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.

Respondent.

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

BRIEF OF *AMICI CURIAE* FOR THE SCHARPEN FOUNDATION, INC., ADVOCATES FOR FAITH & FREEDOM, AND NATIONAL PRO-LIFE ALLIANCE IN SUPPORT OF PETITIONERS

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INTRODUCTION

Pursuant to this Court's Rule 37(1), Amici Curiae will present critical information to this Court that has not already been brought to the Court's attention by the parties. This pertinent information arises from a parallel case litigated in the Riverside County Superior Court, State of California. The evidence presented herein is directly relevant and applicable to this Court's analysis of the California Reproductive FACT Act (the "Act").

INTEREST OF AMICI CURIAE[1]

I. THE SCHARPEN FOUNDATION

The Scharpen Foundation ("Scharpen") successfully challenged the Act in the case entitled *The Scharpen Foundation v. Becerra*, Superior Court of California, County of Riverside, Case Number RIC 1514022. On November 25, 2015, Scharpen filed its lawsuit to challenge the constitutionality of the Act under the free speech clause of article I, section 2 [2] of

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[1] Consistent with this Court's Rule 37.6, *Amici Curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than The Scharpen Foundation, Inc., Advocates for Faith & Freedom, Inc., National Pro-Life Alliance, and its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners' blanket consent to amicus briefs is on file with this Court, and Respondents have consented to the filing of this brief.

[2] California Constitution, article 1, section 2, provides:

> "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

the California Constitution.[3] The California Attorney General, Xavier Becerra (formerly Kamala Harris), answered and represented the state defendants.

Judge Gloria Trask of the Riverside County Superior Court tried Scharpen's free speech claim at a bench trial on October 18, 2017. After considering the evidence discussed below, Judge Trask ruled that on its face, the Act violates Scharpen's freedom of speech under the California Constitution. Judge Trask issued a permanent injunction barring the Attorney General from enforcing the Act against Scharpen. A copy of the Judgment and Statement of Decision will be attached as Exhibits "A" and "B" respectively to *Amici Curiae's* Request for Judicial Notice should the Clerk of this Court authorize such lodging as provided in this Court's Rule 32(3). A letter has been submitted to the Clerk and served on all parties, describing the material proposed for lodging and the reasons why this Court should and can consider the non-record information.[4]

On December 21, 2017, the California Attorney General filed an appeal of the Superior Court's judgment to the Fourth District Court of Appeal of California. This Court's decision will have a direct

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[3] Scharpen also claimed the Act violated its state constitutional rights to freedom of assembly and free exercise of religion under the California Constitution. These claims were resolved in favor of the Defendant on a motion for judgment on the pleadings.

[4] *Amici* also seek to lodge additional evidence from *The Scharpen Foundation v. Becerra*. This brief will cite to the Request for Judicial Notice in anticipation that the Clerk will authorize the lodging of this relevant and admissible evidence under Rule 32(3).

impact upon the proceedings and arguments pending in the California Court of Appeal as this Court's interpretation of the First Amendment is instructive to California Courts.[5] Furthermore, this Court's decision will likely have a direct impact on the injunction from enforcement of the Act on Scharpen.

Scharpen is licensed by the California Department of Public Health to operate a community clinic in the County of Riverside.[6] Scharpen is a 501(c)(3) non-profit, faith-based pregnancy care center that provides services to women and their unborn children to advance its religious belief that life is a gift from God. Scharpen engages in a number of medical and non-medical activities to carry out its religious mission, including pregnancy testing and limited obstetrical ultrasounds. It also communicates pregnancy options and provides medical referrals, emotional support, information on sexually transmitted diseases, information on birth control, and resources for additional pregnancy and post-pregnancy needs beyond the clinic.

It provides these services and information to women with the goal of holistically serving their

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[5] *See Gabrielli v. Knickerbocker*, 12 Cal.2d 85 (Cal. 1938) (explaining that, absent cogent reasons, California courts do not depart from the construction placed by the United States Supreme Court on a similar provision of the federal constitution).

[6] All relevant foundation regarding the nature and purpose of The Scharpen Foundation is included in the Declaration of Scott Scharpen filed in Support of Plaintiff's Trial Brief in *The Scharpen Foundation v. Becerra*, which is attached as Exhibit "C" to the Proposed Request for Judicial Notice.

medical, emotional, spiritual, and material needs. Scharpen's mission is to equip women to be able to choose parenting or adoption, rather than abortion. Consistent with its religious and non-profit nature, Scharpen provides these services completely free of charge and never asks clients for donations. Also consistent with its religious commitments, Scharpen believes that abortion is wrong and has never referred, nor would it ever refer, a client to have an abortion. For these reasons, The Scharpen Foundation opposes the Act's disclosure requirements because the disclosures contravene the entire purpose for the Scharpen Foundation's existence.

II. ADVOCATES FOR FAITH & FREEDOM

Advocates for Faith and Freedom ("Advocates") is a California-based non-profit law firm dedicated to protecting First Amendment liberties. Advocates seeks to protect the right to freedom of speech that is so integral to the fabric of our Nation by ensuring that the government may not compel private speakers to deliver a viewpoint-based message. The right ultimately implicated in this particular case is one of the most dearly held rights Americans possess, as well as one of the most fundamental. The resolution of this case in favor of NIFLA is therefore of great importance to Advocates due to the impact it will have upon future cases involving compelled speech that will undoubtedly arise across the country.

III. NATIONAL PRO-LIFE ALLIANCE

National Pro-Life Alliance is a national non-profit corporation dedicated to advocating for life. Members

of the National Pro-Life Alliance lobby both elected officials and candidates for office to support and pass legislation advancing the pro-life cause. This is done through grass-roots lobbying efforts, research, and publications.

SUMMARY OF ARGUMENT

The state court proceedings in *The Scharpen Foundation v. Becerra* revealed significant factual information that is directly relevant to the U.S. Supreme Court's analysis of the Act. While multiple cases were filed in federal court challenging the Act, none of those cases engaged in significant discovery. Instead, those cases challenged the Act solely based upon the face of the Act and the legislative history. In *The Scharpen Foundation v. Becerra*, significant discovery and a stipulation of facts were completed prior to a bench trial that provided evidence of the discriminatory intent and discriminatory impact of the Act.

The *Scharpen* trial revealed that the Act applies to only 67 clinics, and 66 (or 98.5%) of those are pro-life clinics. The legislative history of the Act shows that this result was intentional, as the Act's true purpose was to force pro-life pregnancy centers to promote abortion. Another significant finding of the *Scharpen* trial court was that the State itself had not made any reasonable effort to inform women of the information within the Act before compelling pro-life clinics to dispense the State's desired message. Based on this evidence, the Act amounts to an impermissible viewpoint-based regulation of speech because it targets clinics that speak from a pro-life viewpoint. As

a viewpoint-based regulation, the Act is *per se* unconstitutional. However, even if this Court applies the strict scrutiny test, the Act still fails.

ARGUMENT

I. EVIDENCE ADMITTED IN *THE SCHARPEN FOUNDATION v. BECERRA*

During 2016 and 2017, Scharpen and the Attorney General exchanged hundreds of pages of documents and the Attorney General deposed Scott Scharpen as Plaintiff's "person most knowledgeable." Almost all of the documents propounded by the parties were admitted into evidence at trial. In addition, Scharpen and the Attorney General stipulated to the underlying facts regarding the impact and applicability of the Act, exempted clinics, and the legislative record.[7]

A. Impact of the Act

The disclosure required by the Act regarding abortion is applicable exclusively to "licensed covered facilities" whose primary purpose is providing family planning or pregnancy-related services. Cal. Health & Safety Code section 123471(a). A "licensed covered facility" is defined by the Act as a facility "licensed under Section[8] 1204 or an intermittent clinic operating under a primary care clinic pursuant to

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[7] The Stipulation is attached as Exhibit "D" to the Proposed Request for Judicial Notice, subject to this Court's Rule 32(3).

[8] Unless otherwise indicated, all statutory references are to the California Health & Safety Code.

subdivision (h) of Section 1206…." Section 1204 states that clinics are eligible for licensure if they are "a tax-exempt nonprofit corporation that is supported and maintained in whole or in part by donations, bequests, gifts, grants, government funds or contributions…" Section 1206 applies to clinics licensed under Section 1204 that have "separate premises from the licensed clinic and are only open for limited services of no more than 30 hours a week."

Therefore, a "licensed covered facility" only includes tax-exempt nonprofit corporations, as opposed to for-profit entities. The Act's definition of "licensed covered facilities" excludes all for-profit obstetrician-gynecologist practices and for-profit abortion clinics, including Family Planning Associates' 23 for-profit abortion clinics in California.[9] Of California's 2,000[10] employed obstetrician-gynecologists, only those that provide services under a non-profit clinic are subject to the Act.

California's Office of Statewide Health Planning and Development ("OSHPD") publishes annual lists of all licensed covered facilities under Sections 1204 and 1206.[11] In December 2016, there were 1,379

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[9] *See* "23 Convenient Locations" www.fpawomenshealth.com/20-convenient-locations (last visited Jan. 9, 2018).

[10] *See* "Occupational Employment Statistics" www.bls.gov/oes/current/oes291064.htm (last updated May 2016).

[11] All relevant foundation regarding the methodology and statistics on primary care clinics is included in the Declarations of Nada Higuera and Christine Torres filed in Support of

licensed covered facilities in California. However, the Act exempts two groups from the 1,379 licensed covered facilities:

> (1) Clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
>
> (2) Licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment ("F-PACT") Program.

Section 123471(c).

The Act's applicability is further narrowed to licensed covered facilities "whose primary purpose is providing family planning or pregnancy-related services." Section 123471(a). However, the Act does not define the term "primary purpose." Does 90% of services constitute a primary purpose? Or 51%? The Act is not clear on how to conclude that a licensed covered facility's primary purpose is providing family planning or pregnancy-related services. For purposes of discerning the clinics subject to the Act in this brief, Scharpen used a 51% threshold. In other words, if over half of a clinic's services are family planning or pregnancy-related, they are considered to have a primary purpose of providing family planning or pregnancy-related services.

Plaintiff's Trial Brief in *The Scharpen Foundation v. Becerra*, which are attached as Exhibit "F" to the Proposed Request for Judicial Notice.

Of the 1,379 licensed covered facilities in California, only 67 clinics provided family planning or pregnancy-related services at least 51% of the time in comparison with their overall services and were not exempt. As a result, only these 67 clinics are subject to the Act.[12] All but one of the 67 clinics (98.5%) are pro-life organizations, also known as "crisis pregnancy centers" or "CPCs." The other organization is the "California Prostitutes Education Project," which is an HIV/AIDS prevention organization.[13]

In sum, the Act only applies to clinics that are tax-exempt non-profit corporations, excluding for-profit entities, and the Act only applies to clinics that have a "primary purpose" of providing "family planning or pregnancy-related services" and are not Medi-Cal and F-PACT providers. Out of 1,379 total licensed covered facilities in California, only 67 clinics provide at least 51% of the subject services and are not exempt, and 66 of the 67 clinics (98.5%) are pro-life organizations who exist to prevent abortions. In the end, the Act distinctly targets less than 5%[14] of nonprofit clinics to

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[12] At trial, Scharpen used an even lower threshold of 10% and found that the Act would only be applicable to 89 clinics, of which 79 are pro-life clinics. For this *Amici* brief, Scharpen is using a 51% threshold, deriving the figures from the same methodology and information in the Declarations of Nada Higuera and Christine Torres, attached as Exhibit "F" to the Proposed Request for Judicial Notice.

[13] *See* "California Prostitutes Education Project" www.calpep.org (explaining organization's mission) (last visited Jan. 9, 2018).

[14] 1,379 licensed covered facilities divided by 67 clinics to which the Act applies equals 4.8%. The percentage would likely be dramatically smaller if "for profit" clinics were also included in

dispense the State's preferred message, a message that contradicts the pro-life purpose for 66 of the 67 clinics.

B. The Act's Legislative History

The original content of the notice prior to legislative amendment began with the following:

> "You have the right to decide whether to have a child. In California, every pregnant woman has the right to decide whether to have a child or to obtain abortion care."[15]

This notice fit the true purpose of the Act, which, as explained by the Legislature, was to advance California's "proud legacy of reproductive freedom and funding forward thinking programs."[16] The insidious threat to this "proud legacy" and "forward thinking," is the "nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's reproductive rights."[17] The problem the Act was designed to address is that CPCs "aim to discourage and prevent women from seeking abortions."[18]

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this calculation – further evidencing the targeting of this uniquely distinguished pro-life group of crisis pregnancy centers.

[15] Assem. Chiu First Amnd. AB 775, 2015-2016, March 26, 2015, attached as Exhibit "G" to the Proposed Request for Judicial Notice.

[16] Hr'g on Assemb. B. No. 775 Before the Assemb. Comm. on Health, Reg. Sess., 3 (Cal. 2015-2016), JA38–39.

[17] *Id*. at 40.

[18] *Id*. at 42.

The legislative history notes that most CPCs are affiliated with NIFLA, "a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America."[19] The Legislature also cites a report by UC Hastings College of Law, which explains that CPCs are pro-life "largely Christian belief-based" organizations that "do not offer services that conflict with pro-life pregnancy options, like abortion referrals or procedures."[20]

The reason for the Act's exemption of all primary care clinics enrolled as Medi-Cal and F-PACT providers is explained in the legislative history, namely because Medi-Cal already covers abortion and considers it part and parcel with family planning:

> "[A] licensed primary care clinic that is both a Medi-Cal provider and a Family PACT provider offers the full continuum of … pregnancy-related services … and abortion services. Under Family PACT, a patient is covered for comprehensive clinical family planning services … Thus, the entire spectrum of services, as specified in the notice, will be provided by a Medi-Cal and Family PACT provider."[21]

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[19] *Id.*

[20] Hr'g on Assemb. B. No. 775 Before the Sen. Comm. On Health, Reg. Sess., 5-6 (Cal. 2015-2016), attached as Exhibit "H" to the Proposed Request for Judicial Notice.

[21] Hr'g on Assemb. B. No. 775 Before Assemb. Comm. on Judiciary, Reg. Sess., 8-9 (Cal. 2015-2016), JA67–68.

C. The State's Fictitious Efforts to Inform Women of Free and Low Cost Abortion Services

In an attempt to justify the constitutional burden imposed by the Act, the Attorney General argued at trial in *Scharpen* that a myriad of governmental efforts to get the Act's information to pregnant women on a timely basis have fallen short, making the Act necessary to supplement the State's efforts.[22] Judge Trask summarized the evidence in her Statement of Decision:

> The Attorney General offered a number of declarations and exhibits. They describe those steps the State has taken [] to educate women regarding the availability of low cost public contraceptive, prenatal, and abortion services. While the educational steps taken by the State are described as "myriad" by the Attorney General, they are actually quite minimal. And while the evidence is voluminous, it describes very little. And even those few entities making an effort to inform women of the availability of services appear nearly as loathe as Scharpen Foundation to specifically use or post the word "abortion".[23]

The only example of a State agency's active effort to notify women was a 12-week "marketing campaign"

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[22] Trial Tr., *The Scharpen Foundation v. Becerra*, attached as Exhibit "I" to the Proposed Request for Judicial Notice.

[23] Statement of Decision, attached as Exhibit "B" to the Proposed Request for Judicial Notice.

in 2015 conducted by the County of Alameda that included large notices about the availability of free pregnancy tests posted on the sides of buses.[24] The Attorney General admitted that this bus campaign was the only active advertising of any pregnancy services a State agency has conducted. *Id*. at 24:18–25.

The other 1,000+ pages submitted by the State were printed pages from various county websites with "completely passive" information on pregnancy services.[25] After reviewing all the documents, Judge Trask's conclusion was that "the word 'abortion' or 'abortion services' only appeared twice in 1000 [and] 300 pages."[26] Judge Trask found the absence of the word significant, as "[t]he elephant in the room is the word 'abortion.'"[27] Trask explained that the State wants "Scharpen to say the word 'abortion,' but the State does not" use the word itself in its advertising.[28] Judge Trask found that "the State's very modest efforts at delivering information to its target audience regarding the availability of services, including abortion services, do not establish the necessity of compelling private citizens to 'supplement' those efforts."[29]

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[24] Trial Tr. at 24, Exhibit "I."

[25] Statement of Decision at 6, Exhibit "B."

[26] Trial Tr. at 37, Exhibit "I."

[27] *Id*. at 36.

[28] *Id*. at 29.

[29] Statement of Decision at 14, Exhibit "B."

II. THE ACT IS VIEWPOINT-BASED AND THUS UNCONSTITUTIONAL

The Act amounts to an impermissible viewpoint-based regulation of speech because it targets clinics that speak from a pro-life viewpoint. This is evidenced by the purpose of the Act to target pro-life clinics and the effect of the almost exclusive applicability of the Act (over 98%) to pro-life clinics. As a viewpoint-based regulation, the Act is *per se* unconstitutional. However, even if this Court applies the strict scrutiny test, the Act still fails.

A. The Act is Viewpoint Discriminatory Because it Targets Pro-Life Clinics

A fundamental principle of the First Amendment is that the government may not regulate speech "because of the speaker's specific motivating ideology, opinion, or perspective …" *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 820 (1995) (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)). Such viewpoint-based speech restrictions, i.e., those "based on hostility—or favoritism—towards the underlying message expressed," are impermissible under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992); *see also Perry*, 460 U.S. at 46 (holding that the government cannot "suppress [or compel] expression merely because public officials oppose the speaker's view"). The test for viewpoint discrimination is whether "the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1750 (2017).

In *Sorrell*, this Court reviewed a Vermont statute restricting pharmaceutical companies and similar entities from using prescriber-identifying information obtained from pharmacists for marketing purposes. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). The Court held that the statute amounted to an unconstitutional viewpoint regulation that targeted pharmaceutical manufacturers and their agents. *Id.* at 565. The Court looked to the legislative history of the statute, explaining that the findings of the Vermont Legislature "confirm that the law's *express purpose and practical effect* are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. *Id.* (emphasis added). Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Id.*

In the legislative history, the Vermont Legislature explained that marketing representatives, in particular those who promote brand-name drugs, convey messages that "are often in conflict with the goals of the state." *Id.* at 580. The legislative history showed that the Legislature "designed [the statute] to target those speakers and their messages for disfavored treatment." *Id.* This Court stressed that a measure which appears viewpoint neutral on its face can still have the unconstitutional purpose to suppress the speech of a particular viewpoint. *Id.* at 564–565.

Here, pro-life pregnancy centers are being regulated because of their specific pro-life viewpoint. Just like in *Sorrell* where the legislative history specifically stated that the law was aimed at

regulating pharmaceutical manufacturers, the Act's legislative history states that its express purpose is to regulate crisis pregnancy centers that "do not offer services that conflict with pro-life pregnancy options."[30] Although on its face the Act appears to be viewpoint neutral, the legislative history shows that the Act was intentionally designed to target pro-life CPCs in order to advance the State's pro-abortion viewpoint. The message of the drug manufacturers in *Sorrell* "was often in conflict with the goals of the state" while here, the message of CPCs threaten California's "proud legacy of reproductive freedom and funding forward thinking programs."[31]

The practical effect of the Act also shows that it was drafted in tandem to achieve this discriminatory result. By defining "licensed covered facilities" to include only tax-exempt nonprofit corporations, the Legislature intentionally excluded all for-profit obstetrician-gynecologist practices and for-profit abortion clinics. The Legislature further limited the applicability of the Act to licensed covered facilities whose primary purpose is to provide family planning or pregnancy-related services. The Legislature then included an exemption for Medi-Cal and FPACT providers because Medi-Cal covers abortion and considers it part and parcel with family planning. CPCs such as The Scharpen Foundation are not part of Medi-Cal and FPACT programs because they are

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[30] Hr'g on Assemb. B. No. 775 Before the Sen. Comm. On Health, Reg. Sess., 5-6 (Cal. 2015-2016), attached as Exhibit "H" to the Proposed Request for Judicial Notice.

[31] Hr'g on Assemb. B. No. 775 Before the Assemb. Comm. on Health, Reg. Sess., 3 (Cal. 2015-2016), JA38–39.

pro-life, and they refuse to provide abortions or referrals for abortions.

The practical effect of the Act is that of the 1,379 licensed covered facilities in California, only 67 clinics would be subject to the Act and not exempt from providing the Act's disclosure. All but one (an HIV prevention organization) of the 67 clinics required to comply with Act are pro-life. Thus, no abortion providers are required to comply with the Act. The Act's apparent compliance with the requirement of facial neutrality does not mask its targeted discrimination. The Act steps into the highly politically charged abortion debate, and then exempts clinics that provide abortions. The fact that for-profit abortion providers are not required to inform women of free or low cost abortions available elsewhere, or of their potential eligibility for free or low cost prenatal care, is further evidence of the real motive behind the Act. That is impermissible viewpoint discrimination. "In its practical operation," the Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Sorrell*, 131 S. Ct. at 565 (quoting *R.A.V. v. St. Paul*, 505 U.S. at 391.

The case of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) also demonstrates how a facially neutral ordinance can discriminate based on religious viewpoint.[32] Although

[32] Although this Court has limited its review of this case to the First Amendment's Free Speech Clause, *Lukumi* supports *Amici Curiae's* position that the Act is also clearly in violation of the Free Exercise Clause because it is neither neutral nor generally applicable, and it substantially burdens Petitioners' and Scharpen's free exercise of religion.

Lukumi dealt with the Free Exercise Clause rather than the Free Speech Clause, *Lukumi* is nonetheless instructive here.

In *Lukumi*, a church practicing the Santeria faith challenged three city ordinances that prohibited its ritual slaughter of animals. *Id.* at 525–28. Although the city contended that the ordinances were motivated by the government's interest in preventing cruelty to animals, the Supreme Court struck down the ordinances. *Id.* To determine whether the ordinances were enacted to target the Santeria religion, this Court went beyond the text of the laws at issue and examined the legislative history and the practical applicability of the ordinances. *Id.* at 540.

The Court analyzed the ordinances' various prohibitions, definitions, and exemptions, and concluded that the ordinances were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members, but to exclude almost all other animal killings. *Id.* at 542. The Court explained that "careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. The exemptions included kosher slaughter, slaughter by licensed food establishments, slaughter for the purpose of food consumption, and so on. *Id.* The Court found that the ordinances were so riddled with exceptions exempting all other killings except those practiced by Santeria adherents, indicating that the real rationale behind the prohibitions was an unconstitutional suppression of religion. *Id.* ("the

burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others").

Even though the Act likewise states that it has a viewpoint-neutral objective, i.e., to provide information to women regarding time sensitive pregnancy decisions, the Legislature carefully drafted the Act to ensure that only 67 clinics must provide this information, and 98.5% of those clinics are pro-life. The exemption of for-profit abortion clinics, for-profit obstetrician-gynecologist, and 95% (1,312 of 1,379) of licensed covered facilities in California shows that the Legislature exempted almost all other places a women would likely go if she were pregnant. The burden of the Act thus falls on pro-life clinics but almost no others. The stated objective of the Legislature to provide women information is thus contradicted by the vast exemptions of the Act.

Indeed, the legislative history accurately reflects the Act's true purpose, which is to target pro-life "crisis pregnancy centers" that do not provide or refer for abortions. The original content of the notice also shows that the Act was about promoting the State's message that women have "a right to decide whether to have a child."[33] To pro-life pregnancy centers, this is akin to suggesting to women that it is acceptable to murder their unborn child. Although this hostility toward "life affirming ministries" is masked on the face of the Act, it is manifest in the Act's legislative

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[33] Assem. Chiu First Amnd. AB 775, 2015-2016, March 26, 2015, attached as Exhibit "G" to the Proposed Request for Judicial Notice.

history and almost exclusive applicability to pro-life pregnancy centers.

B. Viewpoint Discrimination is *Per Se* Unconstitutional

A viewpoint restriction negatively impacts all the values that underlie and inform the First Amendment. The Court stated in *Matal v. Tam*, 137 S. Ct. 1744 (2017) that preventing expressive ideas "strikes at the heart of the First Amendment." *Id*. at 1749. Therefore, a law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." *Id*. at 1766 (Kennedy, J., concurring) (citing *Rosenberger*, 515 U.S. at 829-830).

In *Matal*, the Court addressed the constitutionality of a statutory provision "prohibit[ing] the registration of a trademark 'which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.'" *Id*. at 1753 (quoting 15 U.S.C. § 1052(a)). The U.S. Patent and Trademark Office ("PTO") applied the statute to reject proposed marks if the mark could be considered "disparaging in the context of contemporary attitudes…" *Id*. at 1754. At issue in the case was the PTO's rejection of an application to register the mark "The Slants," the name of a musical band, which the PTO judged to be an ethnic slur offensive or derogatory to Asian–Americans. *Id*. at 1751. The Court ruled that the statute was per se unconstitutional as a viewpoint restriction.

Although the speech compelled by the Act is distinguishable from the hate speech restriction in *Matal*, the principal that a government regulation may not favor one speaker over another is analogous. The government must abstain from regulating speech when the specific motivating ideology, opinion, or perspective of the speaker is the rationale for the restriction. Here, the State is regulating the speech of crisis pregnancy centers based on the centers' pro-life ideology.

A recent decision by the Fourth Circuit is instructive here. In *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, No. 16-2325, 2018 WL 298142, at *1 (4th Cir. Jan. 5, 2018), the Fourth Circuit invalidated an ordinance requiring limited-service pregnancy centers to post disclaimers that they did not provide or make referrals for abortions. That Court explained that the particularly troubling aspects of the ordinance were "(1) that the ordinance applies solely to speakers who talk about pregnancy-related services but not to speakers on any other topic; and (2) that the ordinance compels speech from pro-life pregnancy centers, but not other pregnancy clinics that offer or refer for abortion." *Id*. at 6. The Fourth Circuit explained the following:

> A speech edict aimed directly at those pregnancy clinics that do not provide or refer for abortions is neither viewpoint nor content neutral. Especially in this context, content-based regulation "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."

> *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). We do not begrudge the City its viewpoint. But neither may the City disfavor only those who disagree.

Id. The court struck down the ordinance as an impermissible viewpoint regulation of speech.

The Act likewise attempts to drive the pro-life viewpoint from California pregnancy centers. By means of the Act, California has radically skewed the public debate over abortion in favor of abortion providers by forcing pro-life pregnancy centers to recommend or refer clients to facilities that provide the very services to which they religiously object. Thus, the Act is per se unconstitutional as a viewpoint restriction on speech.

III. THE ACT FAILS STRICT SCRUTINY

If the Court declines to find that viewpoint regulations such as the Act are *per se* unconstitutional, the Court should nonetheless apply strict scrutiny as argued in the Petitioners' Opening Brief at page 39. Due to the First Amendment's robust protection of freedom of speech, laws requiring groups or individuals to convey a message dictated by the government are "subject to exacting First Amendment scrutiny"; the government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* 487 U.S.

781, 798, 800 (1988).[34] The Act does not pass this rigorous test.

A. The Act Serves No Compelling Interest

Defendants bear the difficult burden of demonstrating that the Act is one of the "rare" instances in which a law mandating viewpoint-based speech meets the "demanding standard" of strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

Here, the government's mere invocation of the promotion of public health through the Act's required notice is insufficient to meet the demands of strict scrutiny. In fact, the argument that the Act serves the compelling interest of informing pregnant women that they might be eligible for free or low cost pregnancy-related services is undermined by the extent of the Act's exemptions. *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984) (exemptions "undermine the likelihood of a genuine [governmental] interest").

Additionally, the legislative history of the Act mentions that its author believes that pregnancy resource centers engage in "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from

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[34] The Free Exercise Clause is also applicable and would essentially subject the Act to strict scrutiny. *See Lukumi*, 508 U.S. 531 (holding that a law which is not neutral and of general applicability must be justified by compelling governmental interest and must be narrowly tailored to advance that interest if it burdens religious practice).

making fully-informed, time-sensitive decisions about critical health care."[35] As support, the report only cites a publication of NARAL, a longtime abortion advocacy and partisan group, and a report by the University of California, Hastings College.[36] The legislative history is wholly lacking in any scientific methodology and fails to substantiate its alleged findings with any information that can be objectively evaluated.

Moreover, the command of the Act is not to prohibit pregnancy centers from engaging in false or misleading speech, but to make them speak a government message promoting state funded abortion services. Thus, even if the alleged deceptive practices helped motivate enactment of the Act, the Act itself does not pinpoint this problem as something to be remedied.

B. Compelling Scharpen to Speak the Government's Message is Not the Least Restrictive Means of Advancing the Act's Asserted Interests

It is not enough under strict scrutiny for the government to identify a compelling interest. The government must also show it has adopted the *least restrictive means* of advancing its alleged interests. This is no easy task for the government. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) ("The least-restrictive-means standard is

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[35] Hr'g on Assemb. B. No. 775 Before the Assemb. Comm. on Health, Reg. Sess., 6 (Cal. 2015-2016), JA38–39.

[36] *Id*. at 7.

exceptionally demanding.") (citation omitted). Indeed, there can be little doubt that the government has not chosen the least restrictive means to further its goal of advising women in California of the availability of low cost or free abortions.

One obvious way the State could choose to advance its goals, without having to compel pro-life pregnancy centers to speak a viewpoint-based message contrary to its purpose, is for the State to disseminate the message itself. As this Court has noted in compelled speech cases, the government itself may "communicate the desired information to the public without burdening a speaker with unwanted speech." *Riley*, 487 U.S. at 800. In this case, that would mean informing citizens about the scope of services offered at various facilities through a public advertising campaign. *See Evergreen Ass'n v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014) (noting that New York City could "communicate [the Government] message through an advertising campaign").

There is no legitimate evidence, if any at all, that justifies an argument that the State has reasonably attempted to inform women about the availability of free or low cost abortions. The "only evidence of an active effort to educate women was a 12-week project in Alameda County in 2015, [wherein] [s]igns were posted on buses advertising a 'Free Pregnancy Test' with a phone number."[37] The rest of the 1,300 plus documents submitted by the Attorney General were printed pages from various county websites that

[37] Statement of Decision at 7, Exhibit "B."

"merely described [services offered by the county] as 'family planning' or by a similar euphemism. The word 'abortion' appear[ed] on only 2 county websites." *Id*. at 6. Even assuming, *arguendo*, that women remain unaware that the State funds abortion, the State's very modest efforts at delivering that information do not establish the necessity of compelling pro-life clinics to supplement those efforts.

The State, which "controls public education from K-12, community colleges, State Universities, the UC system, and which controls the funding of the services at issue" can communicate its message through a variety of means.[38] It can use media, including radio and television spots, social media and government internet sites, billboards, notices placed in printed publications, brochures in state and local governmental offices, and so forth. It can even do a bus campaign like it did in the County of Alameda, only instead of advertising free pregnancy tests, it can advertise abortion services. In today's media saturated culture, the list is all but endless. In sum, the government has at its disposal a plethora of means to communicate its own message without forcing pregnancy centers to point the way to the abortion clinic. "The Act compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message."[39]

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[38] *Id*.

[39] *Id*. at 15.

CONCLUSION

For the foregoing reasons, this Court should uphold and protect the fundamental right to the freedom of speech guaranteed by the First Amendment and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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