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 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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INTERESTS 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 counter to 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 regarding 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

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[1] Counsel for all parties received at least 10 days notice of the intent to file this brief. Petitioners have submitted blanket consent to the filing of amicus briefs in this case. Respondents have granted consent to amici curiae for the filing of this 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.

provide alternatives to women with unplanned 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.

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case presented in the Brief for the Petitioners.

SUMMARY OF ARGUMENT

Our political system and cultural life rest upon the ideal that each person should personally decide which ideas are worth expressing and adopting, and the State may not hinder or aid parties in their efforts to move public opinion and achieve their goals. *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 322 (2012); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). But laws requiring private parties to present a state-preferred message risk governmental manipulation of the marketplace of ideas. *Turner*, at 641. By placing the government's thumb, if not its fist, on the scale of debate regarding the moral legitimacy of abortion, the FACT Act violates the First Amendment.

Compelling speech infringes individual conscience as much as forbidding it, if not more. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). The state therefore may not force unwilling students to

salute the flag, or force drivers to disseminate a message they oppose on their private property "for the express purpose that it be observed and read by the public." *Id*. at 642; *Wooley v. Maynard*, 430 U.S. 705, 713 (1977). This is precisely what the FACT Act forces centers to do. The instant compulsion is worse than that in *Wooley*. Because all New Hampshire drivers received a license plate from the state, they knew the message was the state's and not the driver's own. But only the centers receive the script from the state, so visitors will reasonably perceive the message to be the center's own. The Ninth Circuit could uphold the Act only by completely ignoring the two most apposite compelled speech precedents: *Barnette* and *Wooley*.

The Act effects viewpoint discrimination, which is impermissible unless the government is the speaker. *Matal v. Tam*, 137 S. Ct. 1731, 1768 (2017) (Kennedy, J., concurring). The Ninth Circuit categorized the Act as viewpoint-neutral because it applied to "all clinics, regardless of their stance on abortion or contraception." *NIFLA v. Harris*, 839 F.3d 823, 836 (9th Cir. 2016). But viewpoint neutrality mainly concerns *what is said*, not *who says it*. This Court invalidated the laws in *Barnette* and *Wooley*, even though they applied to all students and drivers, regardless of their stance on the flag and freedom. Under the Ninth Circuit's reasoning, it would be viewpoint-neutral to force all drivers to display a sticker saying, "President Trump is Making America Great Again," so long as the law compelled Democrats, Republicans, and Independents alike, "regardless of their stance" on the president's performance.

Courts review apply strict scrutiny to even viewpoint-neutral regulations that are content-based, like the FACT Act. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2226 (2015). Courts may apply a lesser level of review to speech in a professional context, but that exception applies where there is a pecuniary motive (*In re Primus*, 436 U.S. 412, 430 (1978)) or a fiduciary nexus, so the professional exercises judgment in light of the client's individual needs and circumstances. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J. concurring). Neither applies here; the centers act *pro bono* to advance the idea of protecting life rather than to make money, and the notices present a standardized script to all visitors, regardless of their individual needs and circumstances.

California further creates an unconstitutional election, conditioning the centers' exercise of one constitutional right on their forfeiting another. By exempting from its compelled speech requirement those centers that prescribe all FDA-approved contraceptive devices, it forces centers wishing to exercise their right not to prescribe all contraceptives to forfeit their right to free speech, or, alternatively, forces centers to forfeit their right not to prescribe in order to preserve their right to control their message. Either way, the Act unconstitutionally burdens the exercise of a constitutional right.

The Compelled Abortion Referral also operates as an unconstitutional penalty on speech by imposing the obligation to advertise state-funded abortions only as a consequence of (and effective penalty for) centers' engaging in their own pro-life speech. However "effective" the Act may be in ensuring pregnant

women's awareness of abortion options, the state may not burden a speaker's own expression by forcing it to convey an opposing message as a consequence, even where -- unlike here -- it is clear it is the opposing viewpoint. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). As the state may not burden speech by compelling speakers to subsidize opponents' messages; a fortiori, it may not compel unwilling speakers to express the message themselves. *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 742 (2011); see also *Pac. Gas & Elec. v. Pub. Utils. Comm'n of Cal*, 475 U.S. 1, 15 (1986) [provision "forces the speaker's opponent — not the taxpaying public — to assist in disseminating the speaker's message."]

The FACT Act thus violates centers' free speech, both directly, by compelling speech, and indirectly, by requiring centers to forfeit their right not to prescribe contraception, and to refrain from their own affirmative pro-life speech, as conditions for avoiding the Compelled Abortion Referral.

The Act cannot survive strict, or even intermediate scrutiny. The goal of providing contraceptive access did not justify compelling unwilling actors to subsidize such access in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 [189 L. Ed. 2d 675]. The instant interest is even weaker than that in *Burwell*; whereas some women may have been unable to obtain the contraception absent insurance, the instant case concerns only information about how and where to obtain an abortion, which may be found easily through an internet search within minutes.

Because the government can more easily regulate conduct than speech, a finding that a pregnant woman's access to abortion justifies compelling a pro-life center to engage in *speech* facilitating it would necessarily compel the conclusion that her interest in access justifies compelling pro-life individuals to engage in the *conduct* of performing abortions directly. This would radically redefine the nature of constitutional "rights." Protecting rights has traditionally placed distance between the individual and the government, whereas here the state "inserts itself into the private and sensitive relationship between a woman and her physician." *The Scharpen Found., Inc. v. Harris,* No. RIC1514022 (Cal. Super.Ct. Oct. 30, 2017) 15.[2] An individual's right to buy firearms or pornographic videos does not create on an unwilling vendor a duty to provide them — or to post on her door information about where one can find them.

ARGUMENT

I. The Ninth Circuit's decision ignored the two most apposite compelled speech precedents: *Barnette* and *Wooley*.

This Court has long recognized that forcing a speaker to express a message violates the First Amendment as much as forbidding a message, if not more. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943), holding "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Barnette* thus invalidated a West Virginia law compelling students to salute the

[2] The opinion appears in the Petitioner's Brief as an addendum.

flag, and governed the decision in *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977), which struck down a New Hampshire law compelling drivers to display the message "Live Free or Die." That law required drivers to use their private property as a "billboard" for the state-prescribed message. *Id*. at 715. The FACT Act does the same, and is likewise unconstitutional. The Ninth Circuit's opinion could uphold the Act **only by completely ignoring both *Barnette* and *Wooley*** -- the two most apposite precedents.

Compelling speech, which "invades the sphere of intellect and spirit," produces an effect more injurious than restricting it. *Wooley*, 430 U.S. at 715, quoting *Barnette*, 319 U.S. at 642. If New Hampshire had simply forbidden Maynard from driving with a license plate indicating "Slavery is Better than Death," and thereby denied him the chance to express his preferred viewpoint, it would still have left him with the opportunity to use his vehicle to express other messages. But Maynard, like the centers in this case, was forced to affirmatively disseminate a message he found "morally, ethically, religiously and politically abhorrent." *Wooley*, 430 U.S. at 713. Restricting speech cannot create a comparable injury, where the message that the individual must present externally contradicts the one he believes internally.

The instant compulsion is even less defensible than that in *Wooley*, because here reasonable people will attribute the compelled message to the centers and not to the government. In *Wooley*, *every New Hampshire driver* received the license plate from the state, so they all knew it was a state-prescribed message; no one thought Mr. Maynard played any role in its creation.

But only pregnancy centers receive the script from the state, and thus know it is a state-generated message. A reasonable visitor to a center will perceive the message is the center's own. The instant law, as a state court reviewing the law under the California Constitution observed, "forces the clinic to point the way to the abortion clinic and can leave patients with the belief they were referred to an abortion provider by that clinic." *Scharpen*, at 13-14.

II. The compelled speech was viewpoint-discriminatory.

Only in the narrow context of government speech is viewpoint discrimination permissible. *Matal v. Tam*, 137 S. Ct. 1731, 1768 (2017) (Kennedy, J., concurring). Because the script compelled by the FACT Act was not government speech, the Ninth Circuit could not uphold its constitutionality unless it found it was viewpoint-neutral rather than viewpoint-discriminatory. The court's opinion thus focused first on trying to refute the viewpoint-discrimination description and categorize the law as viewpoint-neutral. *Harris*, 839 F.3d 834-36. Its effort was unpersuasive.

In denying there was viewpoint-discrimination, the Ninth Circuit cited the law's universal application, noting it "applies to all clinics, regardless of their stance on abortion or contraception." *Harris*, 839 F.3d at 836. But viewpoint discrimination turns on *what* is said, not *who* says it. Universal application did not save the compulsory flag-salute in *Barnette*, even though it applied to all students, regardless of their stance on the flag. It did not save the compulsory license display in *Wooley*, even though it applied to all drivers, regardless of their stance on freedom. Under

the Ninth Circuit's reasoning, it would be viewpoint-neutral for the federal government to require all drivers to display a sticker affirming, "President Trump is Making America Great Again," so long as it applied to all drivers, Democrats, Independents, and Republicans alike, "regardless of their stance" on the president's performance.

As viewpoint discrimination concerns the content of the speech more than the identity of the speaker, universal application does not establish viewpoint neutrality, as the Ninth Circuit itself recognized in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). *Conant* struck down, as viewpoint-discriminatory, a law forbidding speech that expressed a specific viewpoint (marijuana could be therapeutic), even though the law applied to all doctors, regardless of their stance on marijuana. *Id*. at 637. The only meaningful difference is that *Conant* involved compelled silence and *Harris* involves compelled speech, but the First Amendment opposes both. *Knox*, 567 U.S. 298, 309.

The Ninth Circuit also tried to refute the concern of viewpoint discrimination by asserting the Act "does not convey any opinion" because it does not imply a "preference" for any specific service (e.g. abortion). *Harris*, 839 F.3d at 836. But speech may express a "viewpoint" even without signaling a "preference." The "Live Free or Die" message in *Wooley* did not express a *preference* for dying; it simply referenced the prospect with less abhorrence than Mr. Maynard felt, or wished to communicate. The FACT Act likewise presents abortion not so much as a "preference" but as a legitimate option for consideration, contrary to the

centers' position. See *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore,* No. 16-2325, 2018 WL 298142 at *5 (4th Cir. Jan. 5, 2018) at 14 (*Greater Baltimore*): "[T]he disclaimer portrays abortion as one among a menu of morally equivalent choices. While that may be the City's view, it is not the Center's."

Regardless of whether the Compelled Abortion Referral describes abortion as an equally legitimate option (as childbirth) or as just a sufficiently legitimate option, it remains a viewpoint, even though the legal availability of abortion may be characterized as not an "opinion" but a "fact." The First Amendment bars compelled expression of either. *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 61-62 (2006). The speaker's right to choose her own speech extends "not only to expressions of value, opinion, or endorsement, 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). The state therefore may not compel a speaker favoring a government project to describe cost overruns for past projects, or compel a speaker favoring an incumbent candidate to report the candidate's travel budget. *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988). Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. *Id*. at 795.

Accordingly, effective speech requires that speakers and not the government decide both what to say and how to say it. *Riley*, 487 U.S. at 791. Like our adversarial system of litigation, our adversarial system of public debate works best when all debate

participants can present their best case to the public. The FACT Act hindered the centers from doing that. *Knox*, 567 U.S. 298, 322.

Because the compelled message was not viewpoint-neutral, it violated the First Amendment. *Matal*, 137 S. Ct. 1731, 1768 (Kennedy, J., concurring.)

III. Even if the FACT Act were a content-based, viewpoint-neutral regulation, strict scrutiny must apply.

Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the "most exacting scrutiny." *Turner Broad.,* 512 U.S. 622, 642. Strict scrutiny governs the FACT Act because it is a content-based regulation, even if it is viewpoint-neutral. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2226 (2015).

Just as the Ninth Circuit failed to perceive the strict scrutiny imperative in reviewing a content-based regulation in *Reed v. Town of Gilbert, Arizona*, 707 F.3d 1057 (9th Cir. 2013), *rev'd*, *Reed v. Town of Gilbert, Arizona*, 135 U.S. 2218, it failed to perceive the strict scrutiny imperative in reviewing the content-based FACT Act. The Circuit cited its own decision in *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016) (en banc), to support its assertion that "not all content-based regulations merit strict scrutiny." *Harris*, 839 F.3d at 837. But *Swisher*'s examples of content-based speech that don't merit strict scrutiny were forms of speech that merit no constitutional protection at all (e.g. fraud, child pornography, true threats). *Swisher*, at 313. That some forms of speech fall outside the protective reach of the First Amendment offers no basis

for reducing the level of scrutiny for speech lying within it.

The Ninth Circuit then concluded the compelled notices warranted only intermediate scrutiny because they concern "professional speech." *Harris*, 839 F.3d at 839-41. But not all speech by professionals receives reduced protection. This Court has permitted greater regulation of professional speech where there is a *pecuniary motive* and/or a *fiduciary nexus*. As to the former consideration, the Court has distinguished between providing professional service *pro bono*, "to express personal political beliefs," and professional service offered to "derive financial gain." *In re Primus*, 436 U.S. 412, 422 (1978). As to the latter, the Court has focused on whether there is a "personal nexus" between the professional and client, such that the level of review depends on whether the professional exercises judgment based on the individual needs and circumstances of a client with whose circumstances he is directly acquainted. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J. concurring). But the instant speech involves neither a pecuniary motive nor a fiduciary nexus, and thus requires strict scrutiny.

A. The centers have no pecuniary motive.

This Court has contrasted the reduced protection available for professional speech made with a pecuniary motive with the fuller protection available for speech expressed "to advance 'beliefs and ideas.' " *Primus*, 436 U.S. 412, 438 n.32. An attorney there advised a woman she could contact the ACLU for free representation in possible litigation regarding her sterilization. *Id*. at 414-16. The state disciplined the attorney for the referral. *Id*. at 417-21. The precedent

is remarkably apposite, right down to the subject matter; both the attorney in *Primus* and the pregnancy center staff here acted to oppose the state's role in suppressing human life.

The Court decided *Primus* along with a companion case, which applied intermediate scrutiny to attorneys' in-person solicitation of professional employment. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). *Ohralik* authorized tighter regulation of such speech due to the inherent risk that counsel with a financial motive will subordinate the client's best interests to his own pecuniary interests. *Id.* at 461 n.19. But *Primus* involved *pro bono* representation, which the Court found materially affected the permissible level of state regulation. *Primus*, 436 U.S. at 422.

> Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to *express personal political beliefs* and to advance the civil-liberties objectives of the ACLU, rather than to *derive financial gain*.

Primus, 436 U.S. at 422 (emphasis added).

Public interest organizations like the ACLU and NAACP differ from firms that exist "for the primary purpose of financial gain." *Primus,* 436 U.S. at 431. The pregnancy centers, which do not charge clients, and operate to foster respect for human life rather than generate revenue, resemble the former, not the latter. *Primus* prescribed disparate levels of review for pro bono speech to "express personal political beliefs,"

made "in the context of political expression and association," and for-profit speech, which "simply 'proposes a commercial transaction,' " and is expressed to "derive financial gain." *Id*. at 422, 437-38. Although reduced scrutiny governs speech expressed for the "advancement of one's own commercial interests," strict scrutiny applies to "expression intended to advance 'beliefs and ideas.'" *Id*., at 438, n.32, citing *Ohralik*, 436 U.S. 447 (1978).

The speech at issue here deserves such protection. Just as the ACLU was not "motivated by considerations of pecuniary gain" but by "its widely recognized goal of vindicating civil liberties," the centers here are motivated by their widely recognized goal of protecting unborn human life. See *Primus*, 436 U.S. at 430. The Ninth Circuit unpersuasively rejected reliance on *Primus*, first observing "Appellants have positioned themselves in the marketplace as pregnancy clinics." *Harris*, 839 F.3d at 841. Of course, the centers did not position themselves in the *marketplace* at all, as they do not charge for their work.[3]

The Ninth Circuit actually noted the centers had no pecuniary motive, but, contrary to *Primus*, found that meaningless. It concluded the centers are not, like the ACLU, "engaged in 'political expression and association' " and their "non-profit status does not change the fact that they offer medical services in a

[3] If the Circuit meant to note the centers might have attracted clients who otherwise might have visited other clinics, this would not differ from *Primus*, where the sterilized women also might have contacted other counsel but for Primus's referral. *Primus*, 436 U.S. at 416.

professional context." *Harris*, 839 F.3d at 841. This in no way distinguishes *Primus*, as the ACLU offered legal "services in a professional context." The centers here, like the ACLU in *Primus*, express personal political beliefs, to advance a public objective (fostering respect for life and promoting childbirth), rather then derive pecuniary gain. *Primus*, 436 U.S. at 422. This case differs from *Primus* only in that the ACLU litigated to oppose sterilization and the centers counsel to oppose abortion.

B. There was no fiduciary nexus.

The fiduciary nature of the professional-client relationship also justifies greater state regulation. *Lowe v. SEC*, 472 U.S. 181. Petitioner Lowe had been convicted of financial misconduct; to protect the public from further harm, he was not allowed to work as, or associate with, an investment advisor. *Id*. at 183-84. Lowe and others published a newsletter, which included commentary about investment markets, reviewed market indicators, and offered specific recommendations to buy, sell, or hold certain stocks. *Id*. at 185. The Court distinguished the circumstances under which an investment adviser could publish freely and those subjecting him to professional regulation. Resolving the case on statutory grounds, the Court held the law properly regulated advisers who provided "personalized advice attuned to a client's concerns," but could not limit advisers who did "not offer individualized advice attuned to any specific portfolio or to any client's particular needs." *Id*. at 208.

A three-justice concurrence determined this distinction was constitutional in nature. *Lowe*, 472 U.S. 181, 211 (White, J., concurring). Though it

recognized the state's legitimate role in regulating the practice of the professions, "At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." *Id*. at 230. The concurrence distinguished those cases where the adviser's speech was the (regulatable) practice of a profession and those where it enjoyed the highest level of protection.

> 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 core distinction thus concerned the "nexus" between the "professional and client." Advice concerning a "client's individual needs and circumstances" was professional speech subject to state

regulation, but advice unrelated to "any particular individual with whose circumstances he is directly acquainted" was protected by the full force of the First Amendment, notwithstanding its relation to professional practice.

The *Harris* court misapplied the *Lowe* concurrence in citing just the first sentence of the above quotation: "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." *Harris*, 839 F.3d at 839, citing *Lowe*, 472 U.S. at 232 (White, J. concurring). This is the opposite of the speech at issue here, which is developed by the state, not a professional purporting to "exercise judgment on behalf of the client," and applies automatically, identically, and immediately to all visitors, regardless of their "individual needs and circumstances."

Instead of carefully applying the *Lowe* distinction, the Ninth Circuit drew a seemingly absolute rule that speech does not enjoy the broadest level of protection when it occurs "within the clinics' walls." *Harris*, 839 F.3d at 839-40. Ironically, this differed from the conclusion the Circuit drew regarding physician speech on marijuana, where it cited "the core First Amendment values of the doctor-patient relationship." *Conant v. Walters*, 309 F.3d 629, 637. But the speech at issue there, a recommendation that marijuana could help a particular patient, was actually more properly subject to regulation, as the doctor would provide it only to those patients "with whose circumstances he [was] directly acquainted."

That direct acquaintance likewise distinguishes the instant notices from the "informed consent" procedures, cited by the Circuit, which were reviewed in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and its progeny.[4] These cases addressed disclosures made in the course of a personal, doctor-patient relationship to pregnant women considering an abortion. Truthfully advising one's patient, with whom the doctor is directly acquainted and on whose behalf the doctor exercises judgment, about the risks and consequences of a specific procedure resembles the unexceptional requirement that a doctor describe a drug's side effects before prescribing it. Such a requirement bears little relation to a compulsory notice, broadcast to anyone who enters a clinic, regardless of her "individual needs and circumstances." Courts have thus assumed and/or applied a higher level of scrutiny to state-prescribed notices like the one at issue here. See *Greater Baltimore*, 2018 WL 298142 at *6; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249-50 (2d. Cir. 2014); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189 (4th Cir. 2013); *Scharpen* at 14.

Though *Harris* cited *King v. Governor of N.J.*, 767 F.3d 216 (3d. Cir. 2014), to justify reduced protection for the centers, the Third Circuit there followed the same distinction governing *Lowe*, so speech to "the public at large" (or a personal opinion to a client) received full First Amendment protection, and only

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[4] *Stuart v. Camnitz,* 774 F.3d 238 (4th Cir. 2014); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

speech "based on the professional's expert knowledge and judgment" did not. *Id*. at 232; see also *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011): "There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." The notices compelled by the FACT Act, dictated by the state, are not personalized, as they provide the same information to every visitor. See *Edwards v. District of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014). Nor do they derive from a professional's "expert knowledge and judgment"; to the contrary, a high school could intern could satisfy the FACT Act by posting the notice on the wall with no more "expert knowledge" than needed to use scotch tape.

The Fourth Circuit thus synthesized the "fiduciary" and "pecuniary" strands of professional speech in a case concerning personalized service to a paying client. *Moore-King v. Cnty. of Chesterfield, Virginia*, 708 F.3d 560, 569 (4th Cir. 2013). *Moore-King* actually added a third consideration: "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing [1] *personalized* advice [2] in a *private* setting [3] to a *paying* client or instead engages in public discussion and commentary." (emphasis added). None of these "3P's" appeared below.

C. The centers help form public opinion.

The state's role in regulating speech depends on its function. Presaging the *Primus* concern, Justice Jackson recognized "The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its

money." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring). But this protection does not extend to permit a state "guardianship of the public mind" through speech regulation: "[E]very person must be his own watchman for truth." *Id*. The free trade of ideas guaranteed by the First Amendment "means free trade in the opportunity to persuade to action," which, in this case was the opportunity to persuade visitors to deliver rather than abort their unborn children. *Thomas*, at 537.

The centers' speech thus deserved the highest level of protection. As Justice Breyer observed last term in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), speech enjoys protection in relation to its function. *Id*. at 1152 (Breyer. J. concurring). In this framework, the lowest level of scrutiny should apply to compelled disclosure of "purely factual and uncontroversial information," intermediate scrutiny to a law that "restricts the 'informational function' provided by truthful commercial speech," and strict scrutiny should govern those "government regulations [that] negatively affect[] the processes through which political discourse or public opinion is formed or expressed." *Id*. A pregnancy center's speech regarding abortion and its alternatives falls into this last category; it helps form public opinion: "[T]he context is a public debate over the morality and efficacy of contraception and abortion," demanding the highest level of review. *Evergreen*, 740 F.3d 233, 249, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

Observing that speech in some cases may be incidental to conduct, thus permitting compelled

disclosure, *Expressions Hair Design* offered the example of a law prescribing restaurants charge ten dollars for sandwiches, which would regulate conduct, even though it would likely produce the speech by which the restaurant would inform diners of that price. *Expressions Hair Design*, 137 S. Ct. at 1150-51. But it held a law permitting vendors to describe a cash "discount" but not a credit card "surcharge" was "different," as it regulated speech, not conduct. *Id*. at 1151.

The FACT Act is also different, regulating centers' speech even more intrusively than New York regulated how vendors could describe their prices. To continue the sandwich analogy, the case resembles not so much whether a vendor may charge credit-using customers more than cash-using customers, or even how the vendor may refer to the price disparity. The instant infringement on conscience more closely resembles a hypothetical vegan who opened a restaurant to convince diners to adopt a plant-based diet — but the state forced her to post on her door directions to the nearest McDonald's and Burger King.

The analogy could apply to other recognized protected rights. A sporting goods store that preferred not to sell firearms could be forced to direct customers to the nearest gun store. A video store that declined to sell pornographic materials could be forced to tell customers where they could buy them. These examples would involve not the " 'information function' provided by truthful commercial speech" but the "process[] through which . . . public opinion is formed or expressed." But the same right to proselytize religious, political, and ideological causes also protects the

concomitant right to decline to participate. *Wooley v. Maynard*, 430 U.S. at 714. The right to say "yes" includes the right to say "no."

The Ninth Circuit's real objection to the centers' self-description as "pregnancy clinics" may have been that the centers do not present each visitor with abortion in their menu of pregnancy responses. But just as self-positioning as a "restaurant" does not represent one sells meat, self-positioning as a "sporting goods store" does not represent one sells guns, and self-positioning as a video store does not represent it sells X-rated ones, 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*, 137 S. Ct. at 1552 (Breyer J., concurring); see also *Primus*, 436 U.S. at 431.

Even if the FACT Act is viewpoint-neutral, it must be reviewed through strict scrutiny.

IV. The FACT Act cannot survive strict — or even intermediate — scrutiny.

The Act cannot survive strict scrutiny, which requires the regulation further a compelling state interest and is the least restrictive means available to achieve that interest. *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014). This Court's conclusion in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), that the asserted interest in access to certain forms of contraception did not justify forcing objecting parties to provide it, precludes a finding the FACT Act passes

strict scrutiny. Application of even intermediate scrutiny will invalidate the Act.

Burwell's analysis precludes finding here that the Act passes strict scrutiny. The Court evaluated whether the law requiring plaintiffs to subsidize insurance for contraceptive products furthered the interest (a woman's cost-free access to specific contraceptives) through the least restrictive means. *Burwell*, 134 S. Ct at 2780. The Court assumed the interest, thus defined, was compelling, though the interest here might not be. *Id*. Here the state already provides subsidies for contraception – and abortion – so there is no comparable inaccessibility. The missing element that the centers must provide is only the *information* regarding the availability of such subsidized services. As typing a few words into a search engine can yield the location of nearby abortion providers and the services they offer, it is doubtful that the lack of information here, unlike the funds in *Burwell*, prevents the women's access.

But *Burwell*'s analysis regarding the means applies here. The Court noted that if the interest in cost-free access were so compelling, the state itself could pay the subsidies. *Burwell*, 134 S. Ct. at 2780-81. Likewise, the state here could disseminate the desired information through a public advertising campaign. *Evergreen*, 740 F.3d 233, 250; *Centro Tepeyac*, 722 F.3d 184, 190.

A California trial court, in reviewing the FACT Act under the California Constitution, offered specific options.

> It may purchase television advertisements as it does to encourage Californians to sign up for [subsidized health insurance] or to conserve water. It may purchase billboard space and post its message directly in front of [plaintiff's pregnancy center]. It can address the issue in its public school as part of sex education.

Scharpen at 19.

But instead of purchasing billboard space, it instead chose to "use the wall of the physician's office as a billboard." *Id*. at 17. This violated the First Amendment, which bars the state from forcing individuals to "use their private property as a 'mobile billboard' for the State's ideological message. *Wooley v. Maynard*, 430 U.S. 705, 715. Compelled advertising of the state's message is no more permissible when the billboard stays put.

Despite the asserted significance of the interest, the state did very little. The court observed that only two of the sixteen (one state and fifteen county) governmental websites even used the word "abortion," and the information was hidden behind other information regarding flossing, hazardous waste, and other topics. *Scharpen* at 8. But the state has no need to improve its presentation if it can conscript pregnancy centers to do its job for it. Accordingly, the court concluded the Act could not pass even intermediate scrutiny. *Id*. at 16.

The Second Circuit is in accord. *Harris* distinguished the Second Circuit's *Evergreen* decision, which invalidated a compelled message, on the grounds that *Evergreen* applied strict scrutiny. *Harris*, 839 F.3d

at 842.[5] But the Second Circuit actually concluded the directive could not survive "under either strict scrutiny or intermediate scrutiny." *Evergreen*, 740 F.3d 233, 249-50.

It is easier for the government to regulate conduct than speech. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-514 (1996); see also *Expressions Hair Design v. Schneiderman*, 137 S. Ct. at 1150. A finding that a pregnant woman's access to abortion *information* justifies compelling a pro-life center to engage in *speech* facilitating it would necessarily compel the conclusion that her interest in access to abortion itself justifies compelling pro-life medical professionals to engage in the *conduct* of performing abortions directly. But the state's ability to impress free citizens into state service must be limited. *Scharpen* at 15.

The Act cannot survive strict or intermediate scrutiny.

V. The FACT unconstitutionally conditions the exercise of one constitutional right on a party's forfeiting another.

As explained above, the Constitution protects the right to express one's own message. E.g. *Riley,* 487 U.S. 781, 791. The Constitution likewise protects individual autonomy regarding contraception, both to use and/or prescribe, and the reciprocal right *not to use and/or prescribe*. *Griswold v. Connecticut*, 381 U.S.

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[5] The New York message required centers to disclose they did not provide abortions or referrals for abortions, but did not require them to affirmatively assist women in obtaining them. *Evergreen*, 740 F.3d at 238.

479, 496-97 (1965) (Goldberg, J. concurring); see also *Burwell*, 134 S. Ct. 2751. But the FACT Act unconstitutionally forces centers into an election, where they must forfeit one constitutional right to exercise the other.

The doctrine of unconstitutional conditions applies when a party must desist from exercising a constitutional right in order to obtain a governmental benefit. See e.g. *Agency for Intern. Development v. Alliance for Open Society Intern, Inc.*, 570 U.S. 205, ___, 133 S. Ct. 2321, 2328 (2013). The principle that the state may not burden the exercise of a constitutional privilege is not limited to First Amendment speech. *Griffin v. California*, 380 U.S. 609, 614 (1965). As the state may not condition even an economic benefit (to which the party is not otherwise entitled) on foregoing the exercise of a constitutional right, *a fortiori*, the state may not condition the exercise of another constitutional right on such forfeiture. Accordingly, as criminal defendants have both a right to counsel and a right to jury trial, the state may not force an election, so that defendants enjoy the right to counsel only if they waive jury trial, or may go to trial only if they waive counsel.

But California forced such an election through the FACT Act. The Act exempts from its compelled speech provisions clinics that participate in the Family PACT program. Cal. Health & Safety Code § 123471 (c)(2). Participation requires providing all FDA-approved birth control methods, including those at issue in *Burwell*, 134 S. Ct. 2751, 2762. See Cal. Welf. & Inst. Code, §§ 24005(c), 24007(a)(2). Therefore, to participate, clinics must forfeit their right not to

prescribe, but if they don't participate, they forfeit control over their speech. In sum, they must forfeit their constitutional right to free speech in order to preserve their right not to prescribe, or must forfeit their right not to prescribe to preserve their right to free speech. Either way, this forced election unconstitutionally burdens the exercise of a constitutional right.

The FACT Act creates unconstitutional conditions on the exercise of constitutional rights.

VI. The Act burdens the centers' own speech.

In addition to unconstitutionally compelling the centers to express the government's message, and conditioning the right to control their message on centers' forfeiting their right not to prescribe contraception, the Act is further invalid because it penalizes the centers for their own affirmative expression. Even if valid reasons justified the compelled disclosure, the Act has the special vice of imposing the disclosure burden only as a consequence of (and effective penalty for) the centers' engaging in protected speech.

However important the state interest in notifying the public about the availability of state-funded abortion and related services, the obligation to provide this information does not fall upon the taxpaying public or medical profession generally – only on those who operate centers counseling pregnant women with a pro-life message. See *Pac. Gas & Elec. v. Public Utilities Comm'n of Cal.*, 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 (*Harris*, 839 F.3d at 830), an expressive act enjoying First Amendment protection. *Stuart v. Camnitz*, 774 F.3d 238, 245. This has the effect of burdening, and chilling, the centers' own message.

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

The Supreme Court described this burden in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). The challenged law required newspapers that engaged in protected speech (criticizing political candidates) 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. *Harris*, 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 justification offered for the Florida law, "an electorate informed about the issues," (*id*. at 260, (White, J. concurring)), resembles the justification offered below: "to ensure that women are able to

receive . . . accurate information about [family planning] services." *Harris*, 839 F.3d at 830.

But however great the interest in an informed electorate, the State could not burden the newspaper with providing such information in an unwanted manner. *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 *N.Y. 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 even specific individuals. Individuals are thus free to express privately their position on subjects like abortion 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 promote the very conduct they seek to prevent. Individuals who prefer not to advertise

abortions (and thereby facilitate them) might well desist from operating centers to avoid the obligation imposed by the Act. This would chill pro-life speech.

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 the Act was the "most effective way" to present the information to those lacking it could not justify the First Amendment infringement below. *Harris*, 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. *Pac. Gas*, 475 U.S. 1 (1986); *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, Inc. v. City of New York*, 740 F.3d 233, 249; see also *Expressions Hair Design*, 137 S. Ct. 1144, 1152. (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. *Pac. 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." *Pac. 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).[6] 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. Such "favoritism" "necessarily burdens the expression of the disfavored speaker." *Id*. at 14-15.

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

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[6] 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 Acad. and Institutional Rights, Inc*., 547 U.S. 47, 63-65; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). But as the FACT Act requires pregnancy centers to distribute the notices, which facilitate an activity the centers seek to discourage, this exception does not apply.

inclined toward abortion, the FACT Act "is not content neutral." *Id*. at 13-14.

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

The same principle has emerged more recently in campaign finance cases. The Court has invalidated regulations, like the one in *Pacific Gas*, designed to abridge a speaker's rights to enhance the relative voice of its opponents. *Pac. Gas*, 475 U.S. at 14. The first case concerned a disincentive to candidate speech; the candidate's spending beyond a certain limit would asymmetrically exempt opponents from spending restrictions, which would have operated had the candidate spoken less. *Davis v. FEC*, 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 merely by exempting opponents asymmetrically from otherwise applicable restrictions; it *required the speaker to fund them directly*. For every 1000 dollars that 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 that imposed 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 found the state's argument that the law promoted free and robust discussion no more persuasive than it was in *Miami Herald*. *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 the centers' own speech.

Arizona Free Enterprise, 564 U.S. at 742; *Miami Herald*, 418 U.S. at 256-57.

CONCLUSION

Political polarization has created intense social friction, and cases like this and *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272 (Colo. 2015), *cert. granted*, 137 S. Ct. 2290 (June 26, 2017) (No. 16-111), threaten to aggravate the problem. Historically, the recognition of a right shaped how that activity was treated by the government – not other private individuals. A recognition that conduct warranted constitutional protection constrained the state from prohibiting the activity.

But the acceptance of such a right has not entitled those exercising the right to conscript dissenters into implementing it. The right to send one's child to a religious school does not compel atheists (or public school supporters) to refer children to such schools. The right to buy pornography does not compels newsstands and video stores to carry it, or facilitate its purchase. The right to buy a gun does not create a corresponding duty to sell one.

Abortion rights therefore cannot force opponents to facilitate – or perform – one. The state's "ability to impress free citizens into State service must be limited." *Scharpen* at 15. By forcing pro-life pregnancy centers to present a message, and facilitate conduct they profoundly oppose, the FACT Act violates their freedom of mind. *Wooley*, 430 U.S. 705, 715; *Barnette*, 319 U.S. at 637. It further burdens their own speech by penalizing its presentation. *Arizona Free Enterprise*, 564 U.S. 721, 742; *Miami Herald*, 418 U.S. 241, 256-57.

As the First Amendment protects not only the speaker but also the audience, it is not only the centers but also pregnant women, and public debate itself, which lose when the state manipulates the marketplace of ideas to produce a specified result. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641. California's pregnancy centers compete in the marketplace of ideas with other organizations taking a more favorable view of abortion. Though this debate often occurs in legislatures and courts, the most important audience is the hearts and minds of pregnant women. The FACT Act unconstitutionally invades that personal debate, forcing the centers to refer visitors to organizations like Planned Parenthood without any countervailing burden on those organizations to advertise for pro-life pregnancy centers. *Pacific Gas*, 475 U.S. at 14-15.

Although the government speaking in its own voice may express a viewpoint, it may not impose one on private speakers. *Matal v. Tam*, 137 S. Ct. 1744, 1757. "The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals." *Knox*, 567 U.S. 298, 322. By forcing pregnancy centers to present a message facilitating abortions, the FACT Act coerces speech and distorts public debate. It violates the First Amendment.

Respectfully submitted,

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