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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10 **NATIONAL INSTITUTE OF FAMILY**
11 **AND LIFE ADVOCATES d/b/a NIFLA,**
a Virginia corporation; **PREGNANCY**
12 **CARE CENTER d/b/a PREGNANCY**
13 **CARE CLINIC,** a California corporation;
and **FALLBROOK PREGNANCY**
14 **RESOURCE CENTER,** a California
corporation;

15 **Plaintiffs,**

16 **v.**

17 **KAMALA HARRIS,** in her official
capacity as Attorney General for the State
18 of California; **THOMAS**
19 **MONTGOMERY,** in his official capacity
as County Counsel for San Diego County;
20 **MORGAN FOLEY,** in his official capacity
as City Attorney for the City of El Cajon,
21 CA; and **EDMUND D. BROWN, JR.,** in
his official capacity as Governor of the
22 State of California;

23 **Defendants.**

Case No. 3:15-cv-02277-
JAH-DHB

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY INJUNCTION**

Accompanying papers: Plaintiffs'
Memorandum of Points and
Authorities in Support of Motion
for Preliminary Injunction

1
2 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN

3 PLEASE TAKE NOTICE that on January 11, 2016 this matter is set to be
4 heard in Courtroom 13B of this Court located at 940 Front Street, San Diego,
5 California 92101, Plaintiffs, by and through counsel, will and hereby do, move
6 this Court for a preliminary injunction to restrain the Defendants and all persons
7 acting at their behest or direction, from enforcing against Plaintiffs the
8 unconstitutional Reproductive “FACT” Act, which infringes Plaintiffs’ right to
9 the freedom of speech and the free exercise of religion under the First
10 Amendment.¹ In support of this Motion, Plaintiffs rely on the sworn testimony in
11 the Verified Complaint, filed on October 13, 2015; the Memorandum of Points
12 and Authorities, filed concurrently with this Notice; and if oral argument is made,
13 on the transcript thereof.

14 Respectfully submitted on this 21st day of October, 2015

15 *s/ David J. Hacker*
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22 ¹ Plaintiffs’ Complaint further alleges further federal and state constitutional and
23 statutory violations. Compl. ¶¶ 170–79, 193–217. Due to the strength of Plaintiffs’
First Amendment claims, this motion and accompanying memorandum focus on
the free speech and free exercise claims only.

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forthcoming*

*** Notice of Appearance forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2015, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants:

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21 his official capacity as Governor of the
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23 **Defendants.**

Case No. 3:15-cv-02277-JAH-DHB

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS’
MOTION FOR
PRELIMINARY INJUNCTION

Accompanying papers: Plaintiffs’
Notice of Motion and Motion for
Preliminary Injunction

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTUAL BACKGROUND..... 2

ARGUMENT..... 6

I. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS ON THEIR FIRST AMENDMENT FREE SPEECH CLAIM. 7

 A. The Act impermissibly requires Plaintiffs to engage in compelled speech. 8

 B. The Act Is Subject to Strict Scrutiny as Content - and Viewpoint-Based Regulation. 10

 C. The Act fails strict scrutiny. 15

 1. *Most pregnancy center disclosure laws have been enjoined.*..... 15

 2. *The Act does not serve a compelling interest.* 16

 3. *The Act is not narrowly tailored to California’s alleged interests.*..... 20

II. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR FREE EXERCISE CLAIM. 23

III. PLAINTIFFS MEET THE REMAINING PRELIMINARY INJUNCTION FACTORS. 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases:

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

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ACLU v. Ashcroft,
322 F.3d 240 (3d Cir. 2003)..... 25

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011)..... 7

Angelotti Chiropractic, Inc. v. Baker,
791 F.3d 1075 (9th Cir. 2015) 7, 15

Austin Lifecare, Inc. v. City of Austin,
No. 1:11-cv-00875-LY (W.D. Tex. June 23, 2014)..... 15

Board of Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989)..... 14

California Democratic Party v. Jones,
530 U.S. 567 (2000)..... 17

Central Hudson Gas & Electric Corp. v. Public Service Commission,
447 U.S. 557 (1980) 14

Centro Tepeyac v. Montgomery County,
722 F.3d 184 (4th Cir. 2013)..... 16

Centro Tepeyac v. Montgomery County,
5 F. Supp. 3d. 745 (D. Md. 2014) 2, 15, 16

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 16, 17, 20, 23

City of Boerne v. Flores,
521 U.S. 507 (1997) 16

*Consolidated Edison Co. of New York v
Public Service Commission of New York*,
447 U.S. 530 (1980) 17

Elrod v. Burns,
427 U.S. 347 (1976) 25

1 *Employment Division v. Smith,*
 2 494 U.S. 872 (1990) 24

3 *Evergreen Ass’n, Inc. v. City of New York,*
 4 801 F. Supp. 2d 197 (S.D.N.Y. July 13, 2011)..... 6

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 6 487 U.S. 474 (1988) 16, 21, 22

7 *Greater Baltimore Center for Pregnancy Concerns, Inc. v.*
 8 *Mayor & City Council of Baltimore,*
 9 721 F.3d 264 (4th Cir. 2013)..... 16

10 *Hurley v. Irish-American, Gay, Lesbian, & Bisexual Group of Boston,*
 11 515 U.S. 557 (1995) 8

12 *Miller v. Reed,*
 13 176 F.3d 1202 (9th Cir 1999)..... 24

14 *New York State Club Ass’n v. City of New York,*
 15 487 U.S. 1 (1988) 7

16 *O’Brien v. Mayor & City Council of Baltimore,*
 17 768 F. Supp. 2d 804 (D. Md. 2011) 15

18 *Pacific Gas & Electric Co. v. Public Utility Commission of California,*
 19 475 U.S. 1 (1986) 8, 25

20 *Perry Education Ass’n v. Perry Local Educators’ Ass’n,*
 21 460 U.S. 37 (1983) 12

22 *Pickup v. Brown,*
 23 740 F.3d 1208 (9th Cir. 2013)..... 14, 20

Planned Parenthood v. Casey,
 505 U.S. 833 (1992) 14

Playboy Entertainment Group., Inc.,
 529 U.S. 813 (2000) 16, 17, 21, 23

Police Department of City of Chicago v. Mosley,
 408 U.S. 92 (1972) 10

1 *R.A.V. v. City of Saint Paul*,
 2 505 U.S. 377 (1992) 10, 12

3 *Reed v. Town of Gilbert*,
 4 135 S. Ct. 2218 (2015) 11

5 *Riley v. National Federation of the Blind of North Carolina Inc.*,
 6 487 U.S. 781 (1988) 8, 10, 11, 21, 22

7 *Rosenberger v. Rectors and Visitors of University of Virginia*,
 8 515 U.S. 819 (1995) 12

9 *Simon & Schuster, Inc. v. Members of New York State*
 10 *Crime Victims Board*,
 11 502 U.S. 105 (1991) 10

12 *Sorrell v. IMS Health*,
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 15 740 F.3d 233 (2d Cir. 2014) 2, 11, 13, 15

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 17 165 F.3d 692 (9th Cir. 1999) 24

18 *Thomas v. Collins*,
 19 323 U.S. 516 (1945) 17

20 *Thompson, Secretary of Health and Human Services v. Western States*
 21 *Medical Center*
 22 535 U.S. 357 (2002) 23

23 *Turner Broadcasting System, Inc. v. F.C.C.*,
 512 U.S. 622 (1994) 12, 18

Turner Broad. System Inc. v. FCC (“Turner I”),
 512 U.S. 624 (1994) 9, 17

Turner Broad. System Inc. v. FCC (“Turner II”),
 520 U.S. 180 (1997) 17

United States v. Playboy Entertainment Group, Inc.,
 529 U.S. 803 (2000) 16

1 *West Virginia State Board of Education v. Barnette*,
2 319 U.S. 624 (1943) 8

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4 430 U.S. 705 (1977) 8

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6 **Other Authorities:**
7

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15 Public Law Research Institute UC Hastings College of the Law,
16 available at [https://www.heartbeatinternational.org/pdf/CrisisCenter](https://www.heartbeatinternational.org/pdf/CrisisCenterRegulation_Final.pdf)
17 [Regulation_Final.pdf](https://www.heartbeatinternational.org/pdf/CrisisCenterRegulation_Final.pdf) (last accessed Oct. 6, 2015) 19

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1 negative and up front message declaring that they do not have a licensed medical
2 provider on staff. The Act imposes this disclosure even though such centers
3 engage in no medical practices.

4 Both kinds of disclosures have been subjected to strict scrutiny and struck
5 down by courts around the country. *See, e.g., The Evergreen Ass'n v. City of New*
6 *York*, 740 F.3d 233 (2d Cir. 2014) (striking down the requirement that centers tell
7 women they do not do abortions); *Centro Tepeyac v. Montgomery Co.*, 5 F. Supp.
8 3d. 745 (D. Md. 2014) (striking down requirement that centers post signs saying
9 they are not medical providers). The Act violates the First Amendment right to
10 free speech because it imposes government-required speech into the heart of an
11 ideological non-profit message. The Act also violates Plaintiffs' rights under the
12 First Amendment right to free exercise of religion.¹ Preliminary injunctive relief
13 is needed prior to the Act's effective date of January 1, 2015, to prevent the
14 irreparable harm that will immediately ensue against Plaintiffs' free speech and
15 exercise rights on that date.

16 **FACTUAL BACKGROUND**

17 Plaintiffs are two non-profit pro-life pregnancy centers in San Diego
18 County, PCC and Fallbrook, and a national network of similar centers, NIFLA.
19 Verified Complaint (hereinafter "VC") ¶¶ 2, 4–5. Together they seek to provide
20 help and pro-life information to women in unplanned pregnancies so that they

21 ¹ Plaintiffs' Complaint alleges other federal and state constitutional and statutory
22 violations. Verified Complaint ¶ 170–79; 193–217. Due to the strength of
23 Plaintiffs' First Amendment claims, this motion focuses on the free speech and
free exercise claims only.

1 will be supported in choosing to give birth, and practical medical or non-medical
2 support free of charge in support of Plaintiffs' pro-life viewpoint. VC ¶ 2.

3 NIFLA is a non-profit membership organization comprised of a network of
4 both licensed medical as well as unlicensed non-medical centers providing pro-
5 life information and services to women in unplanned pregnancies. *Id.* at ¶ 41. It
6 has 111 members in the state of California that are regulated by the Act. *Id.* at
7 ¶ 18. NIFLA, PCC and Fallbrook are incorporated as religious organizations and
8 pursue their activities pursuant to those religious beliefs. *Id.* at ¶¶ 36, 40, 42. Most
9 of NIFLA's California members are likewise religious. *Id.* at ¶ 48.

10 PCC provides pregnancy-related licensed medical as well as non-medical
11 information and services without charge, and in furtherance of its religious
12 beliefs. *Id.* at ¶ 21, 32, 36. PCC is licensed by the California Department of Public
13 Health as a free community clinic, and is a licensed clinical laboratory. *Id.* at ¶ 30.
14 Medical services provided by PCC include: urine pregnancy testing, ultrasound
15 examinations, medical referrals, prenatal vitamins, information on STDs,
16 information on natural family planning, health provider consultation, and other
17 clinical services. *Id.* at ¶ 33. Non-medical services provided by PCC include: peer
18 counseling and education, emotional support, maternity clothes, baby supplies,
19 support groups, and healthy family support. *Id.* at ¶ 35.

20 Fallbrook is a religious not-for-profit corporation that provides non-medical
21 pregnancy-related information and services without charge, and in furtherance of
22 its religious beliefs. *Id.* at ¶ 22, 40. Fallbrook provides free pregnancy test kits
23 that women administer and diagnose themselves, educational programs, resources

1 and community referrals, maternity clothes, and baby items. *Id.* at ¶ 38. Fallbrook
2 contracts with a separate organization that is a licensed medical provider of
3 ultrasound services; Fallbrook refers women to that provider’s separate mobile
4 facility located nearby. *Id.* at ¶ 39.

5 The Act requires licensed medical pregnancy centers such as PCC and
6 NIFLA’s licensed California members to provide a notice to all clients stating
7 that:

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

13 Exh. 1 at 3. A “licensed covered facility” is defined as a:

14 [F]acility licensed under Section 1204 or an intermittent clinic
15 operating under a primary care clinic pursuant to subdivision (h) of
16 Section 1206, whose primary purposes is providing family planning
17 or pregnancy-related services, and that satisfies two or more of the
18 following: (1) The facility offers obstetric ultrasounds, obstetric
19 sonograms, or prenatal care to pregnant women. (2) The facility
20 provides, or offers counseling about, contraception or contraceptive
21 methods. (3) The facility offers pregnancy testing or pregnancy
22 diagnosis. (4) The facility advertises or solicits patrons with offers to
23 provide prenatal sonography, pregnancy test, or pregnancy options
counseling. (5) The facility offers abortion services. (6) The facility
has staff or volunteers who collect health information from clients.

21 Exh. A at 2–3. This part of the Act contains two exemptions: “(1) A clinic
22 directly conducted, maintained, or operated by the United States or any of its
23 departments, officers, or agencies,” and “(2) A licensed primary care clinic that is

1 enrolled as a Medi-Cal provider and a provider in the Family Planning, Access,
2 Care, and Treatment Program.” *Id.* at 3. Upon information and belief, the second
3 exemption effectively exempts abortion clinics from the Act’s requirements, but
4 does not generally apply to pro-life pregnancy centers such as Plaintiffs.

5 All licensed covered facilities must post the required disclosure in one of
6 the following ways:

7 (A) A public notice posted in a conspicuous place where individuals
8 wait that may be easily read by those seeking services from the
9 facility. The notice shall be at least 8.5 inches by 11 inches and
written in no less than 22-point type.

10 (B) A printed notice distributed to all clients in no less than 14-point
type.

11 (C) A digital notice distributed to all clients that can be read at the
12 time of check-in or arrival, in the same point type as other digital
13 disclosures. A printed notice as described in subparagraph (B) shall
14 be available for all clients who cannot or do not wish to receive the
information in a digital format.

15 Exh. A at 3–4.

16 The Act requires unlicensed non-medical pregnancy centers, such as
17 Fallbrook and similar NIFLA members, to post a notice to all clients that “the
18 facility is not licensed as a medical facility by the State of California and has no
19 licensed medical provider who provides or directly supervises the provision of
20 services.” Exh. A at 4. The Act defines “unlicensed covered facility” as:

21 [A] facility that is not licensed by the State of California and does
22 not have a licensed medical provider on staff or under contract who
23 provides or directly supervises the provision of all of the services,
whose primary purpose is providing pregnancy-related services, and

1 that satisfies two or more of the following: (1) The facility offers
2 obstetric ultrasounds, obstetric sonograms, or prenatal care to
3 pregnant women. (2) The facility offers pregnancy testing or
4 diagnosis. (3) The Facility advertises or solicits patrons with offers
5 to provide prenatal sonography, pregnancy tests, or pregnancy
6 options counseling. (4) The facility has staff or volunteers who
7 collect health information from clients.

8 *Id.* at 3. The required notice for unlicensed facilities must be “disseminate[d] to
9 clients on site and in any print and digital advertising material[] including Internet
10 Web sites.” *Id.* at 4.

11 Covered facilities that violate the law “are liable for a civil penalty of five
12 hundred dollars (\$500) for a first offense and one thousand dollars (\$1,000) for
13 each subsequent offense,” enforceable by the Attorney General, city attorney, or
14 county counsel. *Id.* at 1, 4. The Act became law by Defendant Governor Brown’s
15 signature on October 9, 2015. It goes into effect against the Plaintiffs on January
16 1, 2015. *See* CAL. CONST. Art. IV, Sec. 8.

17 The Act imposes an imminent and irreparable harm on Plaintiff centers. It
18 subjects them to an intolerable choice: comply with the Act’s disclosures in
19 contradiction of their freedom of speech and religion; refuse to comply and be
20 subject to the Act’s penalties which would cripple them as small non-profit
21 organizations, or cease their expressive activities altogether. To prevent this
22 irreparable harm Plaintiffs need the Court to issue injunctive before January 1.
23 *See, e.g., Evergreen Ass’n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 211
(S.D.N.Y. July 13, 2011) (granting motion “to preliminarily enjoin Local Law 17
from taking effect on July 14, 2011).

ARGUMENT

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2 In considering Plaintiffs’ request for a preliminary injunction, the Court
3 reviews whether Plaintiffs are “‘likely to succeed on the merits, ... likely to suffer
4 irreparable harm in the absence of preliminary relief,’ whether ‘the balance of
5 equities tips in [their favor],’ and whether ‘an injunction is in the public
6 interest.’” *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir.
7 2015) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th
8 Cir. 2011)). “Serious questions going to the merits and hardship balance that tips
9 sharply towards [plaintiffs] can [also] support issuance of a[] [preliminary]
10 injunction, so long as there is a likelihood of irreparable injury and the injunction
11 is in the public interest.” *Id.* (quoting *Cottrell*, 632 F.3d at 1132). Plaintiffs satisfy
12 each of these requirements, and are therefore entitled to injunctive relief.

13 NIFLA asks the Court to grant the injunction with respect to all of its
14 California members, rather than requiring 111 of them to be named as co-
15 plaintiffs. This is appropriate under *New York State Club Ass’n v. City of New*
16 *York*, 487 U.S. 1, 9 (1988) because NIFLA’s members “would otherwise have
17 standing to sue in their own right”; NIFLA’s asserted interests in protecting its
18 members’ ability to advocate their message consistent with their pro-life and
19 religious beliefs free from compelled government speech “are germane to
20 [NIFLA’s] purpose” of supporting its members and, indeed, are at the heart of
21 NIFLA’s purpose; and “neither the claim asserted nor the relief requested requires
22 the participation of individual members in the lawsuit” since NIFLA’s members
23 are subject to the Act in ways parallel to PCC and Fallbrook and the relief they

1 request raises pure questions of law applicable to centers in general.

2 **I. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF**
3 **SUCCESS ON THE MERITS ON THEIR FIRST AMENDMENT**
4 **FREE SPEECH CLAIM.**

5 **A. The Act impermissibly requires Plaintiffs to engage in compelled**
6 **speech.**

7 The Supreme Court has explained that the “right to speak and the right to
8 refrain from speaking are complementary components of the broader concept of
9 ‘individual freedom of mind.’” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)
10 (citing *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).
11 Accordingly, the Court has emphasized that the First Amendment protects not
12 only the right of a speaker to choose what to say, but also the right of the speaker
13 “to decide what not to say.” *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of*
14 *Bos.*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co. v. Pub. Util.*
15 *Comm’n of Cal.*, 475 U.S. 1, 16 (1986)) (internal quotation marks omitted). In
16 this manner, the First Amendment “presume[s] that speakers, not the government,
17 know best both what they want to say and how to say it.” *Riley v. Nat’l Fed. of*
18 *the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). Therefore, the government
19 “may not substitute its judgment as to how best to speak for that of speakers and
20 listeners; free and robust debate cannot thrive if directed by the government.” *Id.*
21 at 791. The First Amendment protects Plaintiffs from being compelled to engage
22 in government-sanctioned speech.

23 “In the context of protected speech,” any “difference between compelled
speech and compelled silence . . . is without constitutional significance.” *Id.* at

1 796. “Laws that compel speakers to utter or distribute speech bearing a particular
2 message are subject to the same rigorous scrutiny” as those “that suppress,
3 disadvantage, or impose differential burdens upon speech because of its content.”
4 *Turner Broad. Sys. Inc. v. FCC* (“Turner I”), 512 U.S. 624, 642 (1994).

5 Here, the Act imposes compelled government messages on certain non-
6 profit pro-life organizations that provide information and free help to pregnant
7 women to empower them to choose not to have abortions. It forces Plaintiffs to
8 post certain disclosures in violation of their First Amendment right to free speech.
9 It requires licensed medical centers, such as Plaintiff PCC and similar NIFLA
10 members, to post a disclosure referring women and making arrangements for
11 them to receive referrals for abortion. The Act requires unlicensed non-medical
12 pregnancy centers, such as Plaintiff Fallbrook and similar NIFLA members, to
13 place in all “digital” advertisements and post within their facilities disclosures
14 telling women they have no medical licenses, even though those centers need no
15 medical licenses since they are not offering medical services (and don’t pretend
16 to).

17 In compelling this speech, the Act interferes with the heart of Plaintiffs’
18 freedom of speech. Forcing licensed Plaintiff centers to tell women where and
19 how to arrange an abortion makes them promote the very opposite of their
20 message. Unlicensed centers, in turn, must clutter or preclude their advertising
21 altogether due to posting the long and prominent disclaimers. Those disclaimers,
22 both in ads and at their facilities, force the Plaintiffs to begin their expressive
23 relationship with a client with an immediate negative message that Plaintiffs

1 would not express in that way at that time. The message strongly suggests that
2 Plaintiffs are unqualified to provide their information because they are not
3 licensed physicians. This is false, however, because the unlicensed Plaintiff
4 centers need no license since they provide no medical services. They are fully
5 competent to share their viewpoint and personal help to women to aid them in
6 choosing better options than abortion. The Supreme Court recognized in *Riley*
7 that forcing a speaker to begin his relationship with an unwanted disclosure
8 imposes a severe harm to speech rights because it may end the communicative
9 relationship before it begins. 487 U.S. at 799–800.

10 For these reasons, the Act by definition impacts First Amendment interests.

11 **B. The Act Is Subject to Strict Scrutiny as Content - and Viewpoint-**
12 **Based Regulation.**

13 The Act is subject to strict scrutiny for several reasons. First, it regulates
14 speech on the basis of content and viewpoint. “The First Amendment means that
15 government has no power to restrict expression because of its message, its
16 ideas, its subject matter, or its content.” *Police Dept. of City of Chi. v.*
17 *Mosley*, 408 U.S. 92, 95 (1972); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377,
18 382 (1992) (“Content-based regulations are presumptively invalid.”); *Simon &*
19 *Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116
20 (1991) (invalidating statute that “plainly imposes a financial disincentive only on
21 speech of a particular content”). Content-based burdens on speech are reviewed
22 with the same rigorous scrutiny as content-based bans on certain speech. *Sorrell*
23 *v. IMS Health*, 131 S. Ct. 2653, 2664 (2011).

1 The Act is expressly content based due to the simple fact that it imposes a
2 disclosure of specific content. Plaintiffs must say what the Act says they must
3 say. That by definition prescribes speech of a specific content. It is subject to
4 strict scrutiny. *See Riley*, 487 U.S. at 791 (requiring charitable solicitors to engage
5 in disclosures triggers “our test for fully protected expression”); *see also*
6 *Evergreen*, 740 F.3d at 249 (“mandating the manner in which the discussion of
7 these issues begins” constitutes a content-based regulation). Indeed, the California
8 Assembly Health Committee itself noted that “[t]he Committee’s analysis of the
9 free speech issues indicates that the licensed facility notice is content-based...”
10 Bill analysis, *available at* http://www.leginfo.ca.gov/pub/1516/bill/asn/ab_075
11 [10800/ab_775_cfa_20150425_202527_asm_comm.html](http://www.leginfo.ca.gov/pub/1516/bill/asn/ab_075_10800/ab_775_cfa_20150425_202527_asm_comm.html) (last accessed Oct. 6,
12 2015); *see also id.* (same conclusion for unlicensed facilities).

13 The Act is also content based because its application turns on whether
14 centers discuss one particular issue: pregnancy. “Government regulation of
15 speech is content based if a law applies to particular speech because of the topic
16 discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S. Ct.
17 2218, 2227 (2015). Here, the Act’s terms explicitly depend on whether a facility
18 offers pregnancy-related speech and services, but not primarily information and
19 services focused on any other issue. *See* Exh. A at 2 (regulating licensed medical
20 centers only if their “primary purpose is providing family planning or pregnancy-
21 related services,” including, among other things, “counseling about”
22 contraceptive methods); *id.* at 3 (regulating unlicensed centers only if their
23 “primary purpose is providing pregnancy-related services” including, among

1 “pregnancy options counseling”). If Plaintiffs wanted to talk about and offer free
2 help on any other issue, such as drug use, diet, or AIDS, the content of that
3 purpose would not trigger the Act’s compelled disclosures. Consequently, the Act
4 on its face distinguishes Plaintiffs’ speech and activity based on the basis of the
5 ideas they express, and therefore it is content-based. *See Turner Broadcasting*
6 *System, Inc. v. FCC*, 512 U.S. 622, 643 (1994).

7 Moreover, the Act is subject to strict scrutiny for discriminating on the
8 basis of viewpoint. Viewpoint discrimination is “an egregious form of content
9 discrimination” and a “blatant” First Amendment violation. *Rosenberger v.*
10 *Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Such viewpoint-
11 based speech restrictions, i.e., those “based on hostility—or favoritism—towards
12 the underlying message expressed,” are impermissible under the First
13 Amendment. *R.A.V.*, 505 U.S. at 386; *see also Perry Educ. Ass’n v. Perry Local*
14 *Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (holding that the government cannot
15 “suppress expression merely because public officials oppose the speaker’s
16 view”).

17 The Act is viewpoint-based because it requires licensed facilities to
18 promote abortion. The Supreme Court has made clear that “[t]he government
19 must abstain from regulating speech when the specific motivating ideology or the
20 opinion or perspective of the speaker is the rationale for the restriction.”
21 *Rosenberger*, 515 U.S. at 829. The Act forces licensed Plaintiff facilities, who are
22 pro-life expressive organizations, to give women information about where they
23 can get free abortions. This steps into the ideologically charged abortion debate

1 and uses the government to force pro-life groups to promote abortion. But the
2 government does not force abortion facilities to tell women where they can get
3 free help to not choose abortion. This is a blatant viewpoint motivated
4 intervention into the abortion debate. As the Second Circuit noted in striking
5 down mandatory disclosures explicitly mentioning abortion in *Evergreen*, “the
6 context is a public debate over the morality and efficacy of contraception and
7 abortion, for which many of the facilities regulated by [the law] provide
8 alternatives.” 740 F.3d at 249.

9 The Act is also viewpoint-based because it exempts facilities that offer
10 certain family planning and Medi-Cal services. *See* Exh. A at 3. Those services
11 inherently favor the abortion rights side of the debate. Medi-Cal covers abortion
12 and considers it part and parcel with family planning.² For this reason, Plaintiff
13 pro-life centers are not part of these programs, but abortion facilities are. The Act
14 steps into the highly politically charged abortion debate, and then exempts centers
15 that do abortions and comprehensive “family planning” from its regulation of pro-
16 life centers. This is impermissible viewpoint discrimination.

17 No lesser doctrines of scrutiny apply to save the Act’s regulation of speech
18 from heightened scrutiny. “Commercial speech” does not apply to Plaintiffs. It is
19 defined as speech which does no more than “propose a commercial transaction,”
20 or that “relates solely to the economic interests of the speaker and its audience.”

21
22 ² *See* Medi-Cal, “Abortions,” available at https://files.medical.ca.gov/pubsdoco/publications/masters-mtp/part2/abort_m00o03.doc (last
23 accessed Oct. 12, 2015).

1 *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469 (1989); *Cent.*
2 *Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–62 (1980).
3 Plaintiffs are non-profit organizations that offer their information and services
4 entirely free of charge. They have no economic interests in their speech or free
5 services, and their expressive activity does much more than merely propose
6 commercial transactions.

7 Likewise the Act does not receive lesser scrutiny as “professional
8 conduct.” In *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013), the court
9 deemed a ban on a certain kind of psychological treatment to be subject to lower
10 scrutiny because it constituted a regulation of conduct not speech. Here the Act
11 does not ban conduct, it explicitly compels certain speech, and consequently is
12 not subject to the lesser scrutiny used in *Pickup*. Moreover, *Pickup* observed that
13 licensed medical professionals are entitled to full First Amendment protection
14 when they are engaged on important public issues. *Id.* at 1227. The Act’s
15 disclosure—telling women where to get free abortions—is the epitome of a public
16 issue. The Act does not impose that speech as a requisite to obtaining consent for
17 surgery, such as occurred in *Planned Parenthood v. Casey*, 505 U.S. 833, 884
18 (1992), where telling a woman the risks of abortion could be required before she
19 undergoes an abortion. Here the Act forces the licensed Plaintiffs to speak in
20 favor of abortion because they *are not* performing an abortion. Then the Act
21 refuses to impose that same disclosure on family planning and Medi-Cal program
22 participants, *i.e.*, abortion providers. This is the opposite situation as *Casey*. Nor
23 is the Act requiring women to know a fact about ultrasounds that is requisite to

1 Plaintiffs performing an ultrasound (such as medical studies about the potential
2 risks of ultrasounds). The Act is instead an attempt to tell pro-life doctors that if
3 they want to give women free counseling, help or ultrasounds so they might not
4 choose abortion, they must promote abortion. That mandate is subject to strict
5 scrutiny under the First Amendment.

6 **C. The Act fails strict scrutiny.**

7 ***1. Most pregnancy center disclosure laws have been enjoined.***

8 “Serious questions going to the merits and hardship balance [] tips sharply
9 towards [plaintiffs]” in this case. *Angelotti*, 791 F.3d at 1081. This is seen by the
10 fact that courts considering laws mandating disclosures by pro-life pregnancy
11 centers have all resulted in injunctions against all or part of the disclosures.

12 In *Centro Tepeyac*, 5 F. Supp. 3d. at 769–70, the court granted summary
13 judgment and permanent injunctive relief against a disclosure requiring a center
14 to tell women they are not licensed medical providers and that the government
15 recommends women seek other care. In *Evergreen*, 740 F.3d at 250–51, the
16 Second Circuit struck down disclosures requiring centers to speak about abortion
17 and tell women that the government favors services elsewhere. In *Austin Lifecare,*
18 *Inc. v. City of Austin*, No. 1:11-cv-00875-LY (W.D. Tex. June 23, 2014), the
19 court issued a permanent injunction against a disclosure whether centers offer
20 licensed medical services. And in *O’Brien v. Mayor & City Council of Baltimore*,
21 768 F. Supp. 2d 804, 817 (D. Md. 2011), the court granted summary judgment
22 and permanent injunctive relief against disclosures discussing abortion and birth
23 control. The Fourth Circuit reversed *O’Brien* not on the merits but to remand for

1 discovery which had not been allowed before summary judgment, while the
2 circuit simultaneously affirmed the preliminary injunction awarded in *Centro*
3 *Tepeyac* because that District Court had left the case open for discovery. *See*
4 *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of*
5 *Baltimore*, 721 F.3d 264 (4th Cir. 2013), *Centro Tepeyac v. Montgomery Cnty.*,
6 722 F.3d 184, 193 (4th Cir. 2013). The injunction in *Centro Tepeyac* became a
7 permanent injunction striking the entire set of disclosures in that case under strict
8 scrutiny. 5 F. Supp. 3d. at 769–70.

9 **2. *The Act does not serve a compelling interest.***

10 Strict scrutiny review under the First Amendment requires that the Act “be
11 narrowly tailored to promote a compelling government interest.” *United States v.*
12 *Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000). “A statute is narrowly
13 tailored if it targets and eliminates no more than the exact source of the evil it
14 seeks to remedy” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal citations
15 omitted). “If a less restrictive alternative would serve the Government’s purpose,
16 the legislature must use that alternative.” *Playboy Entm’t Grp., Inc.*, 529 U.S. at
17 813 (2000). The State’s burden to “demonstrate a compelling interest and show
18 that it has adopted the least restrictive means of achieving that interest is the most
19 demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S.
20 507, 534 (1997). Viewpoint and content-based speech restrictions are presumed
21 unconstitutional. *Playboy*, 529 U.S. at 817–18.

22 The compelling interest test can only be satisfied when the law at issue
23 serves interests “of the highest order.” *Church of the Lukumi Babalu Aye, Inc. v.*

1 *City of Hiialeah*, 508 U.S. 520, 546 (1993). The determination of whether an
2 asserted interest meets this test “is not to be made in the abstract” but rather “in
3 the circumstances of this case” by looking at the particular “aspect” of the interest
4 as “addressed by the law at issue.” *See Cal. Democratic Party v. Jones*, 530 U.S.
5 567, 584 (2000); *see also Lukumi*, 508 U.S. at 546 (rejecting assertion that
6 protecting public health was compelling interest “in the context of these
7 ordinances”). “Only the gravest abuses, endangering paramount interests, give
8 occasion for permissible limitation” of the fundamental right to free speech.
9 *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The State “must demonstrate that
10 the recited harms are real, not merely conjectural, and that the regulation will in
11 fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 664;
12 *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 543
13 (1980) (“Mere speculation of harm does not constitute a compelling state
14 interest.”).

15 The compelling interest test cannot be satisfied where, as here, the
16 government “fails to enact feasible measures to restrict other conduct producing
17 substantial harm or alleged harm of the same sort.” *Lukumi*, 508 U.S. at 546–47.
18 Rather, “a law cannot be regarded as protecting an interest ‘of the highest order’
19 when it leaves appreciable damage to that supposedly vital interest unprohibited.”
20 *Id.* And the government “must present more than anecdote and supposition” to
21 support a speech regulation, but instead must prove the existence of the alleged
22 concern underlying the law based on substantial evidence. *Playboy*, 529 U.S. at
23 822; *Turner Broad. Sys., Inc. v. FCC (“Turner II”)*, 520 U.S. 180, 195 (1997).

1 The Act fails this test. First, neither the Act nor the Defendants can identify
2 any compelling interest that would support the law. There is no specific evidence,
3 much less compelling proof, that the Plaintiffs are engaged in a wrongdoing.
4 Indeed, the Act’s disclosures contain no requirement that a center has engaged in
5 wrongdoing before they are subject to the disclosures. The Act is a quintessential
6 prophylactic measure. Furthermore, the government has no evidence of actual
7 harm resulting from pro-life pregnancy centers as a result of failing to recite the
8 Act’s disclosures. To meet the compelling interest test, the Act would need to
9 show that actual women are being harmed by not receiving these disclosures from
10 Plaintiffs. No such evidence exists, much less evidence of harm of “the highest
11 order.”

12 “When the Government defends a regulation on speech as a means to
13 redress past harms or prevent anticipated harms, it must do more than simply
14 posit the existence of the disease sought to be cured.” *Turner Broadcasting*
15 *System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994). Rather, Defendants “must
16 demonstrate that the recited harms are real, not merely conjectural, and that the
17 regulation will in fact alleviate these harms in a direct and material way.” *Id.*
18 Throughout the legislative history of the Act, there was no quantifiable evidence
19 presented of women suffering actual harm from the activities of pro-life
20 pregnancy centers, licensed or unlicensed. Not even the findings contained in the
21 Act allege any harm to women justifying restrictions on providers of pregnancy-
22 related services. *See* Exh. A at 1–2. This is insufficient to justify a sweeping
23 restriction on all pregnancy centers in California.

1 The only evidence underlying the Act was a biased, unscientific “report”
2 supplied by a partisan organization in the political debate about abortion: NARAL
3 Pro-Choice California (the pro-abortion rights organization which co-sponsored
4 the bill). *See* NARAL Pro-Choice California, Unmasking Fake Clinics, *available*
5 *at* <http://www.prochoiceamerica.org/ca-cpcs/full-report-un.html> (last accessed
6 Oct. 7, 2015) (hereinafter “NARAL Report”), as well as a similar “report”
7 released by the University of California, Hastings College of Law on strategies to
8 restrict pro-life pregnancy centers.³ Neither of these reports are scientific or come
9 close to constituting reliable evidence of a compelling nature. The UC Hastings
10 report only discussed methods of restricting pregnancy help organizations—it did
11 not point to any harms allegedly caused by such organizations.

12 The NARAL report cited no sources for its accusation that pregnancy
13 centers in California “fraudulently present themselves as medical offices,”
14 “trained to lie,” or “only have one agenda: stop any woman from accessing
15 abortion care.” NARAL Report at 1–2. None of these baseless allegations are
16 demonstrated regarding Plaintiffs themselves. And none of those allegations are
17 elements of the Act that must be met before the disclosures apply. The only
18 citation contained in the entire report was to a NARAL Pro-Choice America
19 publication. *See id.* Nowhere did this report even allege actual harm to any
20 woman, but merely repeated the observations of its pro-abortion rights

21 ³ *See* Pregnancy Resource Centers: Ensuring Access and Accuracy of
22 Information, Public Law Research Institute UC Hastings College of the Law,
23 *available at* https://www.heartbeatinternational.org/pdf/CrisisCenterRegulation_Final.pdf (last accessed Oct. 6, 2015).

1 “investigator.” This sparse and extremely biased report is insufficient to support
2 legislation severely restricting the free speech rights of pro-life pregnancy centers

3 The government can offer no evidence that the compelled speech
4 requirement is “actually necessary” to a “solution” for this problem about which
5 it has no evidence. *See Brown*, 131 S. Ct. at 2738. Without any evidence of actual
6 harm, or even alleged harm, by actual women who visited the centers regulated
7 under the Act, the State of California cannot show that the Act is “actually
8 necessary” to protect women’s health.

9 Moreover, California has not sought to restrict the activities of other
10 organizations providing pregnancy-related services. It exempts groups that
11 participate in certain family planning or Medi-Cal programs that include abortion,
12 as abortion facilities do. It also defines licensed and unlicensed centers in a
13 gerrymandered way to focus on the service model of pro-life facilities while not,
14 for example, applying to everyone who performs an obstetric ultrasound. This
15 leaves “appreciable damage to th[e government’s] supposedly vital interest
16 unprohibited.” *Lukumi*, 508 U.S. at 546–47. It also betrays the Act’s viewpoint
17 based nature because disclosures run only in favor of abortion but not in favor of
18 alternatives, *i.e.*, no licensed center is forced to tell women about *alternatives to*
19 an abortion, just about *getting an* abortion. The Act’s express exemption for all
20 providers of certain family planning services and Medi-Cal effectively exempts
21 abortion providers from the Act even though they primarily provide pregnancy-
22 related services and would otherwise be regulated. The government therefore
23 exempts an entire subset of pregnancy provider’s from the Act which purports to

1 serve its interests by regulating providers of pregnancy-related services.

2 ***3. The Act is not narrowly tailored to California's alleged***
3 ***interests.***

4 The Act additionally fails strict scrutiny because the Act is not narrowly
5 tailored nor is it the least restrictive means of achieving any compelling interest.
6 The State bears the burden of demonstrating that there are no less restrictive
7 alternatives that would further its alleged interests. *See Playboy*, 529 U.S. at 813.
8 “A statute is narrowly tailored if it targets and eliminates no more than the exact
9 source of the ‘evil’ it seeks to remedy.” *Frisby*, 487 U.S. at 485.

10 First, the State has completely failed to pursue a wide range of less
11 restrictive alternatives, because it has simply never chosen to send the allegedly
12 compelling messages mandated by the Act with its own voice, its own funds, its
13 own walls, or its own employees. As the Supreme Court has explained, “[b]road
14 prophylactic rules in the area of free expression are suspect. Precision of
15 regulation must be the touchstone in an area so closely touching our most
16 precious freedoms.” *Riley*, 487 U.S. at 801 (internal quotations and citations
17 omitted). “In contrast to the prophylactic, imprecise, and unduly burdensome”
18 Act adopted by the California Legislature, “more benign and narrowly tailored
19 options are available.” *See id.* at 800. In *Riley*, the law at issue compelled
20 professional fundraisers to disclose certain information at the beginning of a call,
21 and the government asserted an interest in ensuring that donors are made aware of
22 certain financial information concerning professional fundraisers. Rejecting the
23 State’s attempt to require even professional fundraisers to provide this

1 information to donors over the telephone, the Court explained that the
2 government can spread this message itself: “[f]or example, as a general rule, the
3 State may itself publish the detailed [information it wants the public to know].
4 This procedure would communicate the desired information to the public without
5 burdening the speaker with unwanted speech during the course of a solicitation.”
6 *Riley*, 487 U.S. at 800.

7 Nothing prevents the Defendants from publishing the information they seek
8 to publicize about pregnancy centers. But they have instead chosen to impose
9 speech on private ideological speakers. In this regard, the disclosure for licensed
10 centers, which lists the services available from the government and requires
11 referral for such services, is particularly troublesome. As noted in *Evergreen*,
12 there is “concern[] that th[e] disclosure[s] require pregnancy services centers to
13 advertise on behalf of the government.” 740 F.3d at 250. Requiring licensed
14 medical centers to speak about government services “affirmatively espouse[s] the
15 government’s position on a contested public issue” and “deprives Plaintiffs of
16 their right to communicate freely on matters of public concern.” *Id.* at 251
17 (internal citations omitted). The government has the ability to communicate these
18 allegedly compelling messages, but has refused to do so. The Act is therefore not
19 narrowly tailored.

20 The Act also fails the narrow tailoring inquiry because it does not “target[]
21 and eliminate[] no more than the exact source of the ‘evil’ it seeks to remedy.”
22 *Frisby*, 487 U.S. at 485. The Act is a prophylactic speech restriction, which
23 applies to all pregnancy centers across the board, without reference to whether

1 such a center has engaged in, or even been accused of, wrongdoing. There need
2 not be even an allegation of misleading tactics, delivery of misinformation, or any
3 misdeeds before the Act’s restrictions take effect. The Act seeks to restrict speech
4 without specifically targeting any alleged wrongdoing, and therefore fails narrow
5 tailoring.

6 Moreover, the Supreme Court has explained that “[i]f the First Amendment
7 means anything, it means that regulation of speech *must* be a last-not first resort.
8 Yet here it seems to have been the first strategy the Government thought to try.”
9 *Thompson. v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The state’s use of
10 compelled speech as “the first strategy” it thought to try, and its failure to pursue
11 (or apparently even consider) the other available options, ends the analysis. So
12 long as there is another mechanism for the government to convey its message, the
13 Act cannot survive strict scrutiny. *Playboy*, 529 U.S. at 813 (“If a less restrictive
14 alternative would serve the Government’s purpose, the legislature must use that
15 alternative.”) For these reasons, the Act fails under the Free Speech Clause.

16 **II. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF**
17 **SUCCESS ON THE MERITS OF THEIR FREE EXERCISE**
18 **CLAIM.**

19 The First Amendment’s Free Exercise of Religion Clause also requires the
20 government to satisfy strict scrutiny (which, as discussed above, it cannot do)
21 because the Act burdens an organization’s exercise of religion, and it does so in
22 conjunction with exercising its rights of speech. Under *Lukumi*, 508 U.S. at 531,
23 “[a] law burdening religious practice that is not . . . of general application must
undergo” strict scrutiny. The Act is subject to strict scrutiny because it is not

1 generally applicable. It exempts Medi-Cal and Family PACT providers from its
2 restrictions, as well as federal healthcare facilities. It also fails to apply to many
3 practitioners that offer ultrasounds or other pregnancy services, because of the
4 multi-factor way in which the definition of a licensed or unlicensed facility is
5 gerrymandered to focus on the actual practice of pro-life pregnancy centers. This
6 leaves many pregnant women without the disclosures.

7 Likewise under *Employment Division v. Smith*, 494 U.S. 872 (1990), “strict
8 scrutiny is imposed in ‘hybrid situation[s]’ in which a law ‘involve[s] not the Free
9 Exercise Clause alone, but the Free Exercise Clause in conjunction with other
10 constitutional protections,” exempting such “hybrid rights” from *Smith’s* general
11 “rational basis test.” *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir 1999) (citing
12 *Smith*, 494 U.S. at 881–82). In order to assert a religious exercise claim in
13 conjunction with free speech, “a free exercise plaintiff must make out a ‘colorable
14 claim’ that a companion right has been violated—that is, a ‘fair probability’ or a
15 ‘likelihood,’ but not a certitude, of success on the merits.” *Id.* (citing *Thomas v.*
16 *Anchorage Equal Rights Commission*, 165 F.3d 692, 703, 707 (9th Cir. 1999). As
17 discussed in detail above, the Plaintiffs have established that the Act violates
18 Plaintiffs’ First Amendment right to freedom of speech. At minimum, in light of
19 other courts enjoining similar laws, this requires strict scrutiny as a hybrid claim
20 under *Miller*, and Plaintiffs have a likelihood of success under strict scrutiny.

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Respectfully submitted on this 21st day of October, 2015

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**Application for Admission Pro Hac Vice
forthcoming*

*** Notice of Appearance forthcoming*

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2015, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants:

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