**No. 16-55249**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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

v.

KAMALA HARRIS, ET AL.,
*Defendants – Appellees.*

On Appeal from the United States District Court
For the Southern District of California,
No. 3:15-cv-02277-JAH-DHB

# BRIEF AMICUS CURIAE ON BEHALF OF THE INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL IN SUPPORT OF DEFENDANTS-APPELLEES

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## INTEREST OF AMICI CURIAE[1]

Amici is the Information Society Project at Yale Law School.[2] The Information Society Project (ISP) is an intellectual center addressing the implications of new information technologies for law and society and focusing on a wide range of issues concerning the intersections between health policy, technology policy, privacy concerns, and the regulation and dissemination of information. Many of the scholars associated with the ISP are especially concerned with the development of First Amendment doctrine and its impact on listeners in the marketplace. The ISP has an interest in ensuring that the constitutionality of the Act is determined in accordance with settled First Amendment principles.

## STATEMENT OF THE CASE

This case concerns the constitutionality under the First Amendment of California's law designed to combat deceptive tactics used by organizations that try to prevent women from obtaining abortions. Assembly Bill No. 775, also known as the Reproductive Freedom, Accountability, Comprehensive Care, and

[1] Counsel for both parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amici curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[2] This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

Transparency Act ("the FACT Act" or "the Act"), requires that licensed medical clinics ("clinics") that provide pregnancy-related services make the following factual disclosure:[3]

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

Cal. Health & Safety Code § 123472(a)(1). The FACT Act applies to clinics whether they do or do not provide abortion and contraceptive services. Moreover, notice may be given by 1) posting a written notice at the facility; 2) distributing a printed notice to a patient at any time during her visit; or 3) providing the patient with a digital notice to be read upon arrival. Id. § 123472(a)(2)(A)-(C). The Legislature adopted the disclosure requirement as "[t]he most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions."[4]

The notice is similar to other notices that the state and federal government require medical providers to disseminate to patients to insure these patients receive information relevant to consumer decision making in the medical context and vital to ensuring the public health. For example, HIPAA requires medical providers to

[3] This brief does not address a separate notice requirement applicable to unlicensed facilities. *See* Cal. Health & Safety Code § 123472(b)(2)-(3).
[4] Assem. Bill No. 775, § 1(a)-(d).

provide notice of patients' rights over their protected health information "[n]o later than the date of the first service delivery."[5] In addition, California law requires pharmacies to post public notices, including about the availability of interpreter services and the customer's right to receive large-font drug labels.[6]

The number of organizations that provide some pregnancy-related services, such as pregnancy tests or ultrasounds, but that have an ideological mission to deter or prevent abortions has grown dramatically in the last approximately twenty years.[7] This report, requested by U.S. Representative Henry Waxman, found that 83% of the centers investigated "provided false or misleading information about the health effects of abortion," and that the centers often "grossly misrepresented the medical risks of abortion."[8] The report also describes how the centers "often mask their pro-life mission in order to attract abortion vulnerable clients," and that their tactics include "obscuring the fact that the center does provide referrals to

[5] 45 C.F.R. § 164.520(c)(2).

[6] *See* Cal. Business & Prof. Code § 4122(a) (requiring pharmacies to publicly post notices); Cal. Code. Reg. tit. 16, § 1707.6 (requiring public notice about the availability of interpreter services and about the customer's right to receive large-font drug labels)."

[7] MINORITY STAFF OF H. COMM. ON GOV'T REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, 109th Cong., at 11 (2006), available at http://www.chsourcebook.com/articles/ waxman2.pdf (hereinafter "WAXMAN REPORT").

[8] *Id.* at i.

abortion" in their advertisements, and misrepresenting that the center will "provide pregnant teenagers and women with an understanding of all of their options."[9]

## SUMMARY OF ARGUMENT

This Court should uphold the district court's denial of the preliminary injunction motion in this case. *National Institute of Family and Life Advocates v. Harris*, No. 15-cv-02277, Order (S.D. Cal. Feb. 8, 2016). *See also A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 2:15-CV-02122-KJM-AC, 2015 WL 9274116 (E.D. Cal. Dec. 21, 2015) (denying preliminary injunction motion against FACT Act); *Livingwell v. Harris*, 4:15-CV-04939-JSW (N.D. Cal. Dec. 18, 2015) (same). Considering the compelled factual disclosure required by the Act as a whole, the Act is a regulation of commercial speech that is subject to and survives rational basis scrutiny. Even if the Act were not considered a regulation of commercial speech but rather a regulation of professional speech, it would

[9] *Id.* at 1-2; *See also* Planned Parenthood of N.Y.C., Crisis Pregnancy Center Surveying Summary and Stories (2011) (hereinafter "PPNYC Report"); Naral Pro-Choice America, CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM (2015), *available at* http://www.prochoiceamerica.org/assets/download-files/cpc-report-2015.pdf; Nat'l Abortion Fed'n, Crisis Pregnancy Centers: An Affront to Choice 5 (2006), available at: http://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf; *See also First Resort*, 80 F. Supp.3d 1043, 1046 (N.D.Cal. 2015) (describing tactics of one crisis pregnancy center in San Francisco).

easily survive the heightened intermediate scrutiny applied by this Court in that context.

First, it is well established that rational basis review applies to compelled factual disclosures in the commercial speech context, especially where those factual disclosures support the value of insuring that the stream of commercial information "flows cleanly as well as freely."[10] This minimal level of protection is accorded to compelled factual disclosures in the commercial speech context because the commercial speech doctrine is designed to protect the flow of speech with the ultimate goal of protecting consumers. Accordingly, the doctrine insures that consumers are not denied access to information, but also allows governments to protect the accuracy of the speech by insuring that the information is truthful and not misleading.

In this case, the FACT Act regulates licensed medical facilities and the notice provision may be made by posting a notice in a public setting, e.g., on the waiting room wall, without any oral statement by a professional tailored to a specific patient. The notice is a designed to inform women of the availability of other free pregnancy-related services. Contrary to the statement of plaintiffs, *see*

[10] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 771-2 (1976). *See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650-51 (1985). See Jennifer Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment,* 15 J. of Const. L. 539, 550-56 (2013).

Appellants' Br. at 27, the disclosure is not viewpoint based or ideological, does not "promote" any services, much less one type of service over another, but simply provides information that all reproductive health services, including prenatal care as well as abortion, are available free of cost to eligible women. A similar notification requirement, disclosing that "medical assistance benefits may be available for prenatal care, childbirth, and neonatal care," was in fact upheld in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding *inter alia,* 18 Pa. Stat. and Cons. Stat. Ann. § 3205(a)).

Second, if for some reason this Court declines to apply the commercial speech doctrine, the speech could be considered a regulation of professional speech. The notice need not be displayed publicly but may be given by a medical professional to the patient.[11] A medical professionals' speech doctrine is taking shape in the lower courts that is context-dependent, and responsive to the concerns of the listeners, i.e., the patients. As this Court has held, the doctrine recognizes that the speech of medical professionals should be protected differently, along a continuum. All regulations of professional speech must receive initial scrutiny to determine where on this continuum they lie. *Pickup v. Brown*, 740 F.3d 1208, 1227-28 (4th Cir. 2014). The FACT Act neither compels nor bans ideological

[11] This Court needn't reach the issue because the Appellants have the option of posting the notice in the facility, for example in a waiting room. The disclosure need not be made as part of individual communications between medical professional and patient.

speech either within the physician patient relationship, nor outside it. Instead, the Act simply provides information that better informs a patient's decisions about where to receive services. Accordingly, after scrutinizing the speech to determine where on the continuum the speech lies, the court should apply an intermediate level of scrutiny and uphold the notice requirement.

It is important to note that *Planned Parenthood v. Casey*, did not establish a unique First Amendment "reasonableness" test for mandated disclosures of truthful nonmisleading information about abortion. *Cf. A Woman's Friend,* WL at *19. Instead, consistent with the established principles that context is crucial to First Amendment analysis and that the level of scrutiny turns on "the nature of the speech taken as a whole and the effect of the compelled statement thereon," *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988), *Casey* held only that the specific physician speech regulation at issue there was not subject to heightened scrutiny, but was only "part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey,* 505 U.S. at 884. The Court did not downgrade to rational basis review any speech mandate so long as it regulates abortion, or so long as it regulates physicians more generally, no matter how repugnant the mandate is to core First Amendment principles. *See Stuart v.*

*Camnitz*, 774 F.3d 238 (4th Cir. 2014).[12]

## ARGUMENT

### I. The Compelled Factual Disclosure Required of Licensed Medical Clinics is a Reasonable Regulation of Commercial Speech Designed to Insure Speech Flows "Cleanly As Well As Freely."

It is textbook First Amendment doctrine that commercial speech has never been given the stringent level of scrutiny or subject to the same doctrinal rules as public discourse.[13] Before 1976, in fact, commercial speech fell outside First Amendment protections altogether. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("the Constitution imposes no . . . restraint on government" regulation of "purely commercial advertising."). In *Virginia State Bd.*, the Supreme Court overruled prior precedent, holding that commercial speech was not "wholly outside" the protections of the First Amendment, *Virginia State Bd.,* 425 U.S. at 761 (striking down a law preventing licensed pharmacists from advertising the prices of prescription drugs), but protected commercial speech less vigorously than core political speech in keeping with the different constitutional values served by the

[12] Notably, in their First Amendment challenge, the physicians in *Casey* did not object to the *substance* of much of the speech required by § 3205 because most *already* was part of standard informed consent and medical practice. *Casey,* 505 U.S. at 884 (reviewing under First Amendment requirement that physicians disclose nature of procedure, health risks of abortion and childbirth, and gestational age of pregnancy).

[13] *See, e.g.,* Stone, et al., THE FIRST AMENDMENT 186-215 (4th ed. 2012); Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 871-72 (2015).

different types of speech. As Dean Robert Post explains, the Court granted commercial speech constitutional protection, albeit diminished protection, because:

> "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." Whereas communication within "public discourse" is protected *both* because of its participatory value to a speaker *and* because of its informational value to an audience, "[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'"

Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer and Abood,* 40 Val. U. L. Rev. 555, 559 (2005) (internal quotations omitted). *See also Virginia State Bd.*, 425 U.S. at 761 (discussing society's "strong interest" in the "free flow of commercial information."); *Nat'l. Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d. Cir. 2001) (protecting "robust and free flow of accurate information" is principal justification for protecting commercial speech).[14] Simply put, where

[14] *See also Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); Robert Post, *Compelled Commercial Speech,* 117 W. Va. L. Rev. 867, 872-73 (2015) (internal footnotes omitted).

public discourse doctrine is speaker centered,[15] commercial speech doctrine is audience centered.[16]

Because of the different constitutional values being served by commercial speech doctrine, that doctrine has developed to allow "'modes of regulation that might be impermissible in the realm of noncommercial expression,'" all in order to serve the value of preserving the informational value of the speech, *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)), insuring that the stream of commercial information flow cleanly as well as freely." *Virg. State Bd.,* 425 U.S. at 771-72. For example, the Court has held that neither overbreadth nor prior restraint doctrines apply to commercial speech;[17] chilling-effect doctrine does not apply;[18] and certain types of commercial speech can be targeted for specific restrictions.[19] Most importantly for

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[15] The most common rationales given for protecting public discourse at the highest level include the "marketplace of ideas" rationale, the self-governance rationale and the autonomy rationale, all of which are concerned with the interests of the speaker. Stone, et al., THE FIRST AMENDMENT 9-14.; *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (The First Amendment is "the guardian of our democracy.").

[16] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 14 (2000) ("*Constitutional Status*") (in commercial speech doctrine "[t]he Court has … focused its analysis on the need to receive information, rather than on the rights of speakers.").

[17] *Id.* at 28-33; Amanda Shanor & Robert Post, *Adam Smith's First Amendment,* 128 Harvard L. Rev. F. 165, 167-73; see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 565 n.8; *id.* at 571 n.13; *Va. State Bd.,* 425 U.S. at 771–72 n.24.

[18] *Va. State Bd.*, 425 U.S. at 771 n.24.

[19] *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (quoting *Va. State Bd.*, 425 U.S. at

purposes of this case, factual disclosures in the context of commercial speech are allowed as long as they are "reasonably related" to the state's interest in "preventing deception of consumers."[20]

### A. Compelled Factual Disclosures are Subject to Rational Basis Review in the Commercial Speech Realm.

Normally laws compelling speech are considered "content-based regulations" subject to strict scrutiny, *Riley v. Nat'l Fed. of the Blind of N.C., Inc.,* 487 U.S. 781, 795 (1988)*; see also Turner Broad. Sys. v. FCC,* 512 U.S. 622, 642 (1994), because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[21] however, the Court reduced the level of scrutiny for compulsory factual disclosure laws targeting commercial speech, distinguishing the interests in compelled speech in the commercial context from the interests in previous cases challenging compelled speech,[22] noting "the interests at stake are not of the same order."[23] As the Court explained in *Zauderer*:

[b]ecause the extension of First Amendment protection to commercial

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771–72).

[20] *Milavetz, P.A. v. United States*, 559 U.S. 229, 253 (2010); *Nat'l. Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d. Cir. 2001).

[21] 471 U.S. 626, 650–51 (1985). *Compare Stuart v. Camnitz,* 774 F.3d 238 (4th Cir. 2014) (striking compelled ideological factual disclosures by abortion providers required to be made to patients in the process of undergoing personalized treatment as regulations on professional speech subject to and failing intermediate scrutiny).

[22] *Zauderer,* at 651.

[23] *Id.*

> speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal.[24]

In fact, the Court recognized, factual disclosures may even be required to "dissipate the possibility of consumer confusion or deception," thus serving the consumer's interest in the protection of commercial speech in the first place. Therefore, instead of applying the four-part test applicable to other forms of commercial speech,[25] the Court adopted rational basis review, recognizing that a compelled disclosure law imposed on commercial speech is constitutional so long as it is "reasonably related to the State's interest in preventing deception of consumers."[26]

**B. The Ordinance Regulates Commercial Speech.**

The law requires the disclosure of nonideological factual information, disclosing California's coverage of prenatal care as well as abortion, and applies to licensed facilities that provide reproductive health services like contraception and abortion, as well as those who do not. The plaintiff seeks to defend its purposeful

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[24] *Id.*

[25] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York,* 447 U.S. 557 (1980).

[26] *Id. See also, e.g., Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Sorrell*, 272 F.3d at 114 ("[M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests."); *Citizens United v. FEC,* 558 U.S. 310, 366–67 (2010) (compelled disclosures in the context of campaign finance regulation subject to lesser scrutiny).

omission of its ideological viewpoint, its use of commercial advertising to mask ideological motivations, its offer of services designed to draw unsuspecting pregnant women seeking medical services into a facility where they will receive ideological information only. But one can't hide behind commercial attributes to mask ideology and then claim that the ideology defeats the commercial mask.

The law requires the disclosure of nonideological factual information, disclosing California's coverage of prenatal care as well as abortion, and applies to licensed facilities that provide reproductive health services like contraception and abortion, as well as those who do not. The plaintiff seeks to defend its purposeful omission of its ideological viewpoint, its use of commercial advertising to mask ideological motivations, its offer of services designed to draw unsuspecting pregnant women seeking medical services into a facility where they will receive ideological information only. But one can't hide behind commercial attributes to mask ideology and then claim that the ideology defeats the commercial mask.

In evaluating the nature of the speech at issue, courts should consider the informational value being served by protecting the speech considering the speech as a whole and taking into account the way the speech is understood by the consumer. The appropriate question in this case is how the target of the speech, a pregnant woman in a waiting room of a licensed medical clinic, will understand a notice posted in the waiting room. *See* Jennifer Keighley, *Can You Handle the Truth?,* 15 J. Const. L. at 589-95 (discussing contours of commercial speech doctrine).

Originally, the Court characterized commercial speech as "speech which does no more than propose a commercial transaction," *Va. State Bd. of Pharm.*, 425 U.S at 762 (internal quotation marks and citations omitted), a limited definition that sufficed for the statute challenged in that case that prevented pharmacists from advertising the price of prescription drugs. However, in *Bolger v. Youngs Drug Prod. Corp.,* 463 U.S. 60, 66-67 (1983), the Court broadened the notion of commercial speech, looking beyond this one factor and found that some speech that did not propose a commercial transaction was commercial speech nonetheless. *Bolger* involved a challenge to a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives. The mailings at issue in the case included both materials directly promoting the plaintiff's products and "information pamphlets discussing the desirability and availability of prophylactics

in general." *Id.* at 62. The Court quickly decided that the materials explicitly advertising the plaintiff's products were commercial speech, but the informational pamphlets "present[ed] a closer question." *Id.* at 66. Ultimately, the Court held that even the informational pamphlets including "discussions of important public issues such as venereal disease and family planning," *id.* at 67-68 (footnotes omitted), fell within the definition of commercial speech. In making its determination the Court considered whether the speech was an advertisement, whether it referred to a specific product, and whether the speakers had an economic motivation for engaging in the speech. *Id.* at 66-68. As the Supreme Court cautioned in *Bolger*, not all of the relevant factors need be present for speech to be commercial, *id.* at 68 n.14, nor is the presence of any one factor dispositive, *id.* at 66-67. *See also Livingwell*, slip op. at 15-16 (citing *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council*, 721 F.3d 264, 285 (4th Cir. 2013) ("it is not necessary that each of the characteristics 'be present in order for speech to be commercial.'")).

The plaintiffs argue that the Act does not regulate commercial speech because they offer services free of charge. Appellants' Br. at 30-31. *See also A Woman's Friend Pregnancy Res. Clinic v. Harris,* No. 2:15-CV-02122-KJM-AC, 2015 WL 9274116, at *17-18 (E.D. Cal. Dec. 21, 2015) (considering "core notion" of commercial speech as related "solely to [the plaintiffs'] economic interest" or

the proposal of a commercial transaction). As noted above, this is only one factor to be considered. *See Livingwell*, slip op. at 16 ("fact that plaintiffs do not charge for their services [was] not . . . dispositive in the analysis of whether the mandated speech should be considered fundamentally commercial"); *First Resort v. Herrera*, 80 F. Supp. 3d at 1052 (whether clinic charged for services not dispositive of commercial speech issue); *Greater Balt. Center for Pregnancy Concerns v. Mayor and City Council*, 721 F.3d 264, 286 (4th Cir. 2013) (citing Bolger, 463 U.S. at 67 n.14); *Fargo v. Women's Health Org. v. Larson*, 381 N.W.2d 176, 180-181 (N.D. 1986). *See also Camps Newfound/Owatonna v. Town of Harrison, Me.,* 520 U.S. 564, 573 (1997) (non-profit organization with religious mission engaged in commercial speech); *Cincinnati v. Discovery Network*, 507 U.S. 410, 419 (1993).

Second, the plaintiffs err by focusing on the *speaker* and altogether ignoring the impact of the speech on the consumer-listener. *See* Appellants' Br. at 31. The Court has noted that First Amendment protections for commercial speech exist *because of* the consumer's interest in the speech, and *despite* the economic interests of the speaker. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (*"Even though the speaker's interest is largely economic*, the Court has protected such speech in certain contexts.") (emphasis added) (citations omitted). *See also Livingwell*, slip op. at 16 (noting speech likely to be considered commercial by listeners); *Greater Balt.,* 721 F.3d at 286 (district court erred by dismissing

commercial speech argument on limited record). Because the commercial speech doctrine is concerned with protecting the free flow of accurate information to consumers, the determination of whether speech is commercial must evaluate the nature of speech from the point of view of the consumer. As Post points out, "[t]he Court has … focused its analysis on the need to receive information, rather than on the rights of speakers." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. at 14 (2000).[27]

The required notice about California's public programs that provide coverage of all reproductive health services impacts the economic interests of the patient by offering her choices about how to obtain services. *Bates*, 433 U.S. at 364 (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)) (protection of *truthful nonmisleading* commercial speech "serves individual and societal interests in assuring informed and reliable decisionmaking."). A licensed medical clinic that provides free pregnancy tests engages in commercial speech when advertising services, regardless of whether they receive any money from clients, because the "advertisements are placed in a commercial context and are directed at the

[27] The "contextual inquiry into the social meaning of a particular speech act goes beyond the factors articulated in *Bolger* and requires analyzing the speech act as a whole." Keighley, 15 J. Const. L. at 591 (citing Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. at 18); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 832 (1999) (definition of commercial speech turns on the relationship between the speaker and audience).

providing of services rather than toward an exchange of ideas." *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986)); *see also Nat'l Servs. Grp. v. Painting & Decorating Contractors*, No. SACV06-563CJC(ANX), 2006 WL 2035465, at *4 (C.D. Cal. Jul. 18, 2006) (looking to the First Amendment definition of commercial speech in a suit under the Lanham Act and concluding that "the mere fact that a speaker is a nonprofit organization does not preclude its speech from being commercial…").

The Court's analysis in *Central Hudson* is informative. In that case, Central Hudson Gas & Electric Corporation held a monopoly over the sale of electricity in the area, and thus the speech could not have an economic impact on the electrical supplier because consumers could not take their business elsewhere. The petitioner had argued that this meant the speech in question could not be "commercial." The Supreme Court disagreed. It held the speech was commercial because of the impact it had on listeners operating in the marketplace. As the Court wrote:

> [e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment.

447 U.S. at 567. In *Central Hudson*, the Court recognized that whether the speech would impact the economic interest of the audience was an important factor to be considered. *Id.* at 561.

Finally, just as charging for religious literature does not commercialize a clearly religious activity, providing services free of charge with a *hidden* ideological motive does not transform what is to the consumer a commercial transaction into an ideological one. In *Jamison v. Texas*, 318 U.S. 413 (1943), the Court considered whether a Jehovah's Witness engaged in commercial speech when inviting individuals to a religious gathering, and offering to send religious books for 25 cents. The Court concluded that the context of the speech as a whole signaled that it was "in the pursuit of a *clearly religious activity*." *Id.* at 417 (emphasis added). *See also Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (concluding that where both speaker and audience were aware of the clearly religious nature of speech, "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise.").

Here, in contrast with *Jamison* and *Murdock*, any religious and ideological speech by the clinic is hidden from women seeking pregnancy-related medical care. While clinics may believe they are engaged in a religious and ideological "venture" when they speak with pregnant women about their views on abortion, from the women's point of view the clinics engage in a solely commercial venture when they encourage women to receive pregnancy-related medical services and when

they deliver those services and discourage abortion and contraceptive use in a licensed medical facility.

Taking the *Bolger* factors into account and examining the nature of the speech as a whole, the speech at issue should be considered commercial speech. *See Livingwell*, slip op. at 16 (noting that despite being "wary to conclude definitively that the speech is commercial on this limited record, . . . [the Court is] concerned that dismissing the theory altogether would constitute legal error.") (*citing Greater Baltimore*, 721 F.3d at 285 (district court erred by abruptly concluded that speech regulated was not commercial speech and taking plaintiff's claim that motives were entirely religious or political)).

At the very least, the court could remand for discovery on economic interests of the Plaintiffs and consumers. Advertising of services by at least some "crisis pregnancy centers" in California has been shown to be related to the "economic interests of the speaker." *See Central Hudson*, 447 U.S. at 561; *Bolger*, 463 U.S. at 66-67. In *First Resort*, the plaintiff clinic has admitted that members of its senior management receive enhanced compensation based directly on the number of new clients brought in, and the advertising serves as a significant fundraising tool as well. *First Resort*, 80 F.Supp.3d at 1046. The court in that case also found that the clinic's advertising is a "means of competing with abortion providers for the attention" of consumers who are seeking abortion and contraception. *Id.* As the

Fourth Circuit held en banc in *Greater Baltimore Center for Pregnancy Concerns*, the important inquiry is "whether the Center possesses economic interests apart from its ideological motivations." 721 F.3d at 285 (holding that "the City's commercial speech theory should not have been so easily dismissed by the district court" and remanding for discovery on the question).[28] If the law regulates the commercial speech of some crisis pregnancy centers, and it meets a rational basis test, as three courts have held at the preliminary injunction stage, it could not be struck down on its face. The State should be allowed to determine whether similar or additional economic motives exist with respect to this clinic.

## II. If the Court Does Not Consider the FACT Act a Regulation of Commercial Speech, the Court Should Uphold the Act as an Appropriate Regulation of Professional Speech.

If the notice required by the Act is given by the professional during an individualized treatment session, the speech could be seen as professional speech, subject to review to determine whether the regulation serves the interest in protecting the integrity of physician-patient communications as a channel for the communication of accurate medical information, that neither compels nor prohibits ideological speech. *See Pickup v. Brown*, 740 F.3d 1208, 1227-28 (9th Cir. 2014);

[28] The court ordered discovery to substantiate the City's claim that the Center has economic interests in its advertising, noting "[s]uch discovery is 'especially important' where, as here, 'the relevant facts are exclusively in the control of the [summary judgment movant]' or the 'case involves complex factual questions about intent and motive.'" *Greater Baltimore Ctr*, 721 F.3d at 285.

*Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); Post, *Informed Consent to Abortion,* 2007 U. Ill. L. Rev. at 940.

The nature of the relationship between the First Amendment and the regulation of professional speech of doctors has been referred to as "obscure and controversial," Robert Post, *Informed Consent to Abortion,* 2007 U. Ill. L. Rev. 939, 944-45 (2015) (discussing competing views of scholars and providing citations), and "fuzzy at best." Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 Cardozo L. Rev. 2347, 2366 (2013).[29] In a number of recent cases, though, the courts, including this one, have begun to flesh out the reasoning behind application of the First Amendment to the speech of medical professionals in a way that takes into account the context in which the speech occurs and the First Amendment values at stake in the regulation of that speech in order to determine whether and how much First Amendment protection the speech deserves. *See*, *e.g.*, *Pickup v. Brown*, 740 F.3d at 1227-28. The doctrine that emerges applies a lower level of scrutiny on the one hand to regulation of speech that is part of the practice of medicine, such as actual treatment or the provision of informed consent, and a higher level of scrutiny to speech by professionals that is ideological or part of the public debate.

[29] Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 834 (1999).

In *Pickup*, this Court applied rational basis review to speech that itself constitutes medical treatment—mental health treatment—conceiving of this as regulation of conduct, *id.*, while the Third Circuit applied an intermediate level of scrutiny to a similar regulation, also upholding the regulation. *See King v. Governor of the State of New Jersey,* 767 F.3d 216, 232 (3d Cir. 2014). Treating "professional speech" differently than speech by professionals in public, viewing these types of speech along a continuum, an approach adopted by this Court and followed by the Fourth Circuit, *see Pickup*, 740 F.3d at 1227; *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), is consistent with the First Amendment values at stake in the regulation of medical practice. For example, on the one hand, where professionals speak publicly, "outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment." *Pickup*, 740 F.3d at 1227-28. *See also King*, 767 F.3d at 232. As this Court noted, "a doctor who *publicly* advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment – just as any person is – even though the state has the power to regulate medicine." *Pickup*, 740 F.3d at 1227 (emphasis added). Whether one considers this speech outside the "professional speech" category altogether, *see* Post, *Informed Consent to Abortion*, 2007 U. Ill. L. Rev. at 952-60 (speech by a

professional in the public sphere is not professional speech), or just at one end of the professional speech continuum, *see Pickup*, 740 F.3d at 1227-28, it receives the highest protection afforded by the First Amendment.

On the other hand, where the state regulates speech that constitutes the treatment itself, as California did by prohibiting licensed medical providers from providing "sexual orientation change effort" therapy to minors, this Court held that the state was merely regulating professional conduct, "even though such regulation may have an incidental effect on speech." *Pickup*, 740 F.3d at 1229. As a regulation of medical treatment, this type of regulation is subject only to a rational basis review. Id. at 1229. *See also* Post, *Informed Consent to Abortion*, 2007 U. Ill. L. Rev. at 952-53.[30]

The Third Circuit took a different approach to evaluating a similar law, but with a similar result. The court declined to find that the law regulated conduct, but still refused to apply strict scrutiny to the restriction on speech that constituted medical treatment. The Court noted that "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession. . . . Like the Fourth and Eleventh Circuits, we believe a profession's speech warrants lesser protection only when it is used to provide

[30] Post, *Compelled Speech*, 117 W. Va. L. Rev. at 952-53 (citing Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954) ("state has broad power to establish and enforce standards of conduct . . . relative to the health of everyone there.")).

personalized services to a client based on the professional's expert knowledge and judgment." *King*, 767 F.3d at 232 (distinguishing professional speech in context of practice from speech by a professional in public sphere). The Third Circuit applied an intermediate scrutiny level similar to the regulation of commercial speech, limiting application of this lower level of scrutiny to circumstances "when the regulation was, as here, enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services." *Id.* at 235 (upholding the prohibition on SOCE therapy for minors as a permissible regulation of the mental health profession).

Regulation of medical treatment and the provision of informed consent are areas traditionally regulated by the state in the interests of preserving public health and protecting patients from "charlatans" and "chickanery," discredited medical treatments and physicians who do not disclose information beneficial to the patient's informed medical choices. As Dean Robert Post has noted, "in the context of medical practice we insist upon competence, not debate, and so we subject professional speech to an entirely different regulatory regime. We closely monitor the messages conveyed by professional speech and we sanction viewpoints that are false when measured by the 'knowledge . . . ordinarily possessed and exercised by physicians in good standing.'" 2007 U. Ill. L. Rev. at

950 (internal citations omitted).[31] The regulation of informed consent is similar though slightly different. It controls the "dissemination of knowledge, rather than the dispensation of medical care," with the goal of enabling a patient to make an "autonomous intelligent and accurate selection of what medical treatment to receive." *Id.*

There are limitations on the state's ability to regulate speech in the professional's sphere, even the regulation of informed consent. *See id.* at 977-78. Describing the limitations on professional speech that is protected, Dean Post offers,

> If state control over professional speech depends upon state power to regulate the practice of medicine, the constitutional category of professional speech extends only so far as the practice of medicine. Physician speech, even physician speech in the presence of a client during the course of medical practice, is not professional speech if it forms no part of the practice of medicine.

*Id.* at 952. This is why the state may not compel a physician to become a mouthpiece for the state's ideology under the guise of regulating "informed consent." *See*, *e.g.*, *Stuart v. Camnitz*, 774 F. 3d at 246; *see also* Post, *Informed Consent to Abortion*, 2007 U. Ill. L. Rev. at 939-40; Jen Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on*

[31] *See also King,* 767 F.3d at 232 ("the practice of most professions...will inevitably involve communication between the professional and her client…To handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm.").

*Compelled Ideological Speech*, 34 Cardozo L. Rev. 2347, 2378 (2013). *Cf. King*, 767 F.3d at 235.

On the other hand, "when physicians speak to us as our personal doctors, they must assume a fiduciary obligation faithfully and expertly to communicate the considered knowledge of the 'medical community.'" Post, *Informed Consent to Abortion,* 2007 U. Ill. L. Rev. at 977-78. Accordingly, when a state adopts a regulation of informed consent, courts should limit review to ensuring that the regulation does not undermine the First Amendment value of protecting professional speech in the first place, that is, the value of insuring patients are well informed to make appropriate medical decisions. As this Court put it:

> [T]he First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issue licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.

*Pickup*, 740 F.3d at 1228.

Holding that the notice is "professional speech uttered in the context of individualized client care," and should therefore be analyzed as professional speech, the district court in a related case explained:

> the content of the required notice itself relates to the medical profession, because it provides information relevant to patients' medical decisions.

*A Woman's Friend Pregnancy Res. Clinic*, 2015 WL 9274116, at *20. When distributed to patients individually as opposed to when posted on the waiting room walls, these notices are occurring as the client is in the process of establishing a "fiduciary professional-client relationship," *see Wollschlaeger v. Governor of the State of Florida*, No. 12-14009, 2015 WL 8639875, at *22 (11th Cir. Dec. 14, 2015), "a context in which the State's interest in regulating for the protection of the public is more deeply rooted." *Id.* This notice is like that approved by the Second Circuit in *Evergreen Ass'n v. City of New York,* 740 F.3d 233, 237-38 (2d Cir. 2014) (approving notice of whether or not facility has "a licensed medical provider on staff"), and unlike the notice disapproved in that case. *Id.* (disapproving of notice encouraging women to consult with a licensed provider).

Moreover, as noted above, the notice required here is like other notices medical providers must provide under the law.[32] It is also remarkably similar to a requirement upheld in *Casey*, 505 U.S. at 884, that physicians inform their patients of the availability of medical assistance benefits for prenatal care, childbirth and neonatal care. *Casey,* 505 U.S. at 884 (finding the requirement "no different from a requirement that a doctor give certain specific information about any medical procedure."). Finally, the compelled notice is not ideological, *cf. Stuart v. Camnitz*, 774 F.3d. at 245-46 (striking down compelled ideological professional speech

[32] *See supra* at 2-3.

under intermediate scrutiny standard). Instead, it gives information about coverage of all medical treatment options available to pregnant women that more fully inform a woman's decision about where she might receive care.

Thus, under *Pickup*, the law falls at the midpoint of the continuum, where the professionals have "somewhat diminished" First Amendment protection, and an intermediate scrutiny standard should be applied. The law easily meets this standard of review as the trial courts in all three cases challenging the FACT Act have held. *NIFLA*, slip. op. at 14; *A Woman's Friend,* 2015 WL 9274116 at *15; *Livingwell,* slip op. at 20.

## CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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April 21, 2016

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 6,885 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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## CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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DATED: April 21, 2016 /s/ Priscilla Joyce Smith
PRISCILLA JOYCE SMITH