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 JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Justice and Freedom Fund ("JFF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Ninth Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The *mission* of Petitioners is advocacy, not financial profits or the practice of a profession. Their *message* is religious expression on a matter of intense public concern. Their *method* is to provide free information and other resources. The State's alleged *mission* is to prevent deception and ensure that women are informed about their full range of reproductive choices. But that mission is betrayed by its *method*. Rather than using its own voice to disseminate its own message, which advocates only *one* choice—abortion—California hijacks the Centers as its couriers.

Compelled speech is anathema to the First Amendment. The Ninth Circuit parted company with this Court and other circuits when it upheld California's Reproductive FACT Act (Cal. Health & Safety Code §§ 123471, 123472, 123473) (the "Act"). Its ruling, if allowed to stand, empowers government to bludgeon free speech. Moreover, the Ninth Circuit employs a flawed professional speech analysis to draw an analogy between the Act's disclosures and informed consent requirements. The resemblance is wholly superficial. Both are disclosures and both are content-based restrictions on speech, but the similarity ends there. Informed consent requires a doctor to provide information about a procedure he performs—such as abortion. The Act requires Petitioners to disclose information about a procedure they do not perform and adamantly oppose—information about what the *state* provides, not about the limited, non-surgical medical services Petitioners offer free of charge.

ARGUMENT

I. THE NINTH CIRCUIT OBSTRUCTS THE CENTERS' ABILITY TO CARRY OUT THEIR *MISSION*.

Petitioners represent religious, nonprofit pregnancy resource centers (the "Centers") whose mission is to offer life-affirming alternatives to abortion. As the Ninth Circuit acknowledged:

> Appellants are strongly opposed to abortion. None provide abortions or referrals for abortions. NIFLA's mission is to "empower the choice for life," and Pregnancy Care Clinic "provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child, rather than abortion." Fallbrook believes "that human life is a gift of God that should not be destroyed by abortion."

Nat'l Institute of Family and Life Advocates, et al., v. Harris, 839 F.3d 823, 831 (9th Cir. 2016) ("*NIFLA*").

The State has a competing mission—allegedly to ensure that women are fully informed:

> California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion.

NIFLA, 839 F.3d at 841.[2] But in reality the State aggressively promotes abortion and suppresses information about alternatives. The State treats the religious nonprofit Centers as professional and/or commercial enterprises, ignoring their mission and tax-exempt purposes. The State's mission, if successful, would ensure that many Centers fail to accomplish their mission. Indeed, the State openly concedes its intent to target the Centers because of their pro-life viewpoint. Through a scheme of broad exemptions, the State cherry-picks pro-life centers and deliberately thwarts their mission. The end result is that the only entities legally required to promote abortion are those who oppose it.

Incredibly, the Ninth Circuit insists the Act does not "encourage, suggest, or imply that women should use those state-funded services." *NIFLA*, 839 F.3d at 842. This is an astounding denial of reality. If California does not intend to "encourage, suggest, or imply" that women should use state-subsidized abortion services, then it makes no sense to commandeer the Centers to advertise them. The Centers exist to *discourage* abortion and they rely on charitable contributions to finance their efforts. The State subsidizes abortion, then uses its superior resources and power to impede *the Centers'* mission rather than to accomplish *its own* mission.

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[2] The Ninth Circuit vastly overstates the State's interests. The State has no obligation to ensure access to abortion, which is perhaps the only "constitutionally-protected" medical service ever recognized by this Court. But that is another discussion beyond the scope of this brief.

The State essentially compels the Centers to abandon their mission. Either they must comply with the law and direct women to state-subsidized abortions, or they must enroll in a regime (the Family PACT program) that would mandate their participation in abortion-related drugs and services. Both options are constitutionally flawed.

II. THE NINTH CIRCUIT DECISION OBSTRUCTS THE CENTERS' ABILITY TO COMMUNICATE THEIR *MESSAGE*.

California impermissibly "prescribes what shall be orthodox" on a morally hot-button issue and "force[s] [the Centers] to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The State advances a distinctly pro-abortion message and demands that the Centers publicize its state orthodoxy. The Centers' proclaim a distinctly religious, pro-life message that abortion is not the only solution to an unplanned pregnancy. Their speech is at the heart of the First Amendment:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (U.S. 1995) (internal citations omitted).

It is difficult enough for small nonprofits to accomplish their mission in reliance on voluntary contributions. Those difficulties may be insurmountable if the Centers cannot communicate effectively with their intended audience.

A. The State Compels The Centers To Disseminate A Pro-Abortion Message In Direct Contradiction To Their Own Pro-Life Message.

This Court has long recognized that "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961). Here, in both purpose and effect, California stifles, penalizes, and curbs the Centers' free speech rights. The State's compelled disclosures drown out the message the Centers exist to proclaim.

1. The Centers Are Engaged In Expressive Advocacy On A Matter Of Public Concern.

The Centers promote an ideology on one of the most explosive public issues in America. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps,* 562 U.S. 443, 444 (2011), quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983). A matter of public concern is "a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004); *see also Connick*, 461 U.S. at 146 ("any matter of political, social, or other concern to the

community"). Abortion has been a quintessential "matter of public concern" for over four decades. The State's efforts to stifle the Centers' message and compel "the utterance of a particular message favored by the Government . . . contravenes this principle." *Turner Broadcast Sys., Inc. v. FCC,* 512 U.S. 622, 641 (1994). California "may not burden the speech of [the Centers] in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-579 (2011); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1314 (11th Cir. 2017).

2. The Disclosures Force The Centers To Become Couriers Of The State's Speech.

The Act reeks of viewpoint discrimination in spite of the Ninth Circuit's inexplicable denial. The Act "is not applied across the board . . . , but instead reflects a legislative purpose to penalize the [Centers]" because they oppose abortion. *NAACP v. Button*, 371 U. S. 415, 445 (1963) (Douglas and White, J.J., concurring). The Ninth Circuit admits the Act is content-based but declines to acknowledge the thinly veiled viewpoint discrimination in California's gerrymandered targeting of pro-life organizations. *NIFLA*, 839 F.3d at 834 ("Although the Act is a content-based regulation, it does not discriminate based on viewpoint."). The Act mandates an exact message that highlights state-subsidized abortion and contraception. Rather than using the massive resources at its disposal, California usurps the Centers' limited resources. The mandatory disclosures gobble up space and garble the Centers' message. Instead of hearing a clear pro-life message, the public is confronted with a hodgepodge of

statements for and against abortion. This commingling of conflicting messages is likely to confuse and mislead the women who come to the Centers for help.

The Act stifles the Centers' right to tailor, time, and edit their messages. Regardless of motives, the State "may not substitute its judgment as to how best to speak" for that of the Centers. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 791 (1988). The Centers are entitled to exercise discretion about the "choice of material . . . the size and content . . . and treatment of public issues." *Hurley v. Irish-American Gay, Lesbian & Bisexual 21 Group,* 515 U.S. 557, 575 (1995). The State wrongfully intrudes on this "editorial control and judgment." *Id*. Even statutory disclosures that do pass constitutional muster should grant "flexibility to tailor the disclosures to . . . individual circumstances, as long as the resulting statements are substantially similar to the statutory examples." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 130 S. Ct. 1324, 1341 (2010). The Act's *inflexible* provisions compel precise words and allow no breathing space for the Centers to craft their own presentations, even if the disclosures themselves were justified. The Ninth Circuit minimizes the burden on the Unlicensed Centers: The "[n]otice is . . . only one sentence long." *NIFLA*, 839 F.3d at 843. But even a cursory look at the law reveals that font size, multiple languages, and other details render that "one sentence" disclosure so onerous that advertising is virtually impossible. Pet. 11; App. 81a-821.

The factual nature of the disclosures cannot salvage the Act. Editorial rights extend "not only to expressions of value, opinion, or endorsement, but *equally to*

statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573 (emphasis added). Compelled statements of either opinion *or* fact burden protected speech. *Riley,* 487 U.S. at 797-798; *see also Milavetz,* 130 S. Ct. at 1343 (Thomas, J., concurring). "While it is true that the words the state puts into the [Centers'] mouth are factual, that does not divorce the speech from its moral or ideological implications." *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). Unlike this case, *Stuart* addressed an informed consent requirement imposed on doctors who perform abortions. Even in that context, where disclosures are generally constitutional, the state could not craft an *ideological* mandate.

B. The Disclosures Are Not Comparable To Informed Consent Requirements For Medical Procedures.

Four decades ago, this Court decreed abortion a constitutional right. It remains a matter of intense public debate that intersects morality, conscience, religion, and law. But it is also a medical procedure. This unique combination creates a tension that has plagued legislatures and emerged in scores of cases before this Court. The government's regulatory role varies considerably depending on the subject matter. The state must exercise restraint so as not to infringe or unduly burden constitutional rights, but it has greater latitude to regulate the practice of medicine.

As a medical procedure, abortion is subject to reasonable state regulation, including informed consent. Even *Roe* conceded that "[the] State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under

circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 149-150 (1973). Those interests in health and safety are "legitimate objectives, amply sufficient to permit a State to regulate abortions *as it does other surgical procedures*." *Id*. at 170-171 (Stewart, J., concurring) (emphasis added). The government may impose informed consent requirements for the disclosure of truthful, non-misleading information about the nature of the abortion procedure and associated health risks. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882 (1992). Informed consent requirements for abortion are "no different from a requirement that a doctor give certain specific information about any medical procedure." *Casey*, 505 U.S. at 884; *see also Gonzales v. Carhart*, 550 U.S. 124, 163-164 (2007) (same). This is a standard practice that cuts across many procedures and varies depending on factors such as surgical risk. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) ("we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level").

However, the Ninth Circuit fails to distinguish expressive advocacy from informed consent to a medical procedure. Unlike typical informed consent provisions, the Act's disclosures are unrelated to any services the Centers *do provide* but consist wholly of a state-crafted ideological message about what the *state provides*. Indeed, the disclosures constitute free advertising for state-subsidized abortion services. Moreover, although "the state may prohibit the pursuit of medicine as an occupation without its license, . . . it

could [not] make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." *Thomas v. Collins*, 323 U.S. 516, 544-545 (1945) (Jackson, J., concurring). Here, the State compels speech "urging persons to follow" its pro-abortion "school of medical thought," contrary to the Centers' message "urging persons" to reject that school of thought.

Prior to *Casey*'s explicit approval of informed consent requirements for abortion, this Court struck down certain state laws that interfered with doctor-patient communications. *See Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747 (1986) and *City of Akron v. Akron Center for Reproductive Health, Inc*., 462 U.S. 416 (1983), both overruled in part by *Casey*, 505 U.S. 833. These cases involved mandatory physician disclosures about the State's position on abortion and potential alternatives. In *Thornburgh*, this Court found the disclosures were "designed not to inform . . . but rather to persuade" and constituted "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient." *Thornburgh*, 476 U.S. at 762. *Casey* narrowed the scope of *Thornburgh* and *Akron* to the extent that these rulings might preclude requiring disclosure of "truthful, non-misleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus." *Casey*, 505 U.S. at 881. But *Casey* does grant carte blanche to the government to mandate the rigid, ideological disclosures California imposes on the Centers.

1. The Ninth Circuit's Professional Speech Analysis Is Flawed.

The Ninth Circuit opinion rests heavily on precedents governing professional speech, asserting that clients come to the Centers "precisely because of the professional services" and specialized knowledge they offer. *NIFLA*, 839 F.3d at 840. The relationship between the First Amendment and the regulation of professional speech has been described as "complex and difficult . . . obscure and controversial." Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 944 (2007). The government has regulated professions for many decades, yet this Court has never formally segregated "professional speech" or relegated it to second-class status for First Amendment purposes. On the contrary, full protection is the norm, guided by established First Amendment principles. *See, e.g., In re Primus*, 436 U.S. 412, 432 (1978) (nonprofit's offer of free legal representation); Pet. Op. Brief 42 (citing cases).

There is no reason for this Court to carve out "professional speech" as a new category, having disclaimed "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010). "[T]here are perils to the recognition of new categories of speech that enjoy diminished First Amendment protection." Rodney A. Smolla, *Professional Speech and the First Amendment,* 119 W. Va. L. Rev. 67, 84 (2016). Those perils include the risk of "government censorship of professional speech that ought to receive robust First Amendment protection."

Id. at 68. Other applicable areas of law—criminal, tort, fraud, ethics, *inter alia*—protect clients from speech-related harms caused by professionals.

The Licensed Centers are not full-fledged medical clinics, nor are they engaged in a licensed, "talk treatment" profession such as psychotherapy. They offer limited, non-surgical medical services, free of charge, that are integrally related to the Centers' pro-life advocacy. Any required disclosures should be relevant to services the Centers *do offer*, not a compelled referral for services they oppose and *do not offer*. If there were risks associated with the ultrasounds, pregnancy tests, or other clinical services the Centers offer, disclosure requirements would be reasonable. Instead, the Ninth Circuit blithely brushes over the distinction between the informed consent requirements imposed on physicians about a procedure *they do perform* and the disclosures the Act imposes on Centers about a procedure *they do not perform*.

Even if the Licensed Centers were engaged in "professional speech"—a questionable premise at best—speech uttered by professionals has many dimensions and is likely entitled to "the strongest protection our Constitution has to offer" when the topic is a public issue like abortion. *Fla. Bar v. Went For It, Inc.,* 515 U.S. 618, 634 (1995). This Court should consider "the nature of the speech taken as a whole and the effect of the compelled statement[s] thereon." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). California may not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. at 439. In *Button*, this Court "rightly rejected the State's

claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015), citing *Button*, 371 U.S. at 438-439. The Ninth Circuit also departs from recent Eleventh Circuit precedent and even its own prior case law:

> The Ninth Circuit recognized that doctor-patient speech (even if labeled professional speech) is entitled to First Amendment protection, and invalidated the policy because it was content- and viewpoint-based and did not have the requisite "narrow specificity." *See Conant v. Walters*, 309 F.3d 629, 637-639 (9th Cir. 2002).

Wollschlaeger, 848 F.3d at 1310; *see also Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013) ("doctor-patient communications *about* medical treatment receive substantial First Amendment protection").

Pro Bono Public Interest Advocacy. The Ninth Circuit ignores the distinction this Court carved out for pro bono public interest advocacy. This case is remarkably analogous to *Primus,* where an ACLU attorney offered free services "to express personal and political beliefs and to advance the civil-liberties objects of the ACLU, rather than to derive financial gain." *In re Primus*, 436 U.S. at 422. This Court relied on the speaker's motive to distinguish protected expression from commercial or professional activities. *Id*. at 437-438 n. 2. The same is true here. The Centers are engaged in advocacy, as in *Primus*. Their free services and information are the method they use to accomplish their mission and communicate their message.

Unlike the Ninth Circuit, the Fourth Circuit found "the relevant inquiry" to be "whether the speaker is providing personalized advice in a private setting to a *paying client* or instead engages in public discussion and commentary." *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (emphasis added). The Centers have no "paying client[s]" and unquestionably engage in "public discussion and commentary." The Ninth Circuit briefly brushed over *Moore-King* in a footnote. *NIFLA*, 839 F.3d at 841 n. 8. The Fourth Circuit, striking down a pregnancy center disclosure requirement, highlighted this factor: "With no record of comprehensive state regulation or paying clients before us, we cannot say that the ordinance regulates professional speech." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council Baltimore*, 2018 U.S. App. LEXIS 297, *15 (4th Cir. 2018).

Moreover, "a speaker's rights are not lost merely because compensation is received." *Riley,* 487 U.S. at 801. As in *Riley*, the Act's disclosures are "intertwined with informative and perhaps persuasive speech" (*id*. at 796)—persuasion against abortion and information about alternatives. Under the Act, women who enter Licensed Centers are confronted with a state pro-abortion message that contradicts the Center's core message and undermines its mission. Woman who enter an Unlicensed Center are greeted by the State's message about what the Center is *not*. In both cases, the State compels conspicuous disclosures about what the Center does *not* do before the Center can explain what it *does* do. The State—not the Centers—creates each woman's first impression, obscuring the Centers' message and mission. The disclosures are not made

within the context of a professional-client relationship, but before that relationship ever commences—and the "Compelled Abortion Referral" (Pet. Op. Br. 8) may ensure that no relationship is ever formed.

Professional Licensing. The state has "a strong interest in supervising the ethics and competence" of licensed professionals. *Greater Baltimore Ctr. for Pregnancy Concerns,* 2018 U.S. App. LEXIS 297, *14. Courts uphold reasonable regulations on licensed professions, including law, accounting, medicine.[3] But there is a difference between (1) ensuring that the Centers' clients are under the care of an appropriately trained physician and (2) providing information on how women can terminate the new life they now carry—using *state* funded services. The former is a legitimate exercise of state power to elevate public health and safety and is typically accomplished through licensing. Laws that regulate entry into a profession are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. *Lowe v. Sec. & Exch. Comm'n,* 472 U.S. 181, 228 (1985) (White, J., concurring), quoting *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 239 (1957).

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[3] *Fla. Bar v. Went For It, Inc.,* 515 U.S. at 625-26 (restriction on direct-mail solicitation of accident victims); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626 (1985) (upholding disclosures about litigation costs in attorney ads for contingency fee cases); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (in-person attorney-client solicitation); *Accountant's Soc'y of Va. v. Bowman,* 860 F.2d 602 (4th Cir. 1988) (accounting terms and standards for licensed CPA's).

Here, "[California] is attempting to use the leverage of licensure to manipulate discussion among private citizens . . . on an issue of major public importance." *Professional Speech and the First Amendment,* 119 W. Va. L. Rev. at 103. The Licensed Centers have already complied with the licensing requirements applicable to the limited services they provide, and unlike other regulatory schemes, the Act dictates the precise content. *See, e.g., Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1056 (9th Cir. 2000) ("California does not dictate the content of what is said in therapy; the state merely determines who is qualified as a mental health professional.") This is classic compelled speech. The State commandeers the Centers to disseminate a government message antithetical to their core mission. The Unlicensed Centers are not subject to any licensing requirement. None of the Centers "purport to exercise judgment on behalf of [a] client in the light of a client's individual needs and circumstances." *Lowe v. SEC,* 472 U.S. at 232 (White, J., concurring). Their free information and services empower *the women themselves* to make informed decisions about their pregnancies. The licensed and unlicensed Centers both engage in expressive advocacy on an issue with significant moral, religious, and political ramifications, not a profession the State may regulate. "It cannot be the duty, because it is not the right, of the state to protect the public against false doctrine." *Thomas v. Collins,* 323 U.S. at 545 (Jackson, J., concurring).

The speech of professional individuals may trigger "a collision between the power of government to license and regulate . . . and the rights of freedom of speech." *Lowe v. SEC,* 472 U.S. at 232 n. 10 (White, J.,

concurring) (non-personalized newsletters with investment advice are not professional speech). Occupational regulations are valid only if "[a]ny abridgement of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. at 467-468. The Act's constitutionally flawed burdens can hardly be deemed *incidental*.

2. A Commercial Speech Analysis Would Be Inappropriate.

The Ninth Circuit conceded that the Act does not regulate "commercial speech." But the line between "commercial" and "professional" is a thin one. Professional services are typically offered to paying clients in a commercial setting. *See, e.g., Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997) (advertising oneself as a "certified public accountant" is commercial speech). Here, the Centers have no economic interests at stake and do not engage in commercial transactions with the women they serve.

In rejecting the analogy between this case and *Primus*, the Ninth Circuit reasoned that the Centers "have positioned themselves in the marketplace as pregnancy clinics" that "offer medical services in a professional context." *NIFLA*, 839 F.3d at 841. Even the Ninth Circuit's own description of the Centers' mission (Section I above) lays bare the flaws in this reasoning. Like the parties in *Primus*, the Centers are engaged in "political expression and association" (*In re Primus*, 436 U.S. at 437-438) concerning one of the most volatile issues of our time. Abortion intersects speech, religion, politics, culture, law, and medical practice. The Centers are not "in the marketplace" to

compete with medical clinics, hospitals, doctors, or others engaged in the practice of medicine. All services are offered free of charge, including the limited medical services provided by the Licensed Centers.

Even in the world of commercial and business activity, "[t]he idea is not sound . . . that the First Amendment's safeguards are wholly inapplicable." *Thomas v. Collins,* 323 U.S. at 531. The marketplace "provides a forum where ideas and information flourish." *Sorrell,* 564 U.S. at 579, quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). In some circumstances the government may "compel disclosure without suppressing speech." *Conn. Bar Ass'n v. United States,* 620 F.3d 81, 93 (2d Cir. 2010). The state has some responsibility to "protect the public from those who seek . . . to obtain its money." *Thomas v. Collins,* 323 U.S. at 545 (Jackson, J., concurring). But even there, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer,* 471 U.S. at 651.

The Centers exist to assist women facing unplanned pregnancies and inform them about *choices* other than abortion. At no time do they "propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 64-68 (1983); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013). Their message is not "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 561 (1980). It is only through a warped redefinition—e.g., equating "the

opportunity to advocate against abortion" with economic benefit—that the government could possibly manufacture a "commercial" transaction. *Evergreen Ass'n, Inc. v. City of New York,* 801 F. Supp. 2d 197, 204 (S.D.N.Y. 2011), *aff'd in part and rev'd in part,* 740 F.3d 233 (2014). That fanciful transformation is "particularly offensive to free speech principles." *Id*. at 206. It twists the mission of the Centers and upends the First Amendment, with absurd results:

> [A]ny house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection.

O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 813-814 (D. Md. 2011). Restaurants may be required to disclose caloric and nutritional information. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health,* 556 F.3d 114, 131-32 (2d Cir. 2009). But it would be flagrantly unconstitutional to impose comparable disclosures on a church operating a soup kitchen to feed the homeless. Restaurants and soup kitchens both provide food—but a church ministry to the poor is not a commercial venture subject to the same level of government regulation. That position would "represent a breathtaking expansion of the commercial speech doctrine." *Evergreen,* 801 F. Supp. 2d at 205. Here, the Centers are motivated by religious beliefs and social concerns, not economic interest.

For many years, "the Constitution impose[d] [no] restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen,* 316 U.S. 52, 54

(1942). When this Court expanded First Amendment protection to cover admittedly commercial speech, the context was abortion. This Court held that an out-of-state advertisement for abortion services "did more than simply propose a commercial transaction . . . it contained factual material of clear 'public interest.'" *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). "The fact that the particular advertisement in appellant's newspaper [for legal abortions in New York] had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees." *Id*. at 818. This Court distinguished the facts from *Valentine*, where a "message of asserted public interest was appended solely for the purpose of evading the ordinance." *Id*. at 819. At this point, three decades after *Valentine*, "the notion of unprotected commercial speech all but passed from the scene." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 759-760 (1976).

Commercial speech that is "inextricably intertwined" with expressive speech is fully protected. This Court declines to "parcel out the speech," phrase by phrase, applying different tests—particularly when the expressive aspect is targeted for regulation. *Riley*, 487 U.S. at 796. *Riley* built on the principle that "[s]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Just recently, this Court applied the First Amendment to strike down the disparagement provision of trademark law. *Matal v. Tam*, 137 S. Ct.

1744 (2017). Federal law regulates trademarks to provide customers with information about the source of goods and services in interstate commerce, but a mark may include expressive components—as in *Matal*. Although this Court found it unnecessary to decide whether or not trademarks are commercial speech (*id*. at 1764), "the line between commercial and non-commercial speech is not always clear, as this case illustrates" (*id*. at 1765). Here, even if the Centers' speech could plausibly be considered either professional or commercial, it is "inextricably intertwined" with persuasive speech advocating a particular view on a contentious social issue.

Even if a commercial speech analysis were appropriate here, the framework developed by this Court is "substantially similar to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (internal citations and quotation marks omitted). And "the abiding characteristic of valid time, place, and manner regulations is their content neutrality. See *Ward v. Rock Against Racism,* 491 U.S. 781, 791-796 (1989)." *Id*. at 573 (Thomas, J., concurring). The FACT Act is not content neutral, as the Ninth Circuit acknowledged.

3. The Disclosures Shut Off The Free Flow Of Information—The Very Purpose Of Informed Consent And Other Disclosures In Professional and Commercial Contexts.

The First Amendment promotes the free flow of ideas and information. This helps ensure that even commercial decisions are well informed. "To this end,

the free flow of commercial information is indispensable." *Va. State Bd. of Pharmacy,* 425 U.S. at 765. *See also Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 113-114 (2d. Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.").

In *Bolger*, this Court considered a federal statute that prohibited mailing information about contraception. The mailings were classified as commercial speech but the statute was unconstitutional because it unreasonably suppressed the flow of information about an important social issue—family planning. *Bolger*, 463 U.S. at 72. This Court "found the First Amendment interest served by such speech paramount." *Id*. at 69. As in *Bolger*, the Centers "desire to convey truthful information relevant to [an] important social issue." *Id*. They provide valuable information to pregnant women about alternatives to abortion. Their pro-life message is at the heart of their existence, not an afterthought designed to sidestep government regulation. The State cannot employ its regulatory authority to shut down speech on either side of the abortion debate. The most it could do is "assess liability for specific instances of deliberate deception"—not "impose a prophylactic rule requiring disclosure even where misleading statements are not made." *Riley,* 487 U.S. at 803 (Scalia, J., concurring).

Even if the Centers' speech was accurately characterized as professional or commercial, the State mandate thwarts the flow of information that

disclosures should facilitate. The Act purports to ensure that women are fully informed of their reproductive options but in reality it stifles access to their full range of choices. Its primary focus is the availability of abortion, emergency contraception, and birth control. The State crafts its message so as to promote abortion. *But that does not fully inform women*. The Centers fill the gap by providing "truthful information relevant to [an] important social issue[]." *Bolger,* 463 U.S. at 69. The Centers widen the range of options for women who might otherwise believe abortion is their *only* choice. Their services facilitate the free flow of information. The Act garbles the Centers' message and thus hinders that flow by interfering with the right to *receive* information. "Indeed, the right to hear and the right to speak are flip sides of the same coin." *Conant,* 309 F.3d at 643 (Kozinski, J., concurring) (medical marijuana); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-867 (1982), *Va. State Bd. of Pharmacy,* 425 U.S. at 756-757. Contrary to the State's alleged interest in *fully* informing women, the Act imposes restrictions *only* on entities that oppose abortion and mandates *only* disclosures that endorse abortion. The Act smothers expression and impedes access to information.

Informed consent laws facilitate the free flow of information by equipping patients with critical information they need in order to consent to a medical procedure. Like any other surgical procedure, abortion requires informed consent. Without it, the physician could be liable for malpractice. Doctors remain free to advocate abortion or discuss other options with pregnant patients. The State erroneously equates informed consent requirements with the mandate

imposed on the Centers. Both schemes are related to the broad subject of abortion but they are otherwise quite dissimilar. The Act's disclosures are unrelated to any risk associated with services the Centers offer. If ultrasounds or pregnancy tests posed health risks, the State could require disclosures of those risks. Instead, the State mandates dissemination of information about a procedure the Centers *oppose* and would never perform or recommend—abortion. That is just as illogical as it is unconstitutional. California's inflexible mandate drowns out the Centers' pro-life message and even jeopardizes their ability to remain open.

The Ninth Circuit echoes the State's charade, citing this Court's decision in *Casey,* 505 U.S. 833. *NIFLA*, 839 F.3d at 837 ("[T]he Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion."). The Ninth Circuit references Fourth, Fifth, and Eighth Circuit cases that are anything but analogous to the facts here. The Fourth Circuit struck down an informed consent law it deemed "ideological" because it "conveys a particular opinion." *Stuart v. Camnitz*, 774 F.3d at 246. The Fifth Circuit upheld a requirement that doctors show pregnant women sonograms and make the fetus's heartbeat audible. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575-576 (5th Cir. 2012). The Eighth Circuit upheld the compulsory disclosure of "truthful, non-misleading information relevant to a patient's decision to have an abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-735 (8th Cir. 2008). Unlike *Stuart v. Camnitz*, *Lakey*, *Rounds*, or *Casey*, the Act contains no informed consent provision. The Ninth Circuit masks the difference by using the vague term "abortion-related disclosures."

See, e.g., NIFLA, 839 F.3d at 837 ("courts are in agreement that strict scrutiny is inappropriate in abortion-related disclosure cases").

Communication between professionals and their clients enhances the free flow of information. The Ninth Circuit's departure from its own precedent is startling. In a case *not* related to abortion, the court stated that: "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." *Conant*, 309 F.3d at 636. In *Conant*, the Ninth Circuit enjoined a federal law that allowed revocation of a physician's license for recommending medical marijuana. The law impermissibly "condemn[ed] expression of a particular viewpoint." *Id*. at 636. *Conant* acknowledged First Amendment rights in the context of requiring informed consent. *Id.* at 637 ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights.") The State's authority to regulate commercial or professional speech does not, under any standard, grant the government carte blanche to skew disclosures in favor of one side of a heated public debate and destroy the mission of those who disagree with its viewpoint.

Occasionally courts enhance the free flow of information by expanding First Amendment protection to new categories of speech. Indeed, protection for commercial speech was forged in the context of disseminating information about abortion services (*Bigelow v. Virginia,* 421 U.S. 809) and contraception (*Bolger,* 463 U.S. 60). But the exclusion of new speech categories is another matter. Courts cannot exercise

"freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens,* 559 U.S. at 472. That is exactly what the Ninth Circuit has done. The court expunges speech about life-affirming alternatives to abortion.

III. THE NINTH CIRCUIT OBSTRUCTS THE CENTERS' ABILITY TO IMPLEMENT THEIR *METHOD*.

The Centers and the State each have a method to accomplish their respective missions. The Centers' method is to offer free information and resources, including limited, non-surgical medical services such as pregnancy tests and ultrasounds. The State has a constitutionally flawed method—rather than using its own funds and voice, California confiscates the Centers' limited resources and compels them to spread a government message that contradicts their mission and message. And while the State claims its purpose is to prevent deception and ensure that women are fully informed about their reproductive choices, its method betrays that claim. The State informs women about *only one* choice—abortion—and deceives women by using pro-life speakers as its mouthpiece. The State abuses its power by enacting laws that distort the Centers' message, crippling their ability to speak and accomplish their mission.

Applying intermediate scrutiny, the Ninth Circuit explained that the Act "need not be the least restrictive means possible" to accomplish the State's purpose. *NIFLA*, 839 F.3d at 842. But the Act turns free speech jurisprudence on its head. Its burdensome, broadly tailored disclosures use the most restrictive means to

accomplish the State's viewpoint-based objective. California defies this Court's warning that:

> If the First Amendment means anything, it means that regulating speech must be a *last—not first—resort*. *Yet here it seems to have been the first strategy the Government thought to try*.

Thompson v. Western States Medical Ctr., 535 U.S. 357, 373 (2002) (emphasis added); *see also Conant*, 309 F.3d at 637. Rather than use its own voice, the "first strategy the [State] thought to try" was to play ventriloquist and require the Centers to become its dummies, bearing the costs of transmitting its message. Even in the commercial context, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Cent. Hudson,* 447 U.S. at 564. The State has a wealth of more narrowly tailored means available—starting with its own voice and resources. *See, e.g., Riley,* 487 U.S. at 800 ("the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file").

The State is free to adopt, promote, publicize and even fund a viewpoint. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In *Rust*, the government funded family-planning services but chose to exclude abortion. *Id*. at 178. California has chosen to subsidize abortion

and contraception. But the State crosses the constitutional line by compelling the Centers to expend their limited resources to advertise the State's program, compromising "the core principle of speaker's autonomy" (*Hurley,* 515 U.S. at 575) and "assum[ing] a guardianship of the public mind" (*Riley,* 487 U.S. at 791, quoting *Thomas v. Collins,* 323 U.S. at 545 (Jackson, J., concurring)).

The Constitution severely restricts the State's ability to compel speech. Under narrow circumstances, the government may use mandatory disclosures to protect the public. But even in a commercial context, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer,* 471 U.S. at 651. That would be true here *even if* the Centers' speech were "commercial"—which the Ninth Circuit admits it is not. *NIFLA*, 839 F.3d at 834 n. 5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review.").

Unlike the Ninth Circuit, the Second Circuit expressed concerns about laws "requir[ing] pregnancy services centers to advertise on behalf of the City." *Evergreen Ass'n*, 740 F.3d 233, 250 (2d Cir. 2014). This "offends the Constitution even if it is clear that the government is the speaker." *Id*., citing *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (invalidating statute that turned "private property [into] a mobile billboard for the State's ideological message"). Even if a message appears benign or is acceptable to some, the State's interest does not "outweigh the [Centers'] First Amendment right to avoid becoming the courier for

such message." *Id*. at 717. Even seemingly innocuous content-based laws can too easily cross the threshold into viewpoint discrimination. Such laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641. That is exactly what California does—in conflict with this Court:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 515 U.S. at 579. The FACT Act contravenes the basic presumption "that speakers, not the government, know best both what they want to say and how to say it." *Riley,* 487 U.S. at 791. Moreover, the State fails to publicize its own message, instead *inflicting the entire burden on the Centers*.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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