personalized advice addressing the client's particular medical circumstances, the Ninth Circuit's decision appears to have misapplied both *Primus*, 436 U.S. 412, and *Lowe*, 472 U.S. 181.

Furthermore, the "FACT Act" unconstitutionally compels pregnancy centers to use their own property to disseminate an unwanted message. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977). Compelling the disclosures as a consequence for the centers' pro-life speech

imposes an unconstitutional penalty on their free expression. *See Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 742 (2011); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). Argument II, post.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER LEVEL OF SCRUTINY FOR PREGNANCY CENTERS' COMPELLED DISCLOSURES.

A. The Ninth Circuit's Decision Conflicts With Second Circuit And Fourth Circuit Decisions In Determining The Proper Level Of Scrutiny For Pregnancy Centers' Compelled Disclosures.

In upholding the disclosures compelled by the FACT Act, the Ninth Circuit in *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016), produced a conflict with decisions from other circuits invalidating such compulsion. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d. Cir. 2014); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (en banc). *NIFLA* found those cases distinguishable, as they applied strict scrutiny rather than the intermediate scrutiny governing review of the FACT Act. *NIFLA*, 839 F.3d at 842. (The Second Circuit actually rejected the compelled message under both strict and intermediate scrutiny. *Evergreen*, 740 F.3d at 249-50.) But even insofar as these cases applied strict scrutiny, the circuits remain in conflict, if not over how to apply a standard of review than over how to select it.

The compelled speech rejected in *Evergreen* and *Centro Tepeyac* for unconstitutionally infringing free speech rights was substantially less intrusive than the FACT Act. The New York law reviewed in Evergreen forced clinics to disclose "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care.'" *Evergreen*, 740 F.3d at 238. A statement denying their provision of abortion did not actively facilitate the patient's undergoing one as the FACT Act does. The rejected disclosure in *Centro Tepeyac* was even less intrusive, informing clients "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider." 722 F.3d at 186. This generic "pro-doctor" advice also did not facilitate abortion; it advised clients to consult licensed professionals but did not provide them with the precise means of contacting a government agent who could advise them on how to obtain a free or subsidized abortion.

The Second and Fourth Circuits found these compelled statements could justify strict scrutiny. *Evergreen*, 740 F.3d 233, 244-45; *Centro Tepeyac*, 722 F.2d 184, 189. The Ninth Circuit's rejection of strict scrutiny for the FACT Act's more intrusive direction creates a conflict requiring this Court's resolution.

B. The Compelled Disclosures Warrant Strict Scrutiny Under *In re Primus* Because They Affect Pro Bono Work To Advance "Beliefs and Ideas" Rather Than Commercial Interests.

The selection of the proper standard of review has posed challenges in many contexts. This Court's recent decision in *Expressions Hair Design v. Schneiderman*, --- S.Ct --- (2017 WL 1155913), observed the legally significant but factually murky distinction between conduct and speech. Justice Breyer's concurring opinion offered a functional test for selecting the proper standard of review, which would turn not so much on the conduct/speech distinction but on whether, or how, the challenged statute, rule, or regulation affects a First Amendment interest. The lowest level of scrutiny would apply to the compelled disclosure of "purely factual and uncontroversial information," an intermediate level to a law that "restricts the 'informational function' provided by truthful commercial speech," and strict scrutiny should govern "government regulations [that] negatively affects the processes through which political discourse or public opinion is formed or expressed." The Second Circuit had no trouble concluding a pregnancy center's speech regarding abortion and its alternatives rested on the most protected of these First Amendment values. *Evergreen*, 740 F.3d 233, 249, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

Expressions Hair Design observed that speech in some cases may be incidental to conduct, thus permitting compelled disclosure. It offered the example of a law prescribing restaurants charge ten dollars for

sandwiches, which would be a conduct regulation, even though it would likely produce the speech by which the restaurant would inform diners of that price. The FACT Act is very different. A closer analogy to it would involve a committed vegan who opened a restaurant to convince diners to consider adopting a plant-based diet for ethical and/or ecological reasons — but the state forced her to post on her door directions to the closest McDonald's and Burger King.

The analogy could apply to other recognized rights. A sporting goods store that preferred not to sell firearms could be forced to direct customers to the nearest gun store. Or a newsstand that opted not to sell pornographic publications could be forced to tell customers where they could buy them. All these examples would involve not the "'information function' provided by truthful commercial speech" but the "process[] through which . . . public opinion is formed or expressed."

This Court drew guidelines for evaluating the protection available to professional speech in *In re Primus*, 436 U.S. 412 (1978). The precedent is remarkably apposite, right down to the subject matter. A practicing professional (attorney) advised a woman she could contact the ACLU for free representation in possible legal action regarding her sterilization. *Id*. at 414-16. The state disciplined the attorney for the referral. *Id*. at 417-21.

Both *Primus* and *NIFLA* thus involved: 1) the speech of a practicing professional; 2) directing a potential client; 3) to receive free services elsewhere; 4) concerning the constitutionalized issue of procreation and its negation. Because the ACLU

engaged in litigation "to advance 'beliefs and ideas' and "as a vehicle for effective political expression and association," the Supreme Court applied strict scrutiny. *Id*. at 430-32, 438 n. 32. Lesser scrutiny would have been enough to protect speech intended to advance only the professional's own commercial interests. *Id*. at 438 n. 32.

The Ninth Circuit found *Primus* inapposite because pregnancy center staff "offer medical services in a professional context." *NIFLA*, 839 F.3d at 841. But both the referring attorney and the ACLU offered legal services in a professional context in *Primus*.

The Ninth Circuit's primary ground for distinguishing *Primus* was the centers' positioning themselves "in the marketplace as pregnancy clinics." *NIFLA*, 839 F.3d at 841. The centers do not position themselves in the "marketplace" at all as they do not charge for their services. The Ninth Circuit's objection instead appears to be that they describe themselves as "pregnancy clinics" but neither offer nor recommend abortion. But just as self-positioning as a "restaurant" does not represent one sells meat, and self-positioning as a "sporting goods store" does not represent one sells guns, nothing in the description "pregnancy center" involves an offer to terminate one. The decision not to — and to counsel against such termination — is the essence of "the processes through which political discourse or public opinion is formed or expressed." *Expressions Hair Design*; *see also Primus*, 436 U.S. at 431.

Pregnancy centers exist to advance beliefs and ideas about pregnancy, childbirth and abortion, not the staff's commercial interests. *Primus*, 436 U.S. 412, 438

n. 32. In rejecting strict scrutiny for the compelled speech below, the Ninth Circuit rejected the holding of *Primus*.

C. The Compelled Disclosures Warrant Strict Scrutiny Under *Lowe v. SEC* Because They Are Standardized Notices (Dictated By The State) Rather Than Doctors' "Individualized Advice Attuned . . . To Any Client's Particular Needs."

The *NIFLA* decision described the relevant professional practice subject to regulation far more broadly than did this Court in *Primus*, which deemed pro bono advice for the purpose of political expression subject to strict scrutiny. The Ninth Circuit characterized as "professional," and thus deserving of lesser scrutiny, any speech "within the confines of a professional's practice," or "within their walls related to their professional services." *NIFLA*, 839 F.3d at 840. This definition not only defies *Primus*, it does not apply to the FACT Act itself. The posted notice concerns access to abortion, but that is not among the center's "professional services."

The Ninth Circuit cited two authorities emphasizing the special nature of the doctor-patient relationship, both of which are inapposite on their face.

A Third Circuit case highlighted a doctor's "education and training," and "access to a corpus of specialized knowledge," but the required notice could be posted by a high school intern, requiring no more specialized knowledge than how to tape paper to a wall. *NIFLA*, 839 F.3d at 839, citing *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014).

NIFLA also recalled *Lowe v. SEC*, 472 U.S. 181 (1985), though it profoundly misrepresented its teaching. The *Lowe* court addressed the distinction between the circumstances under which an investment adviser could publish freely and those subjecting him to professional regulation. Although regulation properly applied to advisers providing "personalized advice attuned to a client's concerns," such regulation was unconstitutional where the adviser did "not offer individualized advice attuned to any specific portfolio or to any client's particular needs." *Id*. at 208. Justice White's Lowe concurrence expounded upon the contrast:

> One who takes the affairs of a client personally in hand and purports to **exercise judgment** on behalf of the client in the light of the **client's individual needs and circumstances** is properly viewed as engaging in the practice of a profession. . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any **particular individual with whose circumstances he is directly acquainted**, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232 (White, J. concurring) (emphasis added).

The Ninth Circuit quoted the first sentence from the above quotation --- but not the second --- in finding the compelled disclosures concerned professional speech subject to intermediate scrutiny. *NIFLA*, 839 F.3d at 839. But it is the second sentence, not the first, that describes the instant regulation. The FACT Act prescribes a standardized notice, which displays the same message to all clients, regardless of their "individual needs and circumstances." The sign need not be posted by licensed medical professionals exercising professional judgment but may be posted by anyone, including staff who have no "direct acquaint[ance]" with the client's particular circumstances. And the disclosure appears to the client before any personalized examination occurs. Accordingly, the requirement to post the notices is not a legitimate regulation of professional practice but a direct regulation of speech. *Lowe*, 472 U.S. at 232, (White, J. concurring).

Other circuit decisions have since applied Justice White's analysis in the medical context, warranting strict scrutiny here. *See King*, 767 F.3d 216, 231-32. The Fourth Circuit held "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is **providing personalized advice in a private setting to a paying client** or instead engages in public discussion and commentary." *Moore-King v. County of Chesterfield, Virginia*, 708 F.3d 560, 569 (4th Cir. 2013) (emphasis added). As the compelled notices are neither personalized, private, nor shown to paying clients, they unquestionably fall on the latter side of that test.

The Eleventh Circuit likewise concluded that speech to the public about public issues enjoyed the highest degree of First Amendment protection, and "the key to distinguishing between occupational regulation and abridgment of First Amendment liberties is in finding a personal nexus between professional and client." *Wollschlaeger v. Florida*, 760 F.3d 1195, 1218 (11th Cir. 2014).

The Ninth Circuit's holding that the notices deserve only intermediate scrutiny as regulations on medical practice thus conflicts with this Court's guidance in *Lowe v. SEC*, 472 U.S. 181, and its progeny in the circuits. *See e.g.*, *Moore-King*, 708 F.3d 560, 569. The decision also conflicts with this Court's applying strict scrutiny to pro bono speech advancing beliefs and ideas (*Primus*, 436 U.S. 412), and the Second and Fourth Circuits' finding strict scrutiny proper for reviewing pregnancy centers' compelled disclosures. *Evergreen*, 740 F.3d 233, 244-45; *Centro Tepeyac*, 722 F.2d 184, 189. Considering the many states regulating hundreds of such centers (*see NIFLA*, 839 F.3d at 831), this Court should clarify the proper standard of review.

II. THE FACT ACT BURDENS PREGNANCY CENTERS' PRO-LIFE SPEECH BY REQUIRING THEY PROMOTE A PRACTICE THEY FIND MORALLY OBJECTIONABLE.

Compelling speech violates the First Amendment as much as forbidding it, if not more. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943): "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." The State may not constitutionally require an individual to participate in

the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. *Wooley v. Maynard*, *infra*, 430 U.S. at 713. Compelled disclosures require pregnancy centers to do just that. *Centro Tepeyac*, 722 F.3d 184, 194 (Wilkinson, J. concurring).

The Ninth Circuit justified the FACT Act because it does not suggest pregnant women *should* pursue a state-subsidized abortion; it informs them only of the *existence* of that option. *NIFLA*, 839 F.3d 823, 842. But regardless of whether compelled speech presents "opinion" or "fact," either form of compulsion unconstitutionally burdens speech. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 797-98 (1988). The right not to speak extends not only to matters of belief or opinion but equally "to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

A. The FACT Act Asymmetrically Burdens Pro-Life Medical Staff By Forcing Them To Express An Unwanted Message.

The Ninth Circuit also justified the FACT Act's compelled disclosure as neutrally applying to all clinics "regardless of their stance on abortion or contraception." *NIFLA*, 839 F.3d at 836. But that analysis conflicted with NIFLA's own description of viewpoint discrimination in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), and *Stuart v. Camnitz*, 774

F.3d 238 (4th Cir. 2014).[2] *NIFLA*, 839 F.3d at 836. *Conant*'s viewpoint discrimination involved a law prohibiting doctors from telling patients that marijuana could help them, even though the compelled silence applied to all doctors, regardless of their stance on marijuana. *NIFLA*, 839 F.3d at 836, citing *Conant*, 309 F.3d at 637. *Stuart*'s viewpoint discrimination similarly involved a law compelling doctors to show their pregnant patients a sonogram and otherwise describe the fetus, even though the obligation to speak applied to all doctors, regardless of their stance on abortion. *NIFLA*, 839 F.3d at 836, citing *Stuart*, 774 F.3d at 255-56.

As *Conant* and *Stuart* thus show, universal application of compelled speech or silence may still burden asymmetrically; the law struck down in *Wooley* required all drivers to display the message "Live Free or Die," regardless of their stance on the subject. The Ninth Circuit's reasoning would justify a law requiring all drivers to display a sticker with the message, "President Trump is Making America Great Again" --- so long as it applied to Republicans and Democrats alike.

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[2] In contrast to the Ninth Circuit's offering physician-patient advice a lower level of protection in *NIFLA* ("a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession," *NIFLA*, 839 F.3d at 839, quoting *King v. Gov. of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014) (emphasis added)), the Ninth Circuit in *Conant* deemed the specific "communication between a doctor and a patient" as involving "core First Amendment interests." *Conant*, 309 F.3d at 636.

Even if there are circumstances under which the state may compel speech, the special vice here is that the state imposed the obligation on the centers only as a consequence of (and effective penalty for) their engaging in protected speech. The FACT Act covers pregnancy centers promoting a message favoring childbirth, and compels them to provide information to pregnant women about how they may seek a state-funded abortion. The obligation to provide this information does not fall upon the taxpaying public generally or any private citizen specifically – only those who operate centers counseling pregnant women with a pro-life message. *See Pacific Gas & Elec. v. Public Utilities Comm'n. of California*, 475 U.S. 1, 15 (1986) (considering provision that "forces the speaker's opponent — not the taxpaying public — to assist in disseminating the speaker's message.") The obligation to post the disclosures (which counter the centers' pro-life message) is specifically triggered inter alia by a center's providing or advertising sonograms (*NIFLA*, 839 F.3d at 830), an expressive act enjoying First Amendment protection. *Stuart*, 774 F.3d 238, 245. This has the effect of unconstitutionally burdening protected speech.

B. The FACT Act Unconstitutionally Chills Speech By Penalizing Pregnancy Centers' Pro-Life Speech With An Obligation to Display a Contrary Message.

1. Print Cases: *Miami Herald* and *Pacific Gas*

The Supreme Court described this burden in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The challenged law applied to newspaper publishers

who engaged in protected speech (criticizing political candidates), and required the publishers to provide the criticized candidate with an opportunity to reply in the newspaper's pages. *Id*. The law mandated the newspaper provide the reply free of charge "in as conspicuous a place and in the same kind of type" as the newspaper's initial criticism. *Id*. at 244.

The Florida law resembles the FACT Act in significant ways. The "same kind of type" requirement resembles the FACT Act's prescriptions regarding the size and placement of the notices directing women toward subsidized abortions. *NIFLA*, 839 F.3d at 830. The Florida mandate that the newspaper use its own pages to disseminate a contrary message resembles the FACT Act's requirement that pregnancy centers use their own walls to display the required notices. *Id*. And the offered justification for the Florida law, "an electorate informed about the issues," (*id*. at 260, (White, J. concurring)), resembles the offered justification below: "to ensure that women are able to receive . . . accurate information about [family planning] services." *NIFLA*, 839 F.3d at 830.

But however great the interest in an informed electorate, the State could not impose upon the newspaper the responsibility for providing such information in a manner contrary to its wishes. *Miami Herald*, 418 U.S. at 256. The twofold penalty on speech identified in *Miami Herald* applies here too. The tangible penalty concerned physical resources. The Florida law required newspapers to allocate space in the paper (and funds required for printing) to the unwanted message, which otherwise could have been devoted to "other material the newspaper may have

preferred to print." *Id*. Likewise, the FACT Act requires pregnancy centers to devote some of their wall space and printing budget to display the required notices, which otherwise could have promoted their preferred message.

Miami Herald also identified an intangible penalty: The right-of-reply rule could deter the newspaper from publishing the criticism in the first place. *Miami Herald*, 418 U.S. at 257. "Government-enforced right of access inescapably 'dampens the vigor and limits of the variety of public debate.'" *Id*., quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

The FACT Act has a similar effect. The law imposes no obligations on the public, or on specific individuals. Individuals are thus free to express privately their pro-life position without government interference. But if they operate a pregnancy center to communicate their message more effectively (and display sonograms in so doing), the state compels them to express an unwanted message, and facilitate the very conduct they seek to discourage. The desire to avoid directly facilitating abortions could well deter pro-life individuals from speaking in their preferred manner to avoid triggering the FACT Act's notice requirements.

The newspaper that initially published the criticism of the candidate was undoubtedly the most effective medium for rebuttal, but this did not justify the First Amendment burden in *Miami Herald*. Accordingly, the California Legislature's finding "that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics . . . to state the existence of these

services" does not justify the First Amendment infringement below. *NIFLA*, 839 F.3d at 830.

Miami Herald's principles extend beyond the press. Although Justice White's *Miami Herald* concurrence distinguished newspapers from public utilities, the Supreme Court extended the *Miami Herald* rule to a public utility twelve years later. *Pacific Gas*, 475 U.S. 1; *Miami Herald*, 418 U.S. 241, 259 (White J., concurring). The application of *Miami Herald* to a public utility guarantees its application a fortiori to private individuals' pro bono speech about the morality of abortion, which rests on the highest rung of First Amendment values. *Primus*, 436 U.S. 412, 438 n. 32; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Expressions Hair Designs*, Breyer J., concurring).

Pacific Gas concerned the utility's monthly billing envelope, which included a newsletter covering matters ranging from political editorials to energy conservation tips and "straightforward" billing information. *Pacific Gas*, 475 U.S. 1, 5, 8-9. California's Public Utilities Commission ordered the utility to present the speech of an organization with which the utility disagreed. *Id*. at 4. *Pacific Gas* found a First Amendment violation based on the same concerns present in *Miami Herald*, even though the Commission's order required the opponent's message to appear in the envelope rather than the newsletter itself. *Id*. at 11 and n. 7.

Pacific Gas' summary of the *Miami Herald* holding fully applies here. "The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the

newspaper disagreed." *Pacific Gas*, 475 U.S. at 18. The state could not force citizens' private property to be a "'billboard' for the State's ideological message." *Id*. at 17, quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).[3] The Court further condemned the asymmetry whereby the utility had to help present the views of its opponents, who had no corresponding obligation to present the utility's position. *Pacific Gas*, 475 U.S. at 14.

The FACT Act involves the same vice; it requires a pregnancy center to "use *its* property as a vehicle for spreading a message with which it disagrees." *Pacific Gas*, 475 U.S. 1, 17. And by compelling the posting of only information inimical to the center's position, and not compelling any speech from those more favorably inclined toward abortion, the FACT Act "is not content neutral." *Id*. at 13-14.

2. Campaign Finance Cases: *Davis* and *Arizona Free Enterprise*.

The same principle has emerged more recently in campaign finance cases. The Court has invalidated regulations designed, like the one in *Pacific Gas*, to "abridge [a speaker's] rights to 'enhance the relative

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[3] The Court has distinguished *Miami Herald* and *Pacific Gas* and required a party to facilitate another's speech in contexts where presenting the other's speech would not interfere with its own message or be construed as reflecting its own views. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63-65 (2006); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). But as the FACT Act requires pregnancy centers themselves to distribute the notices, which facilitate an activity the centers seek to discourage, this exception does not apply.

voice' of its opponents." *Pacific Gas*, 475 U.S. at 14, quoting *Buckley v. Valeo*, 424 U.S. 1, 49 and n. 55 (1976). The first case concerned a disincentive to candidate speech; the candidate's spending beyond a certain limit would asymmetrically exempt opponents from restrictions that would have operated had the candidate spoken less. *Davis v. Federal Election Comm'n*., 554 U.S. 724, 729 (2008). The Court found the law's authorizing fundraising advantages for one's opponents acted as an "unprecedented penalty" on the robust exercise of First Amendment rights. *Id*. at 739. Candidates needed either to limit their speech or endure discriminatory legal treatment. *Id*. at 740. *Davis* thus recalled *Pacific Gas*, "finding infringement on speech rights where if the plaintiff spoke it could 'be forced . . . to help disseminate hostile views.'" *Davis*, 554 U.S. at 739, quoting *Pacific Gas*, 475 U.S. 1, 14.

The Court considered an even more direct infringement in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011). The challenged law burdened a candidate's speech not by merely waiving law that would otherwise restrict his opponents; it *directly funded them*. For every 1000 dollars a privately-funded candidate spent, all opponents would receive 940 for their own use. *Id*. at 728-32. This rule by which "each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent" imposed an even more "constitutionally problematic" "penalty" on speech than in *Davis*, as candidate speech produced "a direct and automatic release" of funds to possibly several opponents. *Id*. at 737.

Arizona Free Enterprise cited *Miami Herald* and *Pacific Gas* in rejecting this speech deterrent. The Court recalled how the challenged law in *Miami Herald* "purported to advance free discussion" but actually "penalized the newspaper's own expression," and the argument that the Arizona law promoted free and robust discussion was "no more persuasive here than it was in [*Miami Herald v.*] *Tornillo*." *Arizona Free Enterprise*, 564 U.S. at 742, internal citations omitted. The Arizona law likewise resembled the *Pacific Gas* mandate that the utility "help disseminate hostile views." *Arizona Free Enterprise*, 564 U.S. 721, 742 n.8, quoting *Pacific Gas*, 475 U.S. 1, 14. After a candidate spoke beyond a limit, the law forced him to disseminate hostile views "in a most direct way — his own speech triggers the release of state money to his opponent." *Arizona Free Enterprise*, 564 U.S. at 742 n. 8.

The FACT Act forces the dissemination of hostile views in an even more direct way. It does not merely trigger funding for a contrary message; it *forces pregnancy centers to express it themselves*.

The FACT Act asymmetrically forces pro-life professionals to disseminate a hostile message, and does so as a "penalty" for exercising their own speech rights. *Davis*, 554 U.S. at 739. This compulsion unconstitutionally burdens speech. *Arizona Free Enterprise*, 564 U.S. at 742; *Miami Herald*, 418 U.S. at 256-57.

CONCLUSION

The Ninth Circuit's decision involves a frequently arising issue where states impose on pro-life professionals a legal obligation to undermine their own pro-life message. This unconstitutionally burdens their speech. This Court should grant review and clarify whether pro bono professional speech, offered to advance beliefs and ideas and not just commercial interests, deserves the highest degree of protection. *Primus*, 436 U.S. 412. This Court should also clarify whether the instant professional speech was so personalized and individualized as to forfeit strict scrutiny under *Lowe v. SEC*, 472 U.S. 181.

DATED: April 20, 2017

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