No. 16-1140

In The
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF PREGNANCY CARE CENTERS IN TEXAS IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Amici pregnancy care centers are nongovernmental corporate entities, and they have no parent corporations and no publicly held corporations hold 10 percent or more of their stock.

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STATEMENT OF INTEREST OF AMICI CURIAE

Both parties have given consent to file this amicus curiae brief. Counsel for Amici has prepared this brief supporting Petitioners.[1]

Pregnancy care centers in Texas and across the nation will be affected by this Court's decision. Their message will be hindered, stifled, and drowned out by being forced to speak a government-crafted message that is contrary to their strongly held beliefs, core values, and mission. The Amici Texas pregnancy care centers are: First Choice Pregnancy Resource Center (Texarkana); Pregnancy Resources and Medical Clinic of North Texas (Burleson); Agape Pregnancy Resource Center (Round Rock); Southwest Pregnancy Services (Duncanville); Cleburne Pregnancy Center (Cleburne); Any Woman Can (San Antonio); El Pasoans for Life (El Paso); Pregnancy Assistance Center North (Spring); Anderson House (Carrizo Springs); The Source for Women (3 centers in Houston); Hope Pregnancy Centers of Brazos Valley (College Station).

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Trinity Legal Center is a nonprofit corporation and is supported through private contributions of donors who have made the preparation and submission of this brief possible. No person other than amici curiae, their counsel, or donors to Trinity Legal Center made a monetary contribution to its preparation or submission. The parties have consented to this brief.

SUMMARY OF THE ARGUMENT

I.

The marketplace of ideas should be marked by robust debate that is free from government interference. This is particularly important regarding controversial and divisive issues such as abortion. The Act in this case is content-based and constitutes viewpoint discrimination that is entitled to strict scrutiny review. Although the Court of Appeals for the Ninth Circuit concluded that the Act is content-based, it erred in failing to apply strict scrutiny. In reaching a wrong result, the court also erred in misapplying this Court's precedents in *Casey* and *Reed*, and therefore, the decision should be reversed.

II.

The Court of Appeals also erred in finding the Act regulated professional speech. Pregnancy care centers are not professional individuals like doctors or lawyers who belong to a learned profession in occupations that require a high level of training and proficiency. The Act is aimed at the centers as the term "facility" was used thirty-one times, but the term "doctor" or "physician" is not used even once. In carving out a new category of speech for abortion, the Court of Appeals erred in applying intermediate scrutiny. The Act is a content-based regulation and the court should have applied strict scrutiny. Even assuming the Court of Appeals applied the correct standard, the regulation could not

pass strict scrutiny muster and was therefore unconstitutional.

ARGUMENT

I. THE ACT IS A CONTENT-BASED REGULATION WHICH REQUIRES STRICT SCRUTINY ANALYSIS, AND THEREFORE, THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN FAILING TO APPLY THE CORRECT STANDARD.

A. In the Marketplace of Ideas, the Government Cannot Constitutionally Compel Speakers to Deliver a Message That Is Contrary to Their Beliefs and Mission, and Therefore, the Court of Appeals Erred.

The marketplace of ideas envisions competing ideas and robust debate. It is a long-standing doctrine dating back to 1919 when Justice Holmes first introduced the concept into American jurisprudence.[2] He stated that "the best test of truth is the power of thought to get itself accepted in the competition of the market."[3] Justice Holmes warned that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe. . . ."[4] Robust

[2] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[3] *Id.*

[4] *Id*.

debate that is uninhibited by governmental interference will lead to truth and the proper evolution of society.

The marketplace of ideas is particularly important regarding controversial or divisive issues such as abortion. As Justices on this Court have recognized, abortion has been one of the most controversial and divisive issues of our time.[5]

Abortion has not only been controversial, it has had a negative impact on women. Women should therefore be able to hear various speakers without the interference and hinderance of government so that they can make an informed decision to either abort their babies or exercise a pro-life option. The courts have

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[5] Justice O'Connor wrote: "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." Planned Parenthood v. Casey, 505 U.S. 833, 866-67 (1992); Justice Scalia referred to the abortion decisions as "a troublesome era in the history of our Nation and of our Court." Planned Parenthood v. Casey, 505 U.S. 833, 1001 (1992) (Scalia J., concurring in the judgment in part and dissenting in part); Justice Kennedy wrote: "To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment." Hill v. Colorado, 530 U.S. 703, 768 (2000) (Kennedy, J., dissenting).

recognized the negative psychological impact that abortion has on women. For example, the Court of Appeals for the Fifth Circuit cited testimony that abortion as practiced is "almost always a negative experience for the patient. . . ."[6] This Court has recognized that abortion:

> Is an act fraught with consequences for others; for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and depending on one's beliefs, for the life or potential life that is aborted.[7]

More recently, this Court recognized, "whether to have an abortion requires a difficult and painful moral decision" and is "fraught with emotional consequences."[8] In addition, women can suffer from depression, regret, guilt, and a loss of self-esteem following an abortion.[9] As Justice Ginsburg wrote, "The Court is surely correct that, for most women, abortion is a painfully difficult decision."[10]

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[6] Women's Medical Center v. Bell, 248 F.3d 411, 418 (5th Cir. 2001).

[7] Planned Parenthood v. Casey, 505 U.S. 833, 852 (1991).

[8] Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

[9] *Id*.

[10] *Id*. at 184 n.7 (Ginsburg, J., dissenting).

Indeed, this Court has recognized the impact that abortion can have on women and that is why women need to hear various speakers to fully understand their choice. Pregnancy care centers are in the unique position to help women through a pregnancy when they are deciding to keep their babies and women should know that help is available for women who choose a pro-life option.

In the marketplace of ideas, particularly on controversial issues that have a negative impact on women, the government should not stifle or drown out a contrary message because it wants to mandate a certain viewpoint. Women deserve better.

B. The Court of Appeals Recognized That the Act Is a Content-Based Regulation, But Erred in Failing to Apply Strict Scrutiny.

1. The Act is content-based and constitutes viewpoint discrimination.

As a general rule, the First Amendment,[11] prevents the government from proscribing or mandating

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[11] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment is applied to the states by the Fourteenth Amendment. *See* O'Brien v. Mayor and City Council of Baltimore, 768 F. Supp. 2d 804 (D. Md. 2011), *aff'd sub nom*. Greater Baltimore Center for

speech.[12] Specifically, "content-based regulations are presumptively invalid."[13] This Court has also been clear that viewpoint discrimination violates the First Amendment: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[14] Furthermore, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[15] The "government regulation may not favor one speaker over another."[16] The Court of Appeals erred when it allowed the State to favor an abortion speaker over a pro-life speaker.

This Court has also held that a speaker has the right not to speak.[17] Justice Jackson, writing for the Court in *Barnette*, stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

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Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012).

[12] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[13] *Id*.

[14] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

[15] *Id*. at 829.

[16] *Id*. at 828.

[17] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

therein."[18] In this case, the Court of Appeals erred because the Act forces pregnancy care centers to speak a message that is directly contrary to their beliefs even though they have a right not to speak the government-scripted abortion message.

Compelled speech is very dangerous in a free society, and consequently, courts must be vigilant.[19] Judge Wilkinson warned in *Centro Tepeyac*: "Because the dangers of compelled speech are real and grave, courts must be on guard whenever the state seeks to force an individual or private organization to utter a statement at odds with its most fundamental beliefs."[20] The Act is unconstitutional because it forces pregnancy care centers to utter a statement that is at odds with their fundamental pro-life beliefs.

Content-based regulations must not discriminate against speakers based on their viewpoint.[21] Being viewpoint neutral means that "the government cannot regulate speech based on the ideology of the message."[22] In the present case, the Court of Appeals correctly concluded that the Act is a content-based regulation,[23] but erroneously concluded that it does not

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[18] *Id*. at 642.

[19] Centro Tepeyac v. Montgomery County, 722 F.3d 184, 193 (4th Cir. 2013).

[20] *Id*.

[21] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 978 (5th ed. 2015).

[22] *Id*.

[23] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 834 (9th Cir. 2016).

discriminate based on viewpoint.[24] The Act targets the content and the viewpoint of pregnancy care centers as they are coerced with the threat of penalties[25] to state a message which is directly contrary to their mission, core values, and beliefs. At the heart of the pregnancy care centers' beliefs is to support a healthy pregnancy and to oppose abortion. Compelled speech " . . . involves the state imprinting its ideology on an unwilling speaker."[26] This is what is at stake in this case because the State is imprinting its abortion ideology on the unwilling pregnancy care centers' speech, and therefore, the Act is unconstitutional.

The Act also constitutes viewpoint discrimination because it regulates the speech of pregnancy care centers based on the ideology of their message. Although the purpose of the Act might sound reasonable, it is, in fact, discriminatory. Section 2 of the Act states: "The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." If this were truly the intended purpose of the Act, a pro-life message would be mandated for abortion facilities so that California women would know that there are pro-life options for

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[24] *Id*. The court stated it was not viewpoint discrimination because "It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker." *Id*. at 835.

[25] CAL. HEALTH & SAFETY CODE § 123473 provides for a civil penalty of $500 for the first offense and $1,000 for each subsequent offense.

[26] Centro Tepeyac v. Montgomery County, 722 F.3d 184, 194 (4th Cir. 2013) (Wilkinson, J., concurring)

women who do not want to abort their babies. The Act, however, does not impose any such mandates on abortion facilities. Instead the regulation requires pregnancy care centers to advertise abortion services which is directly contrary to the mission of the pregnancy care centers. In contrast, nothing in the Act mandates – under civil penalties – that abortion facilities speak a pro-life message and advertise the services of the pregnancy care centers. This is blatant viewpoint discrimination and is unconstitutional.

In summary, the Court of Appeals correctly concluded that the regulation was content based, but it incorrectly concluded that it was not viewpoint discrimination. It allowed the State to coerce pregnancy care centers to speak a message that was directly contrary to their mission, core values, and beliefs but no such mandate was placed on abortion facilities to speak a pro-life message. Because this constitutes viewpoint discrimination, the Act is unconstitutional.

2. Because the Act is content-based and constitutes viewpoint discrimination, strict scrutiny is required.

The Court of Appeals also erred in failing to apply the strict scrutiny standard. "The levels of scrutiny are firmly established in constitutional law. . . ."[27] This Court has consistently held that where the regulation is content-based and constitutes viewpoint discrimination,

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[27] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 700 (5th ed. 2015).

strict scrutiny is applied.[28] In fact, the Court of Appeals even recognized that content-based laws are presumptively unconstitutional,[29] but then stated that it did not apply strict scrutiny because it categorized the speech being regulated as professional speech, which was error.

Furthermore, the strict scrutiny standard is necessary because the Act is not a content-neutral restriction. Content-neutral restrictions are subject only to intermediate scrutiny whereby the government may impose reasonable restrictions on the time, place, or manner of the speech if they are narrowly tailored to serve a significant governmental interest.[30] The Act is not content-neutral because it mandated, under civil penalty, that pregnancy care centers speak a government-crafted abortion statement. On the other hand,

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[28] *See, e.g.*, Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218 (2015); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988). *See generally* Annotation, *Construction and Application of Reed v. Town of Gilbert, Ariz., Providing That Speech Regulation Targeted at Specific Subject Matter Is Content-Based Even If It Does Not Discriminate Among Viewpoints Within That Subject Matter*, 24 A.L.R.7th Art. 6 (2017).

[29] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 836-37 (9th Cir. 2016) (*citing* Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218, 2226 (2015)).

[30] *See generally* Annotation, *Construction and Application of Reed v. Town of Gilbert, Ariz., Providing that Speech Regulation Targeted at Specific Subject Matter Is Content-Based Even if It Does Not Discriminate Among Viewpoints Within that Subject Matter*, 24 A.L.R.7th Art. 6 (2017).

abortion facilities were not mandated, under civil penalty, to speak a pro-life message.

To pass strict scrutiny muster, the government must prove that it had a compelling governmental interest that is narrowly tailored to achieve that interest.[31] The Act fails the first prong of the strict scrutiny test because the State has failed to meet its heavy burden demonstrating a compelling governmental interest. Providing information about health care services available to women as stated in the Act's purpose does not trump the pregnancy care centers' fundamental First Amendment rights. Furthermore, the Court of Appeals based its compelling interest conclusions on the basis that the State has a "compelling interest in the practice of professions within their boundaries. . . ."[32] This rationale is unpersuasive because the Act regulates a facility and not a profession. Even assuming arguendo that there was a compelling interest, the State failed to meet the second prong of the test, that the speech restrictions must be narrowly tailored.

The Act was not narrowly tailored to specifically fulfill its intended goals. The stated purpose of the Act was to ensure women could make their reproductive decisions "knowing their rights and health care

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[31] Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218, 2226 (2015).

[32] National Institute of Family and Life Advocates v. Harris, 839 F.3d 823, 841 (9th Cir. 2016).

services available to them."[33] The Act, however, takes one side of the abortion debate and drowns out the pro-life alternatives by requiring pregnancy care centers to speak a government-crafted abortion message and requiring the message to be in a large font and in multiple languages.

The State has a myriad of other less-restrictive means of informing women of their rights without burdening or infringing upon pregnancy care centers' First Amendment rights. For example, the State could issue pamphlets advising women of both their pro-life and abortion options and risks; it could place ads in newspapers and magazines; it could provide public service announcements on radio and television or other media outlets; or, it could raise awareness in various locations and forums of its safe haven laws.[34] The power of the State has many ways to spread its message without burdening and mandating pregnancy care centers to speak a message which is contrary to their core values and beliefs.

Government laws and regulations which treat speakers differently based on ideas, messages, or subject matter require strict scrutiny because they lend

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[33] Assembly Bill No. 775 at § 2.

[34] California like other states has a safe haven law whereby a child who is seventy hours old or younger may be relinquished at a fire station or hospital without fear of abandoning the child. CAL. PENAL CODE § 271.5.

themselves to invidious uses.[35] Justice Scalia warned that laws that treat speakers differently because of the ideas, messages, or subject matter of their speech "lend themselves" to invidious uses.[36] Content distinctions "give the government the power to target *only* those specific ideas or messages or topics it dislikes" which makes "it possible for the government to repress only the speech of its enemies and not the speech of its friends."[37] In other words, they provide "an attractive vehicle for advancing constitutionally prohibited purposes."[38]

The pregnancy care centers should not become the courier of the State's message. As this Court stated in *Wooley v. Maynard*, " . . . where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's

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[35] Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 252 (stating the *Reed* test was appropriate).

[36] Madsen v. Women's Health Center, Inc., 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part and dissenting in part) (stating "The vice of content-based legislation – what renders it *deserving* of the high standard of strict scrutiny – is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes. A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk") (emphasis in original).

[37] Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 252.

[38] *Id*.

First Amendment right to avoid becoming the courier for such message."[39]

In the present case, speakers are treated differently under the Act because of their ideology and message. To coerce pregnancy care centers to be the courier of the State's message is a violation of their fundamental First Amendment rights. The State has also failed to meet its heavy burden of a compelling governmental interest that is narrowly tailored to serve that interest. The Court of Appeals erred in not applying strict scrutiny; but, even if it had, the Act would not pass strict scrutiny muster.

C. To Justify a Lesser Standard Than Strict Scrutiny, the Court of Appeals Misapplied This Court's Precedents in *Casey* and *Reed*, and Therefore, the Decision Should Be Reversed.

The Court of Appeals erred in misapplying the context of this Court's ruling in *Casey*,[40] and thus reached a wrong result. In *Casey*, this Court was addressing the doctor-patient relationship and what was needed for informed consent for the abortion procedure in that case.[41] This Court stated that " . . . a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a

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[39] Wooley v. Maynard, 430 U.S. 705, 717 (1977).

[40] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[41] *Id*. at 884.

requirement that a doctor give certain specific information about any medical procedure."[42]

The Court of Appeals in this case misinterpreted the context of the *Casey* opinion by applying a doctor-patient relationship requiring informed consent for the abortion procedure to a regulation that pertains to "facilities." The Act mentions facilities thirty-one times and never mentions doctors even once. This is not an informed consent case applicable to doctors performing an abortion procedure where the doctor must provide information regarding the risks and consequences of the medical procedure, and therefore, the Court of Appeals erred.

In addition, the Court of Appeals misapplied *Casey* in treating it as a First Amendment case applicable to the present case. The Court of Appeals correctly stated that this Court only had a "short discussion" in *Casey* concerning the doctor's First Amendment rights.[43]

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[42] *Id*.

[43] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016). Indeed, the majority opinion in *Casey* had one short paragraph stating:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here. Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992) (citations omitted).

Indeed, three sentences do not build a theory of First Amendment law[44] and this supports the fact that *Casey* was not a First Amendment case.

The Court of Appeals also quoted this Court's statement that the First Amendment only applied to the particular facts in *Casey*;[45] but, it did not heed this Court's caveat because it expanded the statement to a completely different set of facts and circumstances. The regulation in this case applies solely to "facilities" and not the doctor-patient relationship requiring informed consent for the abortion procedure. The plain language of the regulation was aimed at "facilities." The Court of Appeals' decision should be reversed because it misapplied this Court's decision in *Casey*.

The Court of Appeals' decision should also be reversed because it misinterpreted this Court's decision in *Reed*.[46] In attempting to state that this Court's decision in *Reed* did not apply, the Court of Appeals cited one of its own opinions in *Swisher* concerning unauthorized military medals.[47] But, that case is factually inapposite to the present case.

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[44] Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 81 (2016) (stating "*Casey*'s three obscure sentences are hardly enough to build a coherent body of First Amendment law").

[45] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016).

[46] Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218 (2015).

[47] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 837 (9th Cir. 2016) (*citing* United States v. Swisher, 811 F.3d 299 (9th Cir. 2016) (en banc)).

Furthermore, the Court of Appeals' application was misplaced. Quoting this Court's decision in *Alvarez*,[48] the Court of Appeals stated in *Swisher* that the

> . . . content-based restrictions on speech have been permitted only for a 'few historic and traditional categories' of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent."[49]

None of these "few historic and traditional categories of speech" exist in the present case, and therefore, the Court of Appeals erred. Contrary to this Court's long-standing view of not creating new categories of speech which would receive less scrutiny, the Court of Appeals attempted to carve out a new category for speech concerning abortion. In the marketplace of ideas concerning a controversial topic such as abortion, this is not in the public's best interest. Any attempt to carve out a new category should be rejected.

This Court's decision in *Reed* provides the proper guidance for deciding content-based speech. As explained in *Reed*: "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message

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[48] United States v. Alvarez, 567 U.S. 709 (2012).

[49] United States v. Swisher, 811 F.3d 299, 313 (9th Cir. 2016) (en banc).

expressed."[50] If "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys," it is a content-based regulation.[51] Therefore, this Court stated that strict scrutiny applied to content-based regulations.[52] The regulation in this case is content-based speech as it pertains to the message and topic of abortion and on its face draws a different message that pregnancy care centers are coerced to speak.

In addition, this Court concluded in *Reed* that strict scrutiny applies regardless of the "government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[53] "Ideological messages are given more favorable treatment . . . ,"[54] and that is particularly important concerning controversial messages such as abortion.

As Justice Alito reiterated in *Reed*, content-based laws must satisfy strict scrutiny.[55] This protection is merited for content-based laws because "they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint."[56] The Act is a content-based regulation that discriminates

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[50] Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218, 2227 (2015) (*citing* cases).

[51] *Id.*

[52] *Id.*

[53] *Id*. at 2228.

[54] *Id*. at 2230.

[55] *Id*. at 2233 (Alito, J., concurring).

[56] *Id*.

against pregnancy care centers' pro-life viewpoint. Thus, these dangers exist in this case.

Dean Smolla surmised that *Reed* "is a powerful reminder that strict scrutiny is triggered by laws that either facially discriminate on the basis of content or are motived by a governmental purpose to penalize disfavored views."[57]

Pregnancy care centers are targeted because of their pro-life mission, core values, and beliefs. The Act demonstrates an animus toward those ideas because there was no similar requirement that abortion facilities provide a pro-life alternative message. If the State was concerned that women had all the information to decide whether to have an abortion or a pro-life alternative, abortion facilities should be compelled to speak a pro-life message. But the Act does not mandate such a message by abortion facilities.

This case involves the free speech rights of pregnancy care centers, but the Court of Appeals for the Ninth Circuit set a dangerous and erroneous precedent in applying intermediate scrutiny to a content-based regulation that discriminates against the centers' pro-life viewpoint and forcing them to speak a government-crafted abortion message. In reaching its erroneous decision, the Court of Appeals misinterpreted and misapplied this Court's precedents, and therefore, the decision should be reversed.

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[57] Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 87 (2016).

II. THE COURT OF APPEALS ERRED IN DEFINING THE REGULATION AS PROFESSIONAL SPEECH, AND THEREFORE, THE DECISION SHOULD BE REVERSED.

A. The Court of Appeals Erred in Concluding That the Act Regulated Professional Speech Which Resulted in a Wrong Result.

This Court has recognized that certain types of speech are not protected by the First Amendment.[58] For example, unprotected speech would include the incitement of illegal activities, fighting words, and obscenity.[59] None of these are present in this case.

There are also categories of less-protected speech[60] such as professional speech and commercial speech. Neither professional speech nor commercial speech[61]

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[58] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1036 (5th ed. 2015).

[59] *Id*.

[60] *Id*. at 1037.

[61] The Court of Appeals correctly stated in a footnote that the Act did not regulate commercial speech. National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 835, n.5 (9th Cir. 2016). This case does not involve commercial speech as defined by this Court in Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64, 66 (1983) (defining as speech that proposes a commercial transaction) or Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980) (defining it as related solely to the economic interests of the speaker and its audience). Pregnancy care centers' purpose is neither to propose a commercial transaction nor related to an economic interest. *See* O'Brien v. Mayor and City Council of Baltimore, 768 F. Supp. 2d 804, 813-14 (D. Md. 2011) (stating reasons why it is not commercial speech),

are applicable in this case.[62] The Court of Appeals correctly concluded that the Act was content-based, but then redefined it as professional speech that only required intermediate scrutiny. There are "perils" to recognizing new categories of speech that would "enjoy diminished First Amendment protection."[63] But the speech involved in this case, in fact, is content-based viewpoint discrimination and is entitled to the highest protection of the strict scrutiny standard.

The Court of Appeals erred when it found that the Act regulated professional speech and applied intermediate scrutiny.[64] First, the court erred in defining the speech regulated by the Act as professional speech. The court defined professional speech as "speech that occurs between professionals and their clients in the context of their professional relationships."[65] Even under this loose definition, pregnancy care centers do not

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aff'd sub nom. Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012).

[62] *See* Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 2018 WL 298142 at 5, ___ F.3d ___ (4th Cir. 2018) (concluding in a unanimous decision that commercial and professional speech were not applicable in that case, and therefore, heightened scrutiny was required).

[63] Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 84 (2016).

[64] *See* National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016) (finding it was professional speech which was subject to intermediate scrutiny).

[65] *Id*. at 839.

meet the definition because a center is not a "professional" in a "professional relationship."

Justice White phrased it differently in an often-cited definition in *Lowe*: "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."[66] Under this definition, pregnancy care centers do not exercise judgments on behalf of the women. They provide alternatives to abortion and help to mothers who want to keep their babies by providing various items such as diapers and baby clothes.

In addition, pregnancy care centers do not meet the commonly used legal definition of professional. Black's Law Dictionary defines professional as "Someone who belongs to a learned profession or whose occupation requires a high level of training and proficiency."[67] It also defines a professional relationship as "An association that involves one person's reliance on the other person's specialized training" and provides

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[66] Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring).

[67] BLACK'S LAW DICTIONARY, *Professional* (10th ed. 2014). The second edition had a more expansive definition: "1. A person, who is a member of a professional body due to the education qualification and follows the prescribed moral and professional code of conduct. 2. A person who has mastered a high level of expertise in a subject, notion or field."

examples including one's relationship with a lawyer, doctor, insurer, banker, and the like.[68]

Pregnancy care centers do not meet this commonly used legal definition for numerous reasons. A center is not a person. A center is not a "learned profession." A center is not a person who has an "occupation that requires a high level of training and proficiency." And, a center is not an association where women are relying on a person's specialized training as they would if they had consulted a lawyer, doctor, or other professional. What the centers do is very different from the specialized training that lawyers, accountants, and other professionals have. Clearly, the Act places the burden on the center and not on a professional such as a doctor, and therefore, the Court of Appeals' analysis was error in deciding that this was professional speech and a lower standard could be applied.

The Act's specific language negates the Court of Appeals' opinion that this was professional speech. The Act mentions the word "facility" thirty-one times and

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[68] *Id*. at *professional relationship*. *See generally*, Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1247 (2016) (stating profession involves three core elements: (1) a knowledge community's insights, (2) communicated by a professional within the professional-client relationship, (3) for the purpose of providing professional advice); Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 47 U. PA. L. REV. 771, 772 (1999) (stating professional speech "fulfills a more defined social role by offering specific knowledge and expertise to an audience that deliberately seeks access to such information and often to the professional's judgment about a particular issue").

never mentions the word "doctor" or "physician." Furthermore, the Act imposes a penalty on the facility[69] and not on a doctor who is the professional.

In addition, the Court of Appeals for the Ninth Circuit erroneously based its professional speech argument on the fact that because the state issues a license that there is a professional relationship which advances the welfare of clients rather than to contribute to the public debate.[70] Under this reasoning, anyone who receives a license from the state would become a professional. Taking this reasoning to its logical conclusion, it would be absurd to believe that anyone who receives a driver's license from the state suddenly becomes a professional or one who gets a fishing license is a professional. The state issues many types of licenses but that does not by definition make the individual a professional.

In reaching its conclusion, the court relied on its own decision in *Pickup*,[71] but this reliance was misplaced as *Pickup* concerned a licensed professional mental health therapist who specialized in sexual orientation cases. Judge O'Scannlain noted in his dissent in *Pickup* that the Supreme Court had never recognized professional speech as a distinct category of

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[69] CAL. HEALTH & SAFETY CODE § 123473.

[70] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016).

[71] Pickup v. Brown, 740 F.3d 1208 (9th Cir.), *cert. denied*, ___ U.S. ___, 134 S. Ct. 2871 (2014).

speech.[72] He stated that the panel was playing a "labeling game."[73] He was also critical of the fact that the panel had failed to cite any authority for the proposition that speech uttered by professionals does not receive any First Amendment scrutiny.[74]

Pregnancy care centers are local, nonprofit organizations that provide compassionate support to women and men who are faced with difficult pregnancy decisions. Even assuming arguendo that the center refers a woman for consultation with a doctor or is supervised by medical personnel, this does not make the center a "professional." The Act places the burden on the center and not the doctor as was the case in *Pickup*, and therefore, the Court of Appeals erred.

B. The Court of Appeals Erred in Applying an Intermediate Scrutiny Analysis to the Act, and Therefore, the Decision Should Be Reversed.

Because the speech being regulated by the Act is not professional speech, the Court of Appeals for the Ninth Circuit erred in applying intermediate scrutiny. When the government attempts to coerce speech, it must pass strict scrutiny. The Court of Appeals' decision authorizes the government to target pregnancy care centers by forcing them to state and publish a

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[72] *Id*. at 1221 (O'Scannlain, J., dissenting from order denying rehearing en banc).

[73] *Id*. at 1218.

[74] *Id*.

government-crafted message which is contrary to their mission, core values, and beliefs. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[75] This is particularly abhorrent where the speech concerns the most controversial issue of our time.

In *Riley*,[76] this Court rejected compelled speech requirements for noncommercial speakers. It stated that " . . . the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."[77]

Furthermore, this Court in *Riley* stated: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content based regulation of speech."[78] There is no question that the speech in this case would alter the content of the speech and coerce the pregnancy care centers to speak a government message that is contrary to their core values and beliefs.

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[75] Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 235 (2d Cir. 2011) (*quoting* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995)), *aff'd*, ___ U.S. ___, 133 S. Ct. 2321 (2013).

[76] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988).

[77] *Id*. at 791.

[78] *Id*. at 795.

In *Riley*, this Court also recognized that the compelled disclosure would "almost certainly hamper" legitimate fundraising efforts.[79] This is certainly true for pregnancy care centers who rely on pro-life donors to fund their efforts. Pro-life donors would be offended that a pregnancy care center had to use its funds to promote an abortion message. Thus, this compelled speech would have a negative financial impact on pregnancy care centers.

This Court held in *Riley* that the statute was unconstitutional because it failed the strict scrutiny test and the regulation was not narrowly tailored. The Court of Appeals erred because it failed to apply strict scrutiny and the regulation was not narrowly tailored. Pregnancy care centers are content-based speakers concerning a controversial issue and should be afforded the full protection of a strict scrutiny analysis. The Act in the present case is subject to strict scrutiny because it compels a government mandated and scripted speech on noncommercial speakers and discriminates against the centers based on their pro-life viewpoint. Strict scrutiny is triggered in viewpoint discrimination cases and particularly in the controversial context.[80]

Assuming arguendo that this Court finds the regulation was professional speech, full First Amendment protection of professional speech should still be given

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[79] *Id*. at 799.

[80] *See* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 239 (2d Cir. 2011), *aff'd*, ___ U.S. ___, 133 S. Ct. 2321 (2013).

by requiring strict scrutiny.[81] This Court, however, does not need to create a category for professional speech or the standard to apply in such a case because this is a content-based Act that constitutes viewpoint discrimination, and therefore, strict scrutiny should have been applied.

The speech in the present case is not professional speech. Therefore, the Court of Appeals miscategorized the type of speech and applied the wrong level of scrutiny. The regulation is content-based and constitutes viewpoint discrimination, and therefore, is entitled to strict scrutiny review. Had that standard been applied, the regulation could not pass strict scrutiny muster and should have been held unconstitutional.

[81] Commentators have suggested that strict scrutiny should be applied to professional speech. *See, e.g.*, Sherman, Commentary, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 192-93 (2015) (stating occupational speech should be treated like any other content-based speech and subject to strict scrutiny); Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 84 (2016) (stating professional speech should be subjected to strict scrutiny which is the norm for content-based regulations); Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1310 (2015) (stating professional speech merits strict scrutiny).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be reversed and A.B. 775 held unconstitutional.

Respectfully submitted,

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