No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, THE NATIONAL LEGAL FOUNDATION, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND SAMARITAN'S PURSE IN SUPPORT OF PETITIONERS

Steven W. Fitschen
James A. Davids
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133

David A. Bruce, Esq.
205 Vierling Drive
Silver Spring, Maryland 20904

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
1001 Pa. Ave., NW, 8th Floor
Washington, D.C. 20004
(202) 250-3833
rick@claybrooklaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service charities, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred because made in the image of God, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with

---

[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every woman in America.

The **Ethics & Religious Liberty Commission of the Southern Baptist Convention** ("ERLC") is the moral concerns and public policy entity of the Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Scripture teaches that every person is an image-bearer of God and that the womb is his domain. SBC members believe God's knowledge of unborn life even precedes the creative act of conception. Therefore, abortion is incongruent with SBC beliefs. The ERLC is committed to upholding the freedom of Christian ministries who care for women in unplanned pregnancies because we believe mothers and their unborn children are known and loved by God.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from California, are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations, especially with respect to contentious issues like abortion.

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when any state government compels the speech of faith-based organizations to make statements wholly contradictory to their exempt mission and purpose of helping vulnerable persons, including distressed women and unborn children.

SUMMARY OF THE ARGUMENT

The Courts of Appeals are in conflict over the proper standard of review in compelled speech cases involving abortion notices. Some use strict scrutiny, some apply intermediate scrutiny of varying definitions, and others use rational-basis review. Often, the court identifies no standard at all.

The standard applied should be uniform across all courts. Moreover, cases involving abortion should not have a different standard than other speech cases, and *Casey*[2] does not require otherwise. Compelled

---

[2] *Planned P'hood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). The question on which this Court granted *certiorari* in this case was limited to the First Amendment (Continued...)

speech, in this area as in others, should be subject to strict scrutiny, especially so when it involves viewpoint discrimination. California's statute compelling pro-abortion speech at pregnancy centers committed to a pro-life viewpoint does not satisfy strict scrutiny and is, therefore, unconstitutional. However, other laws, especially those requiring informed consent to the serious surgical procedure of abortion, foster several compelling state interests and will pass strict scrutiny analysis as narrowly tailored to that situation.

ARGUMENT

This Court should enforce a uniform standard for all compelled speech cases involving viewpoint discrimination, including those dealing with abortion notices and surgery. The standard, as has been ably articulated by the Petitioners in this case, is strict scrutiny.[3]

That does not mean that all such regulation is unconstitutional, even though it sounds the death knell for the California statute here. Many laws, especially those requiring a woman's informed consent before she undertakes surgery, serve compelling interests in a suitably tailored manner. Even though many informed consent laws have been upheld under lesser standards of review, they typically satisfy

---

question, and this Brief does not address due process aspects of abortion regulation.

[3] Pet. Br. 20-49.

strict scrutiny as well. This Court, therefore, when finding the California statute unconstitutional, should be careful to reserve judgment on other abortion compelled speech laws.

I. The Courts of Appeals Have Adopted Conflicting Standards.

Amici need not present an exhaustive cataloguing of the various approaches taken by the Courts of Appeals when dealing with abortion compelled speech regulations. By way of example, some courts have applied a rational basis or reasonableness test[4] and some intermediate scrutiny,[5] while

---

[4] *E.g.*, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012) (satisfies reasonableness test if regulation is truthful, not misleading, and relevant; rejects strict scrutiny analysis); *Planned P'hood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (same); *see also Casey*, 505 U.S. at 906 (Rehnquist, C.J., dissenting) (articulating that the State should be able to regulate abortion procedures in any way rationally related to a legitimate state interest); *Thornburgh v. Am. Coll. of OBGYNs*, 476 U.S. 747, 802 (1986), *overruled in part by Casey*, 505 U.S. 833 (1992), (White, J., dissenting) (articulating that the State's regulation of the practice of medicine is subject to review only for rationality), 828 (O'Connor, J., dissenting) (articulating that regulation only requires a rational relationship to State's interest unless it puts undue burden on abortion decision, which would be allowed if it can satisfy strict scrutiny).

[5] *E.g.*, *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016); *Stuart v. Camnitz*, 724 F.3d 238, 248-49 (4th Cir. (Continued...)

others have suggested that strict scrutiny is appropriate and have applied it in some circumstances.[6] Some courts applying the same level of scrutiny to very similar legislation have reached different conclusions.[7] Still other Courts of Appeals have announced no particular standard when reviewing abortion compelled notice regulations.[8]

2014) (adopting a sliding scale standard depending on the interests and circumstances and applying intermediate scrutiny in particular case).

[6] *E.g.*, *Greater Balto. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balto.*, No. 16-2325, slip op. at 9-16 (4th Cir. Jan. 5, 2018) (applying strict scrutiny review to city's compelled speech regulation of pregnancy center); *Evergreen Ass'n, Inc. v. City of N.Y.,* 740 F.3d 233, 244-49 (2d Cir. 2014) (suggesting strict scrutiny but avoiding determination by ruling that most of challenged ordinance did not meet intermediate scrutiny, but finding one part of ordinance met strict scrutiny); *Stuart*, 724 F.3d at 246 (suggesting strict scrutiny may be appropriate when compelled speech by doctor is ideological); *Centro Tepeyac v. Mtgmy. Cnty.*, 772 F.3d 184, 188-93 (4th Cir. 2013) (en banc) (upholding required notice of no doctor on staff under strict scrutiny); *Rounds*, 530 F.3d at 743 (Murphy, J., dissenting).

[7] *Compare Stuart*, 724 F.3d at 249, 251 (rejecting Fifth Circuit's decision regarding very similar regulation in *Lakey* and Eighth Circuit's in *Rounds*), *with Evergreen*, 740 F.3d at 249-51.

[8] Courts articulating no particular standard have principally compared the regulation in question to the regulations upheld in *Casey*. *E.g.*, *A Woman's Choice–East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir.

(Continued...)

This cacophony of approaches is detrimental to freedom of speech and the public's perception of the Rule of Law. Abortion cases attract, and deserve, careful attention from the general public. When our courts cannot articulate a common standard—or when abortion cases have special rules for no discernable reason—it engenders a belief that rulings are result-oriented, rather than principled. An important antidote to such a perception is to apply the same standard to abortion speech regulation as applies in other compelled speech cases involving viewpoint discrimination.

II. Strict Scrutiny Should Apply in Compelled Speech Cases Involving Viewpoint Discrimination, Including Laws That Regulate Abortion Speech.

In *Reed v. Town of Gilbert*, this Court applied strict scrutiny in a case involving signage when the ordinance discriminated on the basis of content.[9] The *Reed* Court repeated the admonition from *Rosenberger v. Rector and Visitors of University of Virginia*[10] that viewpoint regulation is a "more blatant" and "egregious form of content discrimination."[11] Ac-

---

2002); *Planned P'hood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995); *Barnes v. Moore*, 970 F.2d 12, 14-15 (5th Cir. 1992).

[9] 135 S. Ct. 2218 (2015).

[10] 515 U.S. 819, 829 (1995).

[11] 135 S. Ct. at 2230.

cordingly, strict scrutiny must also be applied when government engages in viewpoint discrimination.

Almost all the abortion regulations involved in cases such as this are viewpoint discriminatory. Jurisdictions passing laws regulating pregnancy centers are motivated by the desire to reduce the effectiveness of the centers' message and to encourage women to have abortions.[12] Other jurisdictions have regulated speech in doctors' offices, including by informed consent laws requiring doctors to tell a pregnant woman of the development of her baby, the availability of an ultrasound sonogram, the ability to hear her baby's heartbeat, and risk factors in abortion.[13] Others have required informing a woman considering abortion of the existence of local pregnancy centers; the availability of funding for prenatal, delivery, and postnatal care; and that the father is responsible for financial assistance.[14] Although some courts have upheld these laws based on a lower standard of review for professional speech and stat-

---

[12] *See NIFLA*, 839 F.3d at 829 (State of California); *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014); *Greater Balto. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balto.*, 721 F.3d 264 (4th Cir. 2013); *Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d 745, 760 (D. Md. 2014).

[13] *E.g.*, *Casey*, 505 U.S. at 902 (Pa.); *Lakey*, 667 F.3d at 573 (Tex.); *Rounds*, 530 F.3d at 726-27 (S.D.); *A Woman's Choice*, 305 F.3d at 685 (Ind.).

[14] *E.g.*, *Thornburgh*, 476 U.S. at 763 (Pa.); *Stuart*, 774 F.3d at 242-43 (N.C.); *Rounds*, 530 F.3d at 726-27 (S.D.); *A Woman's Choice*, 305 F.3d at 685 (Ind.).

ing that the compelled speech by the doctor is strictly factual,[15] the obvious intent of the statutes is to encourage women to carry their pregnancy to term and live birth.[16] This is not to say that such an intent makes the statute objectionable.[17] But reciting "professional speech" as a shibboleth does not dispose of First Amendment concerns about viewpoint discrimination. Indeed, the *Reed* Court noted that, in *NAACP v. Button*,[18] "the Court rightly rejected the State's claim that its interest in the 'regulation of

---

[15] *E.g.*, *Lakey*, 667 F.3d at 575-76; *Rounds*, 530 F.3d at 734-36.

[16] *See, e.g.*, *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 443-44 (1983), *overruled in part by Casey*, 505 U.S. at 882; *Thornburgh*, 476 U.S. at 759, *overruled in part by Casey*, 505 U.S. at 882; *Stuart*, 774 F.3d at 245; *Rounds*, 350 F.3d at 747 (Murphy, dissenting) (noting probable intent of S.D. law is to discourage abortion).

[17] This Court in *Akron* that found regulation unconstitutional because it had the intent to favor childbirth and discourage abortion. 462 U.S. at 443-44. The *Casey* Court found that approach inconsistent with the State's legitimate interest in favoring childbirth and overruled. 505 U.S. at 882. Thus, a regulation is no longer susceptible to challenge solely because it expresses preference for protecting life of the unborn. *See id.* at 883 ("we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion"); *Lakey*, 667 F.3d at 575.

[18] 371 U.S. 415, 438-39 (1963).

professional conduct' rendered the statute consistent with the First Amendment, observing that 'it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.'"[19]

No special carve-out for abortion should be made to free speech law. Some courts (including the Ninth Circuit here) have interpreted the three-Justice joint opinion in *Casey* to have done just that.[20] But that is not a necessary reading of *Casey* for several reasons: The joint opinion did not articulate its standard of review under the First Amendment when upholding pro-life regulation;[21] it did not distinguish between regulations compelling speech and other regulation, basing its decision on due process grounds of whether the regulation put an undue burden on the woman's choice;[22] and *Casey*, decided

---

[19] 135 S. Ct. at 2229; *see also Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (holding that when commercial speech mixes with fully protected speech, it is entitled to strict scrutiny review); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (holding that State's authority to regulate commercial speech extends only to "expression solely related to the economic interests of the speaker and its audience").

[20] *E.g.*, *NIFLA*, 839 F.3d at 835-38; *Lakey*, 667 F.3d at 575.

[21] 505 U.S. at 879-901.

[22] *Id.* The Fifth Circuit in *Lakey* pointed out that Petitioners in their briefs in *Casey* had raised a compelled speech argument under the First Amendment. 667 F.3d

(Continued...)

in 1992, obviously preceded this Court's latest articulation of First Amendment law in *Reed*. Furthermore, *Casey*'s due-process ruling, as discussed further below, can be harmonized with the First Amendment's strict scrutiny test for any regulation that does involve compelled speech.[23]

III. The California Law Is Viewpoint Discriminatory and Does Not Satisfy Strict Scrutiny.

Amici need not belabor Petitioners' point that the California law involved here is viewpoint discriminatory and warrants strict scrutiny.[24] The Ninth Circuit itself quoted from California's legislative findings that showed disapproval of the anti-abortion message of the pregnancy centers and the desire to rein in that speech by compelling the centers to declare a pro-abortion message.[25] As *Reed* explained, even when a statute is not discriminatory on its face (as the Ninth Circuit inaccurately held with respect to the California law[26]), it can warrant

---

at 574. However, the justices in *Casey* did not address that directly, or try to harmonize its due process standard with First Amendment doctrines, in any of their various decisions.

[23] This Brief focuses on compelled speech by private persons. It does not deal with regulation of conduct.

[24] Pet. Br. 31-39.

[25] *NIFLA*, 839 F.3d at 829-30.

[26] *NIFLA*, 838 F.3d at 835-36. Petitioners demonstrate why this ruling is incorrect. Pet. Br. 31-39.

strict scrutiny if its "justification or purpose" is content- or viewpoint-based.[27]

Nor need *Amici* elaborate why the California law does not meet the strict scrutiny test. Even were it to be assumed that California has a compelling interest in encouraging abortions (an erroneous proposition, as discussed further below), there is no governmental need to have the message conveyed by those who are morally opposed to it. As Petitioners have set out, California has ample alternative methods to advertise its free abortion services.[28] Its forcing private parties to communicate the State's message is unjustified and unjustifiable.[29]

---

[27] 135 S. Ct. at 2228.

[28] Pet. Br. 49-51. *See also, e.g.*, *Evergreen*, 740 F.3d at 250 (listing alternatives).

[29] This situation is to be distinguished from that in *Rust v. Sullivan*, in which government grantees were compelled as part of their agreement to voice the government's position. *Rust* involved government speech paid for by the government, and the government has no First Amendment rights. 500 U.S. at 193, 198-99. Here, the government is forcing a private citizen to speak a message, to which an objecting citizen may resort to the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705 (1977).

IV. Other Abortion Speech Laws Will Likely Satisfy Strict Scrutiny Analysis Because the Interests Implicated Are Significantly Different Than Those Implicated by California's Law.

Because government action promoting pro-life or pro-abortion speech is viewpoint-discriminatory, *Amici* assume that strict scrutiny analysis would apply to all abortion-related speech regulation, whether pro- or anti-abortion. It does not follow, however, that because California's pro-abortion law fails strict scrutiny analysis, other regulations, and particularly those involving informed consent for the abortion procedure, do not pass muster if heightened scrutiny were applied to them. That is because the relevant interests and circumstances vary greatly between the two situations. In the following subsections, *Amici* will compare and contrast the interests involved with regulation of doctors who actually perform abortions to the interests involved with regulation of pregnancy centers that do not.

A. The Interests in Protecting Unborn Life Are Compelling, and the Interests in Encouraging Abortion Are Not.

This Court has recognized, including in *Roe*, that the State may foster a compelling interest in protecting fetal life.[30] Indeed, this Court has always

---

[30] *See Roe v. Wade*, 410 U.S. 113, 163 (1973) (finding this "important" interest becoming "compelling" at vi-

(Continued...)

recognized the obvious, scientific truth that, if allowed to develop, a pregnancy normally results in a healthy child imbued with all the rights of personhood.[31] Stated negatively, the purpose of abortion is to stop that natural development of the fetus and to prevent live birth. But while this Court has held that the government cannot create an undue burden on a woman obtaining an abortion prior to her child's viability, that does not mean that the State must finance or encourage the killing of the fetus.[32] Instead, as this Court reiterated in *Gonzales v. Carhart*, the "government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[33]

This compelling interest in protecting the life of the fetus is logical and important. For one thing,

---

ability); *see also Gonzales v. Carhart*, 550 U.S. 124, 145 (2007).

[31] *See, e.g.*, *Gonzales*, 550 U.S. at 157-59 (recognizing fine line between late-term abortion and infanticide); *Roe*, 410 U.S. at 163.

[32] *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Congress's funding of pro-childbirth services, but not abortion services); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding state law prohibiting use of public facilities and personnel for abortions); *Williams v. Zbarez*, 448 U.S. 358 (1980) (upholding state law prohibiting use of public funds for abortion); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding city's refusal to pay for abortions at its hospital).

[33] 550 U.S. 124, 157 (2007); *see also Casey*, 505 U.S. at 882.

abortion brings an abrupt halt to the natural development of a living organism.[34] For another, abortion has been linked with concerns about eugenics.[35] For another, a State may desire to increase its population for any number of reasons, including federal funding linked to population.[36] A State may also be con-

---

[34] *See Roe*, 410 U.S. at 163 ("State regulation protective of fetal life after viability thus has both logical and biological justifications.").

[35] *See, e.g.*, Charles Camosy, *Is the Call for Zika Virus Abortions the New Eugenics?*, L.A. Times, Feb. 19, 2016, at http://www.latimes.com/opinion/ op-ed/la-oe-camosy-zika-abortion-eugenics-20160219-story.html; Wesley J. Smith, *No Girls Allowed! Sweden Okays Gender Eugenic Abortion*, First Things, May 13, 2009, at https://www.firstthings.com/blogs/firstthoughts/2009/05/no-girls-allowed-sweden-okays-gender-eugenic-abortion-1; David Harsanyi, *Pro-Choicers Should Explain Why They Think Eugenics is Acceptable—Iceland's 'Eradication' of Down Syndrome Raises Inconvenient Questions. At Least, it Should*, Aug. 16, 2007, at http://thefederalist.com/2017/08/16/icelands-eradication-syndrome-raises-inconvenient-questions-pro-choicers/.

[36] In fiscal year 2000, GAO found that 85 percent of federal government obligations in grants to state and local governments were distributed on the basis of formulas that use data such as state population and personal income. *Testimony on the 2010 Census*, https://www.gao.gov/assets/120/118299.pdf. "It has been understood for some time that a substantial proportion of federal domestic assistance is distributed on the basis of population data gathered through the decennial census . . . ." *Counting for Dollars: The Role of the Decennial Census in the Distribution of Fed. Funds*, at https://www.brookings.edu/re

(Continued...)

cerned about low birth rates and declining population, as many European countries are experiencing currently.[37]

The State has no similar interest in fostering abortion. The "objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice."[38] As President Clinton memorably put it, the government's interest is that abortion be "legal, safe, but rare."[39] All members of the *Casey* Court con-

---

search/counting-for-dollars-the-role-of-the-decennial-census-in-the-distribution-of-federal-funds/.

[37] "The population of the EU is expected to peak by 2050 and then gradually decline, suggesting a dim future for that body. . . . The most important EU country, Germany, has endured demographic decline for over a generation. Germany's population is forecast to drop 7.7% by 2050. . . . The main problem is the very low fertility rate of the EU's superpower, which . . . was 1.4 between 2010 and 2015. It takes a fertility rate of 2.1% to replace your own population. . . . [M]any of Europe's tinier 'frontier' countries have abysmal fertility rates. . . . Things are not that much better in Western Europe, where fertility rates are also below replacement rates . . . ." Joel Kotkin, *Death Spiral Demographics: The Countries Shrinking the Fastest*, Feb. 1, 2017, at https://www.forbes.com/sites/joelkotkin/2017/02/01/death-spiral-demographics-the-countries-shrinking-the-fastest/ #180b57f3b83c.

[38] *Thornburgh*, 476 U.S. at 801 (White, J., dissenting), *overruled in part by Casey*, 505 U.S. at 882.

[39] *See, e.g.*, http://www.nytimes.com/1996/ 08/30/us/clinton-s-speech-accepting-the-democratic-nomination-for-president.html.

firmed that a woman does *not* have a right to an abortion on demand.[40] Rather, under *Roe* and its progeny, a woman has "a right to terminate a pregnancy free of undue interference by the State."[41] She has no right to a free abortion.[42]

The State has no compelling interest in increasing the incidence of abortion. After all, under the common law and in every jurisdiction of this country until well into the last century, abortion was a crime.[43]

The woman's right to abortion without undue interference from the State as identified by this Court's case law has been justified by a minority of justices on the basis of equal rights for women,[44] with the implied syllogism being, because a man after having sexual intercourse can walk away without becoming pregnant, a woman should not have to bear that consequence, either. The syllogism is faulty. It does not state a compelling interest for the State, at

---

[40] 505 U.S. at 887; *see also Doe v. Bolton*, 410 U.S. 179, 189 (1973); *Roe*, 410 U.S. at 153 (rejecting argument that women's right to abort is absolute).

[41] *Id.*

[42] *See Rust*, 500 U.S. at 201-03; *Webster*, 492 U.S. at 507, 510-11.

[43] *See generally* Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Carolina Academic Press 2006).

[44] *See Gonzales,* 550 U.S. at 171-72 (Ginsberg, J., dissenting, with Stevens, Souter, and Breyer, JJ.).

least in those situations in which the sexual relations are consensual between the man and the woman.[45]

It is simple biology that women can carry children and men cannot. The genders stand on equal footing before they have consensual sex, but not after.[46] And men and women both know that one of

---

[45] Of course, there are the tragic cases of pregnancy after rape, but those instances are, thankfully, rare. *See Casey*, 505 U.S. at 850-51 (noting that non-consensual pregnancies are rare). The Guttmacher Institute reports that rape was cited as the primary reason for having an abortion in one percent of cases in 1987 and in less than one-half of one percent in 2004. https://www.guttmacher.org/sites/default/files/pdfs/tables/370305/3711005t3.pdf.

[46] The necessity for the sexes to be equally situated in order for there to be an equal protection problem is demonstrated in *Schlesinger v. Ballard*, 419 U.S. 498 (1975). There, this Court considered a challenge to the Navy policy of making females serve longer than men to attain promotions. This Court noted, "[T]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty." *Id.* at 508. As this Court later observed in *Rostker v. Goldberg*, 453 U.S. 57 (1981), commenting on *Schlesinger*, "In light of the combat restrictions, women did not have the same opportunities for promotion as men, and therefore it was not unconstitutional for Congress to distinguish between them." *Id.* at 67. Similarly here, men do not have the same "oppor-
(Continued...)

the consequences of having such relations is childbearing. Willing participants in intercourse have no more fundamental right to expunge the natural results of their sexual act than they have to escape the natural consequences of any other voluntary act. Thus, a state has no legitimate, compelling interest in fostering a belief that a woman is denied equality because, by nature, she can bear a child and a man cannot. At the same time, all the States (and the District of Columbia and Puerto Rico) appropriately recognize that the consequences of an unwanted pregnancy fall more heavily on the woman and provide for her the opportunity to drop off an unwanted baby at designated locations through "safe haven" laws.[47]

In sum, California has not justified its challenged regulation on an attempt to discourage women to carry their children to term, and any such implied interest should be given no weight. California's

---

tunities" for pregnancy as do women. *See also Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding there was no sex discrimination under Title VII when company did not include pregnancy in disabilities coverage); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding from equal protection attack California not including pregnancy in covered disability risks because there was no discrimination based on sex).

[47] *See* Children's Bureau, *Infant Safe Haven Laws*, 2016, at 2-64, *available at* https://www.childwelfare.gov/pubPDFs/safehaven.pdf#page=2&view=Who%20May%20Leave%20a%20Baby%20at%20Safe%20Haven (last visited Jan. 9, 2018).

only legitimate interest here is to inform women of where they can get free abortion services, an available government benefit. But whatever minimal interest a woman has in obtaining a free abortion and a State has in advertising it, those interests are not compelling. On the other hand, a State's expressed interest in protecting and encouraging life by having the woman carry her pregnancy to full term is.

B. The Interest in Preventing Sex-selection Discrimination Against Females Is Implicated by Abortion Speech Laws, but That Interest Is Not Implicated Here.

States also have a compelling interest that abortion is not used as a tool to discriminate against females. Several states have outlawed abortions whose motivation is sex discrimination,[48] and social

---

[48] As reported by the Guttmacher Institute, ten states (Arizona, Arkansas, Illinois, Indiana, Kansas, North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota) currently have laws that ban abortions for reason of sex selection at some point in pregnancy. https://www.guttmacher.org/print/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly. The law in Arkansas has been preliminarily enjoined and is the subject of ongoing litigation. *See Hopkins v. Jegley*, No. 4:17–cv–00404, 2017 WL 3220445 (E.D. Ark., July 28, 2017), appeal filed, No. 17-2879 (8th Cir., Aug. 28, 2017). The laws of Indiana and Illinois have been permanently enjoined, although an appeal of the Indiana case is currently pending. *See Planned P'hood of Ind. and Ky., Inc. v. Comm'r of the Ind. State Dep't of* (Continued...)

science studies have shown that parents, when limiting the size of their families, often prefer one sex over another, normally male.[49] The most prominent example is China, where abortion has been officially encouraged, even mandated, as part of its one-child policy (recently modified to a two-child limit).[50] The result of that policy has been a significant skewing of the gender composition of China's population toward males.[51] That, in turn, has had adverse consequences for its society at large.[52]

Health, No.1:16-cv-00763, 2017 WL 4224750 (S.D. Ind., Sept. 22, 2017), appeal pending, No. 17-3163 (7th Cir., Oct. 19, 2017).

[49] "If Americans could have only one child, they would prefer that it be a boy rather than a girl, by a 40% to 28% margin, with the rest having no preference or no opinion on the matter." Frank Newport, *Americans Prefer Boys to Girls, Just as They Did in 1941*, June 23, 2011, at http://news.gallup.com/poll/148187/americans-prefer-boys-girls-1941.aspx (reporting on results of Gallup poll).

[50] China began its one-child policy in 1980, restricting most families to only one child. Beginning in late 2013, China allowed couples to have two children if one of the parents had been an only child. In October 2015, the Chinese Government announced that it would allow all couples to have no more than two children beginning in 2016. *See generally* https://www.brookings.edu/articles/the-end-of-chinas-one-child-policy/ (Mar. 30, 2016).

[51] "According to China's 2010 Census, men currently outnumber women by at least 34 million, an imbalance in large part due to China's fertility policy (known as the one-child policy) and a preference for sons." Wash. Post, Apr. 30, 2014, https://www.washingtonpost.cm/news/mon

(Continued...)

The laws and public policies of this country uniformly militate against sex discrimination.[53]

---

key-cage/wp/2014/04/30/the-security-risks-of-chinas-abnormal-demographics/?utm_term=.5439d7504f17.

[52] "[O]ver the next 20 years in large parts of China . . . there will be a 10%–20% excess of young men. . . . It has also been assumed that a combination of psychologic vulnerability and sexual frustration may lead to aggression and violence in these men. There is good empirical support for this prediction: cross-cultural evidence shows that the overwhelming majority of violent crime is perpetrated by young, unmarried, low-status males. In China . . . the sheer numbers of unmated men are a further cause for concern. Because they may lack a stake in the existing social order, it is feared that they will become bound together in an outcast culture, turning to antisocial behavior and organized crime, thereby threatening societal stability and security. . . ." Therese Hesketh, *et al.*, *The Consequences of Son Preference and Sex-selective Abortion in China and Other Asian Countries*, Canadian Med. Ass'n J., 2011 Sep. 6; 183(12): 1374–1377, at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3168620/ (footnotes omitted). "The crime rate has almost doubled in China during the past 20 years of rising sex ratios. . . . A study into whether these things were connected [*Sex Ratios and Crime: Evidence from China's One-child Policy*, by Lena Edlund, *et al.*, Institute for the Study of Labour, Bonn. Discussion Paper 3214] concluded that they were, and that higher sex ratios accounted for about one-seventh of the rise in crime." *The Worldwide War on Baby Girls*, Mar. 4, 2010, at http://www.economist.com/node/15636231.

[53] *See, e.g.*, Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. *§§* 2000e *et seq.* (prohibiting employment discrimination based on sex)*;* Title IX of the

(Continued...)

States can legitimately regard it a compelling interest to protect against this discrimination against females by, for example, requiring a doctor to inform women that abortion is impermissible when the sex of the fetus is the motivating cause.[54]

Educ. Amends. of 1972*, as amended,* 20 U.S.C. §§ 1681 *et seq*. (prohibiting sex discrimination in education programs or activities that receive federal financial assistance); Cal. Fair Emp't and Hous. Act, Cal. Gov't Code §§ 12900 *et seq*. (making it illegal for employers of five or more employees to discriminate against job applicants and employees on the basis of sex).

[54] For example, Arizona bans sex-selection abortions and requires both doctor and patient to sign an affidavit stating that the unborn child is not being aborted because of her or his sex or race. Ariz. HB2443, § 2 (2011), at https://www.azleg.gov/legtext/50leg/1r/bills/ hb2443p .pdf. As Arizona's prohibition of race as a motivation for abortion indicates, the disparity between abortion rates among the races also raises serious concerns that can legitimately be taken into account by a State. The most recent "Abortion Surveillance" report (for the year 2013) from the Centers for Disease Control and Prevention indicates that non-Hispanic black women have the highest abortion rate (27.0 abortions per 1,000 women aged 15–44 years) and ratio (420 abortions per 1,000 live births), both significantly higher than that for non-Hispanic white women. The CDC reports that non-Hispanic white women are the category with the lowest abortion rate (7.2 abortions per 1,000 women aged 15–44 years) and the lowest ratio (121 abortions per 1,000 live births). CDC, *Surveillance Summaries* 65(12);1–44, Nov. 25, 2016, at https://www.cdc.gov/mmwr/volumes/65/ss/ ss6512a1.htm.

C. The State's Interest in Regulating the Medical Profession Is Often Implicated by Abortion Speech Laws, but It Is Not Implicated Here.

States have a compelling interest in regulating the medical profession and, in particular, in making sure that patients have adequate, truthful information about the risks and benefits of serious surgeries.[55] This interest stems from the facts that (a) doctors have specialized knowledge and expertise that is unavailable to the patient, (b) only doctors can perform most surgeries and so are the best individuals to convey the information to the patient, and (c) surgeries have serious risks and can be life altering. The District of Columbia Circuit put it this way:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his

---

[55] "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales*, 550 U.S. at 157 (quoting *Wash. v. Glucksburg*, 521 U.S. 702, 731 (1997)).

> physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.[56]

Patients must make difficult choices about whether to have surgery performed, and whether to ask for a second opinion or additional information. States have a compelling interest in making sure that patient choices are informed and voluntary. These elements are the undergirding interests supporting States constitutionally being able to compel doctors to give information to patients in certain circumstances.

This Court has recognized that these interests are at their height when abortion is being considered. As this Court wrote in *Gonzales*, abortion for a woman has long-term physical, emotional, and psychological implications:

> Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sus-

---

[56] *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (footnotes omitted; quoting *Schloendorff v. Sec'y of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92, 93 (1914)).

> tained. Severe depression and loss of esteem can follow.
>
> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here at issue [partial-birth abortions]. . . . The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.[57]

These same interests apply not just to late-term abortions, but to all abortions.

Compelling truthful speech by doctors to enable women to make informed choices about abortion also satisfies the least restrictive means test. When meeting with a doctor to discuss an abortion, the procedure is not just being contemplated (like when a woman comes to a pregnancy center) but also can be

---

[57] 550 U.S. at 157-59 (citations omitted).

promptly performed. Moreover, the only way to assure that women have the information they need before making a choice that may alter their lives forever is to make sure disclosure is provided by their physicians. Physicians are the only ones licensed to perform abortions and, thus, they are the only failsafe to make sure women are provided the information they need to make an informed, voluntary decision. Indeed, this Court has "stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out."[58]

---

[58] *Colautti v. Franklin*, 439 U.S. 379, 387 (1979). Similarly, the Second Circuit in *Evergreen,* 740 F.3d at 247-48, and the Fourth Circuit in *Centro Tepeyac*, 722 F.3d at 188-93, found regulation requiring pregnancy centers to disclose to clients whether they had a doctor on staff to be narrowly tailored because that was the one place the client could be expected to receive the information. It follows that a requirement to have the doctor tell a woman carrying a child about the risks of abortion, the current gestational development of her baby, and her financial options if she foregoes abortion is narrowly tailored because that is the only way to make sure that she gets the information to make an informed choice. The Ninth Circuit in this case relied on those precedents. 839 F.3d at 843-44. However, Petitioners demonstrate why the California regulation is distinguishable, overly broad, not narrowly tailored in other ways, and otherwise inconsistent with strict scrutiny analysis. Pet. Br. 49-62.

Women coming to non-surgical pregnancy centers will not be getting immediate abortions. They will be advised of the various risks of the procedure and given information about their fetuses, but, before a woman has an abortion, she will also talk with her doctor. There is no need for pro-life pregnancy centers to declare the availability of free abortion services provided by the State, because pro-life pregnancy centers are not minutes away from putting women into the operating room and cannot do so. The State has ample other ways of providing that information, including by having the doctor who is to perform the abortion provide notice of the free services.[59]

D. Pecuniary and Non-pecuniary Interests Are Significantly Different for Pregnancy Centers and Abortion Providers.

In furthering the compelling interests just discussed, States may legitimately take into account that doctors specializing in abortions have a pecuniary interest in the woman choosing to have an abortion. There is a logical concern that, but for regulation specifying what doctors must tell their patients about an abortion, doctors may be inclined, because of the financial incentives to perform the operation,

---

[59] *See Evergreen*, 740 F.3d at 250 (listing several alternatives to having pregnancy centers disclose the State's message).

either to avoid or minimize discussion of all the risks and other relevant factors.

Pro-life pregnancy centers present no such concerns. They are non-profit organizations and do not perform abortions. Thus, they have no incentives to downplay the risks of abortion or to avoid discussing fetal development, showing sonograms, or facilitating mothers' listening to fetal heartbeats.

For purposes of the First Amendment, this Court has recognized a distinction between the regulation of for-profit and non-profit organizations. In *Ohralik v. Ohio State Bar Association*[60] and *In re Primus,*[61] decided the same day, this Court contrasted (a) legitimate regulation of for-profit, in-person solicitation of clients by attorneys; with (b) illegitimate sanctioning of an ACLU attorney for writing letters to prospective clients offering free legal services. This Court relied on its previous teaching in *NAACP v. Button*[62] that non-profit organizations and their clients had "expressive and associational" interests "at the core of the First Amendment's protective ambit,"[63] noting that the State had to justify such regulation by exacting standards and precision, as there was a "danger of censorship" and because "First Amendment freedoms need breathing space to

---

[60] 435 U.S. 447 (1978).

[61] 436 U.S. 412 (1978).

[62] 371 U.S. 415 (1963).

[63] *Primus,* 436 U.S. at 424 (citing *Button,* 371 U.S. at 433).

survive."[64] By contrast, this Court found that a "lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns" that, "[w]hile entitled to some constitutional protections, . . . is subject to regulation in furtherance of important state interests."[65]

These teachings from the regulation of the legal profession have applicability to the abortion compelled speech situation. On the one hand, doctors are performing in-person, for-fee communications when they meet with a woman considering abortion. On the other hand, pregnancy centers are non-profit organizations, and the First Amendment rights of expression and association are at their height when a pregnant woman visits a pregnancy center. These centers and their employees are not part of the individually licensed medical profession, they provide no threat to perform an irreversible medical procedure, and they have no financial inducement to encourage women to do so. The State's interests in compelling non-profit centers to articulate the government's message are minimal in comparison to the interests in regulating the speech of surgeons who could promptly perform an abortion for a medical fee.[66]

---

[64] *Id.* at 432-33 (quoting *Button,* 371 U.S. at 433).

[65] *Ohralik,* 436 U.S. at 459.

[66] *See also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (striking down State's regulation of professional non-profit fundraisers by licensing and compelled speech as violating their First Amendment rights).

E. Pregnancy Center Employees Generally Have Moral Objections to Encouraging Abortions, While Doctors Generally Have No Moral Objections to a Woman Declining an Abortion.

Abortion is a surgical procedure like few others. To remove an appendix or a wisdom tooth does not normally embrace ethical quandaries; whether to secure an abortion does so for a large segment of Americans. This, also, is a legitimate factor when balancing the acceptability of compelled speech in this context.

The calculus is not the same on both sides of the issue. As this Court has recognized, for many, abortion is unethical in almost every instance, because it is the taking of an innocent life that was generated by a prior, voluntary choice.[67] On the other hand, few consider it unethical in almost every instance to carry a child to term and give it birth. This consideration is important when balancing the interests of compelled speech, and it puts doctors and pregnancy centers at opposite poles of the analysis. Asking doctors to give truthful information about the abortion procedure and the fetus does not require them to violate their consciences. Moreover, such regulation gives doctors full play to advise their clients by taking into account the woman's particular

---

[67] *See, e.g.*, *Casey*, 505 U.S. at 850-51; *Roe,* 410 U.S. at 116.

situation, including recommending abortion if the doctor considers it to be so indicated in the circumstances by either professional, social, or ethical concerns. In contradistinction, compelling those staffing pro-life pregnancy centers to voice a pro-abortion message invariably foists on them a conflict of conscience. "The First Amendment protects the rights of individuals . . . to refuse to foster . . . an idea they find morally objectionable."[68]

The different physical settings presented by pregnancy centers and doctors' offices are also relevant. If it ever occurred that a woman made a mistake about what services a pregnancy center offered,[69] she would undoubtedly have no compunction about walking out of the waiting room and not giving the center's employees the opportunity to communicate their pro-life message to her.[70] That same woman would likely find it much more uncomfortable to walk out of a private consultation with a doctor,

---

[68] *Wooley*, 430 U.S. at 715.

[69] *See Greater Balto. Ctr.,* slip op. at 17 (noting that after seven years of litigation the city did not identify a single example of a woman coming to the pregnancy center who had incorrectly believed she could obtain an abortion there).

[70] *See Riley,* 487 U.S. at 795-801 (holding unconstitutional a regulation requiring a fundraiser to disclose his cut before making an appeal for funds because it would "almost certainly" hamper fundraising efforts for charities and noting that such a required notification might end conversations with a prospective donor before they even got started).

highlighting the need for the doctor to supply the relevant information to the woman to allow her to make an informed choice.

CONCLUSION

This Court should strike down California's regulation of pro-life pregnancy centers as viewpoint-discriminatory, compelled speech that cannot withstand strict scrutiny. When doing so, this Court should recognize that the interests involved in informed consent laws that allow women to make an informed choice are markedly different and normally will further compelling interests in a suitably tailored manner.

Respectfully submitted,

/s/ Frederick W. Claybrook, Jr.
FREDERICK W. CLAYBROOK, JR.
Counsel of Record
CLAYBROOK LLC
1001 Pa. Ave., N.W., 8th Floor
Washington, D.C. 20004
tel. (202) 250-3833
fax (202) 628-5116
Rick@claybrooklaw.com

STEVEN W. FITSCHEN
JAMES A. DAVIDS
THE NATIONAL LEGAL FOUNDATION
2224 Va. Beach Blvd.
Suite 204
Virginia Beach, Va. 23454
(757) 463-6133

DAVID A. BRUCE, Esq.
205 Vierling Drive
Silver Spring, MD 20904

January 16, 2018