No. 16-55249

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, a Virginia corporation; PREGNANCY CARE CENTER, D/B/A PREGNANCY CARE CLINIC, a California corporation; and FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation,
Plaintiffs–Appellants

v.

KAMALA HARRIS, in her official capacity as Attorney General for the State of California, THOMAS MONTGOMERY, in his official capacity as County Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; and EDMUND D. BROWN, JR., in his official capacity as Governor of the State of California,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:15-cv-02277-JAH-DHB – Hon. John A. Houston

BRIEF FOR APPELLANTS

Matthew S. Bowman
David A. Cortman
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
mbowman@ADFlegal.org
dcortman@ADFlegal.org

Dean R. Broyles
California Bar No. 179535
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, California 92025
(760) 747-4529
dbroyles@nclplaw.org

Kristen K. Waggoner
Kevin H. Theriot
Elissa M. Graves
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
kwaggoner@ADFlegal.org
ktheriot@ADFlegal.org
egraves@ADFlegal.org

Anne O'Connor
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930
AOConnor@nifla.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants National Institute of Family and Life Advocates, Pregnancy Care Center, and Fallbrook Pregnancy Center state that they are all non-profit corporations and that there is no parent corporation or publicly held corporation that owns 10 percent or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Other Authorities

INTRODUCTION

The State of California recently enacted a law that no other state has imposed, which forces citizens to speak contrary to their own views on a controversial public issue. The "Reproductive FACT Act" ("the Act") compels non-commercial pro-life medical facilities to actually promote abortion when women walk in the door, even though these religiously-motivated non-profit centers exist to offer women free help to make choices other than abortion. The centers include Plaintiff-Appellants Pregnancy Care Center ("PCC") and National Institute of Family and Life Advocates' ("NIFLA") California medical members. The Act's explicit legislative purpose states it disagrees with Plaintiffs' viewpoint.

The Act also forces non-commercial pro-life organizations that provide no medical services (and so have no license) to recite extensive disclaimers on their walls and ads. These disclaimers effectively preclude any digital promotion of their information or practical help. These centers include Plaintiff Fallbrook Pregnancy Resource Center ("Fallbrook") and NIFLA's unlicensed facility members.

The State admits, and the District Court found, that the Act was passed with the stated "Purpose" of targeting pro-life "crisis pregnancy

centers," because they "aim to discourage and prevent women from seeking abortions," and they (allegedly) "misinform" women. EOR 11; 76; 86. This is an explicitly viewpoint-discriminatory purpose—disagreeing with pro-life speech and information—being used to force citizens to speak the State's own message.

The District Court denied Plaintiffs' motion for preliminary injunctive relief against this novel statute. In doing so it committed multiple legal errors, holding:

- that "the statute is not a broad, content-based restriction of speech," much less is it viewpoint discriminatory, even though it compels speech containing specific content and its purpose explicitly disagrees with pro-life centers' views and information about abortion, EOR 14;

- that the Act's compelled words are not "speech" at all but "conduct" and "subject to rational basis review," EOR 12;

- that "if speech is implicated" for pro-life medical facilities, "the Act regulates professional speech" and survives "intermediate scrutiny," EOR 13–14, even though this Court has counseled that professional speech is often protected by strict scrutiny, *see Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002), *and Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014) ("*Pickup*");

- that if strict scrutiny applies to speech imposed on unlicensed pro-life centers, the statute passes strict scrutiny because the state deems its goal compelling enough to coerce citizens to speak for the State, EOR 15;

- that despite the Act's discriminatory purpose of targeting pro-life centers it is "neutral" and "generally applicable" under the Free Exercise of Religion Clause, EOR 16–17 and not subject to strict scrutiny under the hybrid rights claim concerning religion and speech that this Court recognizes, see *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004);

- that even though Plaintiffs' raised "serious questions" under the preliminary injunction standard, EOR 17, Plaintiffs fail the irreparable harm, balance of harms, and public interest prongs of the test because the District Court's legal errors discussed above led it to conclude Plaintiffs would not succeed on the merits of their claims, EOR 18; and

- that even though the Act empowers the City of El Cajon Defendant-Appellee to enforce the Act against Plaintiff Pregnancy Care Center, it is not subject to Plaintiffs' request for preliminary injunctive relief even if Plaintiffs made a sufficient showing because the City did not actually enact the law. EOR 17.

This court reviews the District Court's reliance on these erroneous legal premises *de novo*, *see Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). It should reverse and remand on all these grounds.

STATEMENT OF JURISDICTION

The district court properly exercised jurisdiction over this case pursuant to 28 U.S.C. § 1331. The District Court held that "the record provides sufficient factual context to support [Plaintiffs'] position that their action is ripe for judicial review." EOR 8.

The District Court denied Plaintiffs' motion for preliminary injunction in an Order entered on February 9, 2016. EOR 1–19 ("Order"). Plaintiffs filed a timely notice of appeal on February 18, 2016. EOR 20–23. This is an appeal from an order denying a motion for preliminary injunction, and therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

I. Is the Act a content-based speech regulation because it compels Plaintiffs to recite certain words, and a viewpoint-discriminatory law because its stated purpose and justification expresses disagreement with pro-life crisis pregnancy centers that discourage abortion?

II. Does the Act's requirement that Plaintiff medical facilities recite certain disclosures constitute a regulation of speech or of mere conduct subject to rational basis review? And if it regulates speech, is it subject to strict rather than intermediate scrutiny because the speech occurs neither in a physician-patient conversation nor as part of obtaining consent for a particular procedure?

III. Can the Act's coercion of unlicensed Plaintiff centers satisfy strict scrutiny when the disclosures crowd out their non-commercial advertisements, and the government could communicate this message itself without coercing Plaintiff centers?

IV. Does the Act's express purpose of targeting pro-life centers because of disagreement with their message render it not neutral or generally applicable under the Free Exercise of Religion Clause,

and is it subject to strict scrutiny under this Court's doctrine of hybrid speech and religious exercise rights?

V. Given the District Court's finding that Plaintiffs raised "serious questions," should it have found that the likely burden on their First Amendment rights constitutes irreparable harm and weighs in favor of injunctive relief? Was the Court justified in deeming the City Attorney of El Cajon not liable merely because he was not the Act's author?

PERTINENT STATUTORY PROVISIONS

California Assembly Bill No. 775, The Reproductive FACT Act (see EOR 69-73)

Article 2.7. Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility offers pregnancy testing or pregnancy diagnosis.

(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(4) The facility has staff or volunteers who collect health information from clients.

(c) This article shall not apply to either of the following:

(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.

(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

123472.(a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

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

(2) The information shall be disclosed in one of the following ways: (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type. (B) A printed notice distributed to all clients in no less than 14-point type. (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

(3) The notice may be combined with other mandated disclosures.

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

(2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.

(3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous" means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

123473. (a) Covered facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

(1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.

(2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

(b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

STATEMENT OF THE CASE

AB 775, known as the Reproductive FACT Act ("the Act"), was signed into law on October 9, 2015. It went into effect on January 1, 2016. *See* CAL. CONST. Art. IV, Sec. 8.

Plaintiffs filed this action on October 13, 2015, alleging violations of the Free Speech and Free Exercise clauses of the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Coates-Snow Amendment, 42 U.S.C. § 238n, and the Free Speech Clause of the California Constitution. EOR 33–68. The complaint is verified, and its factual assertions are sworn and affirmed by Plaintiffs under 28 U.S.C. § 1746. EOR 66–68; *see also* EOR 3 ("Plaintiffs' verification sufficiently complies with section 1746."). Plaintiffs filed their motion for preliminary injunction on October 21, 2015, asking that the Act be enjoined prior to its January 1 effective date. See EOR 27 (docket entry no. 3).

The district court denied Plaintiffs' motion in an order issued on February 9, 2016. EOR 1–19 ("Order"). Plaintiffs filed their notice of appeal on February 18, 2016. EOR 20–23.

STATEMENT OF FACTS

Plaintiffs are two non-profit pro-life pregnancy centers in San Diego County, PCC and Fallbrook, and a national network of similar centers, NIFLA, which has over 110 member centers in California. EOR 34–35, 37, 41 (Verified Complaint ("VC") ¶¶ 2, 4–5, 18, 41). Together they seek to provide help and pro-life information to women in unplanned pregnancies so that they will be supported in choosing to give birth, and free practical support in furtherance of Plaintiffs' pro-life viewpoint. EOR 34 (VC ¶ 2). All of Plaintiff centers' information and services are provided free of charge. *Id.;* EOR 2–3 (Plaintiff centers are "non-profit" and "offer free information and services"). Plaintiffs are all incorporated as religious organizations, and they along with most of NIFLA's members pursue their activities pursuant to those religious beliefs. EOR 40–41 (VC ¶¶ 36, 40, 42, 48).

Some Plaintiffs are licensed medical facilities that provide medical services alongside their pro-life information and non-medical assistance, while others are not licensed and thus do not provide medical services but only information and non-medical support. PCC provides licensed medical services free of charge and in furtherance of

their pro-life religious motives. EOR 37, 39–40 (VC ¶¶ 21, 32, 36). About 73 of NIFLA's California member centers are similar to PCC in their medical status and activities. EOR 37, 41–42 (VC ¶¶ 19, 46, 50). PCC is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory. EOR 39 (VC ¶ 30). Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider consultation, and other clinical services. EOR 39 (VC ¶ 33). Non-medical services provided by PCC include: peer counseling and education, emotional support, maternity clothes, baby supplies, support groups, and healthy family support. EOR 40 (VC ¶ 35).

Fallbrook is a religious not-for-profit corporation that provides non-medical pregnancy-related information and services without charge, and in furtherance of its religious beliefs. EOR 38, 40 (VC ¶ 22, 40). About 38 of NIFLA's California member centers are similar to Fallbrook in their unlicensed status and provision of only non-medical activities. EOR 41–42 (VC ¶¶ 47, 50). Fallbrook provides free pregnancy test kits that women administer and diagnose themselves,

educational programs, resources and community referrals, maternity clothes, and baby items. EOR 40 (VC ¶ 38). Fallbrook and similar NIFLA centers advertise for their provision of free information and services, including on the Internet. EOR 46, 48, 50, 52–53, 55 (VC ¶¶ 79–81, 101–02, 118, 136, 155).

The State explained, and the District Court found, that the "PURPOSE OF THIS BILL" (emphasis in original) is to target the speech of pro-life centers, to wit: "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," which "aim to discourage and prevent women from seeking abortions," and that "often confuse [and] misinform" women. EOR 86; EOR 11 (court order); EOR 76 (State's brief); *see also* EOR 86 at 2(a) (defining CPCs as being pro-life). The legislative history contains no evidence that Plaintiff centers actually "misinform" women, and the Act does not require that a center be providing incorrect information before its required disclosures apply.

Pursuant to this purpose and justification, the Act requires licensed medical centers, such as PCC and NIFLA's licensed California members, to provide a notice to all clients stating that:

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

EOR 72. A "licensed covered facility" is defined as a:

> [F]acility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purposes is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to 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.

EOR 71–72. This part of the Act contains two exemptions: "(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies," and "(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program ["Family PACT"]." EOR 72. Family PACT is the State's program of family planning and comprehensive "reproductive health

care" providers. See CAL. WELF. & INST. CODE § 14132.

Licensed covered facilities must post the disclosure as follows:

> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.
>
> (B) A printed notice distributed to all clients in no less than 14-point type.
>
> (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

EOR 72–73. The notice must be provided "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." EOR 72. For San Diego County, where PCC and Fallbrook are located, "threshold" languages can include Spanish, Arabic, Vietnamese, and Tagalog.[1]

The Act requires unlicensed non-medical pregnancy centers, such

[1] *See* State of California, Department of Health Care Services, "Medical Eligibles with Threshold Languages by County," *available at* www.dhcs.ca.gov/dataandstats/statistics/Documents/Medi-Cal_Threshold_Languages_by_County.xls (last visited March 17, 2016).

as Fallbrook and similar NIFLA members, to post a notice to all clients that "the facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." EOR 73. The Act defines "unlicensed covered facility" as:

> [A] facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or diagnosis. (3) The Facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

EOR 72. The required notice for unlicensed facilities must be "disseminate[d] to clients on site and in any print and digital advertising material[] including Internet Web sites," "in English and in the primary threshold languages." EOR 73.

Covered facilities that violate the law "are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense," and the Act's

requirements are enforceable by the Attorney General, city attorney, or county counsel. EOR 70, 73.

SUMMARY OF THE ARGUMENT

Compelled speech is a constitutionally suspect enterprise, especially when occurring in non-commercial contexts, based on viewpoint-discriminatory purposes, and when interfering in discussions of highly controversial social issues like abortion. The District Court committed legal error, constituting abuses of its discretion, when it deemed the Act's coerced speech is subject to mere rational basis review, dismissed its content and viewpoint based characteristics, and deferred to the State's asserted interests instead of requiring the State to satisfy its serious burdens under First Amendment scrutiny.

The First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker "to decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)) (citation and internal quotation marks omitted). This Court is equally rigorous in protecting the freedom from compelled speech. *See, e.g., R.J. Reynolds Tobacco Co. v.*

Shewry, 423 F.3d 906, 915 (9th Cir. 2005) ("the First Amendment prohibits the government from compelling citizens to express beliefs that they do not hold"); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) ("professional speech may be entitled to 'the strongest protection our Constitution has to offer'" (quoting *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995)); *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016) (requiring heightened judicial scrutiny even in many commercial speech contexts).

But the State of California, in a law no other state has enacted, now forces non-commercial pro-life medical facilities to promote abortion to everyone who walks in the door, and is compelling facilities not subject to any licensing regime to recite disclosures in up to four languages on their walls and in every single Internet ad by which they offer their free viewpoint and assistance. This violates the freedoms of speech and religious exercise, and should have been preliminarily enjoined by the District Court.

The District Court's several legal errors are subject to *de novo* review under the abuse of discretion standard and require reversal. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012).

First, the District Court committed legal error in deeming this compelled speech statute as not being content-based. The Supreme Court taught in *Riley* that when the state compels speech, it by definition "dictate[s] the content of speech," and therefore cannot do so "absent compelling necessity, and then, only by means precisely tailored"—that is, strict scrutiny. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988). Second, the District Court erred in deeming the Act not viewpoint-discriminatory, even though the Act's stated purpose and justification are based on disagreement with specifically pro-life "crisis pregnancy centers," because they "aim to discourage … abortions," and they "misinform" women, *i.e.*, provide information the State disagrees with. EOR 11, 76, 86. Plaintiffs deny that they misinform anyone, and no evidence exists that they do. But the State's assertion that it disagrees with Plaintiffs' information and view on abortion constitutes, by definition, viewpoint discrimination. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663–64 (2011).

Third, the District Court committed clear legal error when it held that the Act's compelled words on Plaintiff medical facilities are not "speech" at all, but are mere "conduct" that is "subject to rational basis

review." EOR 12. It is not possible to deem the required recitation of a particular text to be *not* speech. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), deemed a particular *treatment* regimen to be conduct, but recognized multiple ways the state regulates professionals' *speech*.

Fourth, the District Court erred in holding that if the Act's coerced speech is speech, its coercion on the medical center Plaintiffs is subject to intermediate scrutiny under *Pickup* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Not only is intermediate scrutiny precluded by the Act's viewpoint discrimination discussed above, but *Pickup* leaves in place *Conant*'s robust protection of professional speech, 309 F.3d at 637, and itself maintains that significant First Amendment protection exists for "communications *about* medical treatment" that the State considers "outside the mainstream," *Pickup*, 740 F.3d at 1227. The Act implicates rigorous scrutiny by requiring referral to abortion when women walk into a facility (not in a physician-patient relationship), and because the State deems pro-life views as "outside the mainstream." *Id. Casey* does not apply here at all. It involved obtaining consent to allow the doctor to perform a surgery—abortion—serving the State's interest in protecting unborn life. 505 U.S. at 881–83. Here, the

Act's disclosures occur without any connection to a procedure Plaintiffs perform, instead happening when people walk in the front door.

Fifth, the District Court committed legal error in deeming that coercion of the speech of unlicensed facilities satisfies constitutional scrutiny even though the Act is neither a commercial or professional speech regulation. The Act forces Fallbrook and similar centers to place extensive disclaimers, in multiple "threshold languages" such as Arabic, Vietnamese, and Tagalog, on every Internet search ad, for example, "Pregnant? Need Help? Call Fallbrook." This is incompatible with the Supreme Court's application of strict scrutiny in *Riley*.

Sixth, the District Court erred in holding that the Act is "neutral" and "generally applicable" under the Free Exercise of Religion Clause despite the Act's express purpose disagreeing with pro-life centers because their "inform[ation]" and viewpoint "discouraging abortion." Moreover, the court did not even consider the application of strict scrutiny under this Court's recognition of the doctrine of hybrid free speech and religious exercise rights. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004).

Seventh, the District Court doubled down on these legal errors when it held, in passing, that Plaintiffs failed to satisfy the other factors necessary for obtaining a preliminary injunction, such as irreparable harm, because of the court's previous holdings on the above issues. Finally, the District Court committed legal error in holding that even if Plaintiffs had been entitled to preliminary injunctive relief, and even though the Act empowers Appellee City Attorney of El Cajon to enforce its terms, Plaintiffs may not obtain relief from the City because the City did not author the Act. The Ninth Circuit allows injunctive relief against any government agency empowered to enforce an unconstitutional law unless it disavows enforcement (the City did not).

STANDARD OF REVIEW

The District Court's denial of Plaintiffs' motion for preliminary injunction is reviewed for abuse of discretion. Within that standard, this Court conducts *de novo* review of conclusions of law—whether the District Court "got the law right." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Lands Council v. McNair,* 537 F.3d 981, 986 (9th Cir. 2008) (en banc)). *See also Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (*de novo* review applies to

reliance on an erroneous legal premise) (citations omitted). *Rucker v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001) (*en banc*) (the District Court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact"), *rev'd on other grounds, Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002); *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc) (legal errors are subject to "plenary" review without deference to the District Court).

"The inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

In considering Plaintiffs' request for a preliminary injunction, the Court reviews whether Plaintiffs are "'likely to succeed on the merits, ... likely to suffer irreparable harm in the absence of preliminary relief,' whether 'the balance of equities tips in [their favor],' and whether "an injunction is in the public interest.'" *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015) (quoting *Cottrell*, 632 F.3d at 1131). "Serious questions going to the merits and hardship balance that tips sharply towards [plaintiffs] can [also] support issuance of a[] [preliminary] injunction, so long as there is a likelihood of irreparable

injury and the injunction is in the public interest." *Id.* (quoting *Cottrell*, 632 F.3d at 1132).

I. The Act is subject to strict scrutiny for being a content-based speech regulation with an explicitly viewpoint-based purpose.

A. The Act's compelled speech is necessarily content based, and thus presumptively unconstitutional.

The Supreme Court has explained that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the Court has emphasized that the First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker to decide "what not to say." *Hurley*, 515 U.S. at 573 (quoting *Pac. Gas & Elec. Co.*, 475 U.S. at 16) (internal citation and quotation marks omitted).

In this manner, the First Amendment "presume[s] that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 791. Therefore, the government "may not

substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Id.* at 791. The First Amendment protects Plaintiffs from being compelled to engage in government-sanctioned speech.

"In the context of protected speech," any "difference between compelled speech and compelled silence . . . is without constitutional significance." *Id.* at 796. "Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. Inc. v. FCC* ("Turner I"), 512 U.S. 624, 642 (1994). In short, compelled speech is highly suspect. *See also Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("The government may not . . . compel the endorsement of ideas that it approves."); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974) (forcefully rejecting attempt to "[c]ompell[] editors or publishers to publish that which 'reason tells them should not be published'").

The Supreme Court's disfavor towards compelled speech and content-based speech regulations significantly overlap because

compelled speech is, by definition, a content-based speech regulation. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. This point from *Riley* therefore teaches that a compelled speech requirement is, by its nature, a content-based restriction, because it compels speech *of a certain content*. *See also Evergreen Association v. City of New York*, 740 F.3d 233, 249, 250 (2d Cir. 2014) ("'We therefore consider [laws mandating speech]' to be 'content-based regulations'" (quoting *Riley*, 487 U.S. at 795)).

Content-based speech regulations are, in turn, presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Conant*, 309 F.3d at 637–38 (deeming content-based restrictions on professional speech presumptively invalid). "A law that is content based on its face is subject to strict scrutiny." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (laws that are content or viewpoint based "must satisfy strict scrutiny"). "The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept.*

of City of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

This is the source of the District Court's first legal error. With respect to the Act and its compelled disclosures, it declared "the statute is not a broad, content-based restriction of speech." EOR 14. This was plain legal error, and it led the District Court to further errors discussed below in applying lower levels of scrutiny, and insufficiently applying the full rigor of strict scrutiny applicable to content-based statutes. Indeed, the legislature itself conceded that the Act is content-based. EOR 89.

The content-based character of the Act is particularly harmful to the Plaintiffs' expressive mission. Forcing licensed Plaintiff Centers to tell women where and how to arrange an abortion makes them promote the very opposite of their message. Unlicensed centers, in turn, must clutter their walls and preclude much if not all of their Internet advertising altogether due to posting long and prominent disclaimers in multiple languages. All these disclaimers force the Plaintiff centers to begin their expressive relationship with an immediate unwanted or negative message. In the case of licensed centers, it inserts the idea of low-cost availability and legitimacy of

abortion into their desired pro-life expressive relationship, including with the unborn children themselves who they don't believe should be subject to a free abortion. Unlicensed centers must essentially send listeners the false message that there is something inadequate about their non-medical assistance because they are not physicians. The Supreme Court recognized in *Riley* that forcing a speaker to begin his relationship with an unwanted disclosure, as the state tried to do with charitable solicitors in that case, imposes a severe harm to free speech rights because it may end the communicative relationship before it begins. 487 U.S. at 799–800.

The Act is necessarily a content-based law, and therefore it is subject to strict scrutiny under well-established Supreme Court precedent. The District Court entered an erroneous legal conclusion and should be reversed and remanded.

B. The Act is viewpoint-based, the most egregious form of speech regulation.

The District Court's failure to acknowledge the Act's viewpoint discriminatory purpose and justification is an even more serious legal error. "Viewpoint discrimination is [] an egregious form of content discrimination. The government must abstain from regulating speech

when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination is a "blatant" First Amendment violation. *Id. See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding that the government cannot "suppress expression merely because public officials oppose the speaker's view").

"In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell*, 131 S. Ct. at 2667.

Sorrell outlines a form of viewpoint discrimination that is exactly embodied by the Act here. *Sorrell* considered an Act that Vermont enacted regulating speech related to pharmaceuticals, but with a specific and admitted motivation: because of disagreement with particular kinds of speakers and their speech. "[T]he Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that 'are often in conflict with the goals of the state.'" 131 S. Ct. at 2663 (citation omitted). This "goes even beyond mere content discrimination, to actual viewpoint

discrimination." *Id.* at 2657 (quoting *R.A.V.*, 505 U.S. at 391).

The Act here is utterly indistinguishable from *Sorrell* in its viewpoint-discriminatory character. The California legislature, the District Court, and even the State itself in its brief below, expressly describe the "PURPOSE OF THIS BILL" (emphasis in original). They state the purpose is to target the speech of "crisis pregnancy centers," which by definition in the legislative record are pro-life centers (*see, e.g.*, EOR 86 at 2(a)). This legislative purpose explains "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," which "aim to discourage and prevent women from seeking abortions," and that "often confuse [and] misinform" women. EOR 11, 76, 86.

Plaintiffs of course deny that they misinform women, and the State has no evidence that they do. Nor does the Act require that they be engaging in actual misinformation before its disclosures apply. And the First Amendment does not countenance "government authority to compile a list of subjects about which false statements are punishable. . . . Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 132 S. Ct. 2537,

2547 (2012). Nevertheless, the Act's purpose and justification that the State must burden Plaintiffs' speech because they "discourage" abortion and provide negative "[]inform[ation]" about it, and that Plaintiffs' viewpoint is "unfortunate[]" and "mis[taken]," EOR 86, is the very definition of viewpoint discrimination.

This is what Vermont's legislature admitted in *Sorrell*: specific speakers ("detailers"), "in particular those who promote brand-name drugs," need to have their speech regulated because they "convey messages that 'are often in conflict with the goals of the state.'" 131 S. Ct. at 2663. The text of the Act then remedies this in a one-sided way: forcing communication of the availability of abortion, and forcing unlicensed centers to bury any advertisements under massive multi-lingual disclosures. It is necessarily the case that, under *Sorrell*, the Act here is viewpoint-based due to the legislature's express purpose.

Consequently, the Act is the most "egregious" burden on free speech imaginable. Under *Sorrell*, the viewpoint-based finding led to "heightened scrutiny" even though it was a regulation of commercial speech. The Act here is not a regulation of commercial speech, and therefore the maximum level of constitutional protection applies. As

the District Court found as a factual matter, Plaintiffs "offer free information and services." EOR 4. In contrast, this Court declares that commercial speech only exists where speech "does no more than propose a commercial transaction." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). Since even commercial speech regulations were struck down under heightened scrutiny in *Sorrell*, non-commercial speech restrictions that are viewpoint discriminatory necessarily face even higher levels of scrutiny. *Cf. Retail Digital Network*, 810 F.3d at 649 (even in the commercial context, *Sorrell* requires a "demanding" level of scrutiny beyond intermediate scrutiny).

The District Court committed reversible legal error in failing to hold that the Act is viewpoint discriminatory under *Sorrell* and therefore subject to the most demanding levels of scrutiny.

II. The District Court erred in holding that the Act's regulation of medical facilities is subject to rational basis review or, alternatively, intermediate scrutiny.

A. The Act does not regulate mere conduct and thus is not subject to rational basis review.

The District Court committed legal error in deeming the Act "is

subject to rational basis review" with respect to licensed facilities. EOR 12. It made this error based on a flawed legal interpretation of *Pickup*, concluding that the Act's coerced speech is somehow merely a "professional conduct" regulation and not a speech regulation. *Id.*

As discussed above, compelled speech is necessarily a regulation of speech, and a content-based regulation at that. It is not a mere "conduct" regulation under *Pickup* or any other theory. *Pickup* held that a specific regimen of psychotherapy is professional "conduct" rather than speech. 740 F.3d at 1229. This is nothing like the Act here. It is not a ban, but is a command to recite disclosures. The disclosures are, by definition, speech. And the disclosures *do not occur during treatment*. They occur as soon as someone walks in the door. The forced speech happens before and is disconnected with actual treatment, and happens even if no treatment ever occurs (indeed, with the apparent government intent that women go elsewhere to receive different treatment—abortion—which Plaintiffs do not offer).

Pickup in fact emphasizes that communications by professionals to their clients are speech under the First Amendment, and therefore entitled to protection. "[D]octor-patient communications about medical

treatment receive substantial First Amendment protection," even though the government "has more leeway to regulate conduct." *Id.* at 1227. The Act directly impacts "communications about medical treatment," *id.*, because it compels licensed Plaintiffs to deliver a government message to every client that the State of California provides abortion and other services.

The District Court further misapplied *Pickup*'s observation that if a law regulates conduct, it is relevant that a professional is also free to discuss his own views as well. *See* EOR 13. That begs the question of whether the Act is a mere conduct regulation, which it is not. The Supreme Court has explained many times that the fact that someone who is forced to speak can, outside the coercion, also recite his own view, does not *in any way* cure the offense that the coerced speech imposes on his First Amendment rights. Freedom of speech is "empty" if "the government could require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 576 (quoting *Pac. Gas & Electric Co.*, 475 U.S. at 16). The fact that a compulsion to speak does not "prevent[] the Miami Herald from saying anything it wishe[s]" besides the compelled speech "begs the core question. Compelling

editors or publishers to publish that which reason tells them should not be published is what is at issue." *Miami Herald*, 418 U.S. at 256 (citation and internal quotation marks omitted).

The District Court committed serious legal error in deeming a compelled speech law a mere conduct regulation subject to rational basis review and justified by the ability to recite other speech.

B. The Act is subject to strict scrutiny, not intermediate scrutiny as a professional speech regulation.

1. This Court applies strict scrutiny to speech by professionals outside a course of treatment, or concerning controversial recommendations.

The District Court committed legal error in applying intermediate "professional speech" scrutiny to its disclosures on licensed medical facilities, and declaring that the Act satisfies that scrutiny. As discussed above, intermediate scrutiny is not applicable to a content-based law, much less to a viewpoint-based regulation of speech. Even when intermediate scrutiny might be applicable as a commercial speech matter, this Court insists that under *Sorrell* a legislative act targeting speakers (here, "crisis pregnancy centers") because of their views ("discourage[ing]" and "misinform[ing]") about

abortion is subject, at minimum, to heightened scrutiny, not intermediate scrutiny. *Retail Digital Network*, 810 F.3d at 649. But this is not a commercial speech regulation, and Plaintiffs engage in no commercial speech at all. *Cf.* EOR 4 (Plaintiffs "offer free information and services"). Strict scrutiny applies under content-based speech doctrine, and viewpoint discrimination is simply unconstitutional.[2] And it is legal error to overextend an intermediate scrutiny doctrine. As this Court said of commercial speech, the doctrine should not be "defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012) (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 579 (1980)) (Justice Stevens, concurring)).

[2] Recently this Court suggested that *Reed v. Town of Gilbert*'s rule of strict scrutiny for content-based speech might not apply in cases of "commercial speech or speech that falls within one of a few traditional categories which receive lesser First Amendment protection." *Sarver v. Chartier*, No. 11-56986, 2016 WL 625362, at *11 n.5 (9th Cir. Feb. 17, 2016). But "the Supreme Court has never formally endorsed the professional speech doctrine." *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). As discussed herein, lower scrutiny for some professional speech does not apply to the facts of this case.

The District Court's application of intermediate scrutiny was legal error with respect to this Act. In *Conant*, this Court declared that "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" 309 F.3d at 637 (quoting *Florida Bar*, 515 U.S. at 634). *Pickup* went out of its way to leave *Conant* in force, by holding that the regulation in *Pickup* concerned not speech at all but mere conduct. 740 F.3d at 1229. According to *Pickup*, "doctor-patient communications *about* medical treatment receive substantial First Amendment protection," in contrast to conduct regulations, and "a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment." *Id.* at 1227. Intermediate scrutiny can only begin to be considered applicable "within the confines of a professional relationship." *Id.* at 1228.

The medical Plaintiff centers' speech as impacted by the Act deserves "robust protection" under *Pickup*. The Act does not require disclosures "within the confines of a professional relationship"—the disclosures occur in the waiting room *before* such a relationship occurs. In fact, the Act applies to "facilities" rather than trying to say how a

physician and patient should discuss a matter. Under *Pickup* and *Conant*—which *Pickup* leaves in place–the Act on its face attempts to interfere with "communications *about* medical treatment" not the actual patient relationship. It tries to tell people who walk in the door that low-cost abortions are available elsewhere. The Act is a judgment by the state that pro-life "crisis pregnancy centers" who "discourage" abortion (EOR 86) are centers that the government "considers outside the mainstream," *Pickup*, 740 F.3d at 1229. This puts the Act squarely under *Conant*'s purview, where this Court struck down the government's attempt to burden doctors' speech because of their viewpoint on a controverted issue. 309 F.3d at 637–39.

2. The Supreme Court applies strict scrutiny to *pro bono* speech by regulated professionals.

The Supreme Court has declared that when speech occurs in a licensed professional context, it is subject to strict scrutiny if the speech is performed for *pro bono*, non-commercial issue advocacy purposes. In *In re Primus*, 436 U.S. 412 (1978), the Court held that the offering of free legal services for the purpose of the "advancement of [the attorney's] beliefs and ideas" could not be subject to the same intermediate level of scrutiny applicable to licensed attorney speech

made for commercial gain. *Id.* at 437–38 & n. 32. Instead the Court required the government to show a "compelling" interest and "close" tailoring. *Id.* at 432. Even though in regulating attorney speech "for pecuniary gain … a showing of potential danger [to the State's interests] may suffice," a *pro bono* regulated professional's speech "may not be disciplined unless her activity in fact involved the type of misconduct" the State seeks to avoid. *Id.* at 434. In other words, where intermediate scrutiny may apply to for-profit professional speech, strict scrutiny must be used for non-commercial professional speech. The District Court's ruling was in error.

The District Court misapplied *Planned Parenthood v. Casey* in deciding intermediate scrutiny applies here. *Casey* upheld requirements that abortion doctors deliver certain messages to patients in the course of treatment, specifically, in order to obtain informed consent to perform abortions on them. This does not apply to the Act here, for two reasons. First, *Casey* deemed the disclosure justified as part of obtaining informed consent to a surgical procedure: "as with any medical procedure, the State may require a woman to give her written informed consent." 505 U.S. at 881. But the Act's compelled disclosures are not

part of informed consent before performing a procedure. They happen when people walk in the door, with no connection to Plaintiffs' procedures at all, even if those people receive no procedures (indeed, with the apparent intent that women leave and obtain their free abortions elsewhere). If a woman arrives to get free baby clothes, she must be told of free abortions available elsewhere. The Act does not, for example, require PCC to tell women about abortion *as part of* getting her consent for PCC to perform an ultrasound. The State did not pursue the Act to make sure that what Plaintiffs *perform* is done properly, but to insert speech about abortion into Plaintiffs' waiting room because the State does not like Plaintiffs "discourag[ing]" abortion. *Casey* simply does not justify the Act's imposition of disclosures in a free-floating context.

Second, the disclosure in *Casey* was allowed as a restriction on abortion itself, in service of "a State['s desire] to further its legitimate goal of protecting the life of the unborn." *Id.* at 883. But the Act's disclosures here do not burden abortions; they support abortion. The Supreme Court's upholding of informed consent prior to abortion constitutes a limit on abortion itself due to "the legitimate interest of

the Government in protecting the life of the fetus that may become a child." *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Here, the Act essentially makes unborn-protecting medical practice illegal, by forcing all pro-life pregnancy care clinics to promote abortion. This contradicts their philosophy and theology of medicine, which is to treat every unborn child that enters the center as a human being they could never suggest should be killed with subsidized state funds. Abortion is now legal, but that does not mean medical practices committed to the centuries-old Hippocratic Oath against abortion can be made to violate their beliefs. *Casey* in no way justifies such a result, and federal law prohibits California from forcing Plaintiffs to refer or arrange referrals for abortion, which is what this Act requires. *See* 42 U.S.C. § 238n(a).

3. The Act would fail intermediate scrutiny if it applied.

Plaintiffs also contend that the Act fails to satisfy intermediate scrutiny, even if it did apply. This is exactly what the Second Circuit held in *Evergreen*. The law in *Evergreen* required centers to tell women specifically whether they offer abortion, emergency contraception, and prenatal care, and to say that the City recommends that women consult a licensed provider. 740 F.3d at 238. This is substantially similar to the

Act's requirement here that licensed centers tell women "California has public programs that provide … family planning services … , prenatal care, and abortion" and to give them a public phone number to pursue such services. EOR 70. The Second Circuit assumed that intermediate scrutiny applied. *Id.* at 249–50 (holding the disclosure "not sufficiently tailored … under either strict scrutiny or intermediate scrutiny"). Yet it struck down the disclosure "under intermediate scrutiny" especially because of "the political nature of the speech," namely, that "the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the law] provide alternatives," and because "[w]e are also concerned that this disclosure requires pregnancy services centers to advertise on behalf of the" government. *Id.*

The Second Circuit's concerns about freedom of speech are shared by this Court in intermediate scrutiny contexts. For example, this Court recently struck down, under intermediate scrutiny, the federal statute prohibiting falsely wearing military medals. *United States v. Swisher*, 811 F.3d 299, 317 (9th Cir. 2016) (*en banc*) (applying "Justice Breyer's intermediate scrutiny test" from the concurring opinion in *Alvarez*, 132

S. Ct. at 2552–53). Notably, the statute in *Swisher* failed intermediate scrutiny even though this Court narrowly interpreted it "as proscribing 'only false factual statements made with knowledge of their falsity and with the intent that they be taken as true.'" *Id.* at 315 (quoting *Alvarez*, 132 S. Ct. at 2552–53). But the Act here compels speech upon centers that have engaged in no false statements at all. The Act's "evidence" is based on generic and biased assertions that some centers might somewhere be "misinform[ing]" women, in response to which the Act coerces the speech of innocent pro-life centers. If the far more narrowly tailored statute in *Swisher* was constitutionally infirm, the Act should have been enjoined here.

Moreover, as discussed below, the State could pursue its interests with alternatives that do not trigger "a public debate over the morality" of abortion. *Evergreen*, 740 F.3d at 249. For example, it could require licensed centers to merely tell patients a phone number where they can apply for Medi-Cal in general, and that Medi-Cal offers free or low-cost services. This would connect pregnant women to all the services the State seeks to offer them, without requiring pro-life medical centers to inject abortion or contraception by name into the front end of their

interactions with women. Even under intermediate scrutiny, the Act is not sufficiently tailored to the government's interests.

C. The Act's disclosures for medical centers fail strict scrutiny.

Had the District Court applied strict scrutiny to the Act's requirements on licensed facilities, a preliminary injunction should have issued.

1. Many courts have enjoined local iterations of the Act.

"Serious questions going to the merits and hardship balance [] tips sharply towards [plaintiffs]" in this case. *Angelotti*, 791 F.3d at 1081. Other courts considering laws mandating disclosures by pro-life pregnancy centers have resulted in injunctions. In *Evergreen*, 740 F.3d at 250–51, the Second Circuit struck down disclosures requiring centers to speak about abortion and contraception and to tell women about the government's alternative options. In *Centro Tepeyac v. Montgomery Co.*, 5 F. Supp. 3d. 745, 769–70 (D. Md. 2014), the district court granted summary judgment and permanent injunctive relief against a disclosure requiring a center to tell women they are not licensed medical providers and that the government recommends women seek other care. In *Austin Lifecare, Inc. v. City of Austin*, No.

1:11-cv-00875-LY (W.D. Tex. June 23, 2014), the court issued a permanent injunction against a disclosure about a center's licensed medical status.

2. The State lacks compelling evidence of an actual problem that the disclosures actually cure.

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

The compelling interest test can only be satisfied when the law at

issue serves interests "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The State "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664*; Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."). "[U]nless [the law] is justified by a compelling government interest and is narrowly drawn to serve that interest," it cannot pass constitutional muster. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) ("*Brown*"). "The State must specifically identify an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to the solution. . . . That is a demanding standard." *Id.*

In *Brown*, California conceded it could not point to a causal link between violent video games and harm to minors, but it "claim[ed] that

it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies." *Id.* (emphasis added). The court rejected that argument because the government "bears the risk of uncertainty" in a speech restriction, such that "ambiguous proof will not suffice." *Id.* at 2739 (emphasis added). The court found that even scientific studies were insufficient, where they merely showed a correlative "connection" between violent video games and harm to children, because under strict scrutiny the state must "prove that violent video games cause minors to act aggressively . . ." *Id.* Otherwise the "evidence is not compelling." *Id.*; *see also Playboy*, 529 U.S. at 822.

The Act fails this test. The State bears the burden of satisfying this test, and the District Court committed legal error by neither putting the State to its burden, nor by requiring evidence that is compelling under *Brown*. There is no specific evidence, much less compelling proof, that by reciting the disclosures a known percentage of women will avoid a demonstrable set of injuries. There are no scientific studies *at all* showing what alleged "harms" come to women from going to Plaintiffs' facilities, and how the disclosures cure those

harms to a compelling degree. At the same time the State significantly undermines the alleged importance of its interest when it exempts from the Act certain facilities that are enrolled in Medi-Cal and family planning programs, ensuring that the pregnant women in those programs will not receive the Act's messages. *See Lukumi*, 508 U.S. at 546–47 (no compelling interest if a law leaves "appreciable damage to th[e government's] supposedly vital interest unprohibited").

"When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner I*, 512 U.S. at 664 (citation and internal quotation marks omitted). The only "evidence" underlying the Act is biased, unscientific "reports" supplied by partisan organizations in the political debate about abortion, such as NARAL Pro-Choice California, and a similar "report" released by the University of California, Hastings College of Law on strategies to restrict pro-life pregnancy centers. EOR 83–99. Neither of these reports (1) are scientific or even reliable rather than being biased and anecdotal, (2) prove harm from Plaintiff centers, or (3) prove causation that the disclosures will

prevent harm. These reports are nothing more than ranting disagreements with the pro-life viewpoint, defining pro-life speech as false *as such*, proving the Act is unconstitutional rather than sustaining it under strict scrutiny.

3. The Act is not narrowly tailored and the State could pursue its interests by other means.

The Act fails the narrow tailoring inquiry of strict scrutiny because it does not even tailor itself to preventing the alleged deception its advocates complain of. Strict scrutiny requires a law to "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby,* 487 U.S. at 485. The Act, however, is a prophylactic speech regulation that applies to all pro-life pregnancy centers without reference to whether each center has engaged in, or even been accused of, wrongdoing or "deception." The Act's disclosure requirements contain no prerequisite element that a center actually engages in "deception" or "misinformation." The Act forces centers to speak even if the alleged problems don't exist at those centers.

As the Supreme Court has explained, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious

freedoms." *Riley*, 487 U.S. at 801 (internal quotations and citations omitted). The State's mere showing that "potential danger" exists "may suffice" in a commercial context, but not in a *pro bono* advocacy-motivated activity: there, speech cannot be regulated "unless her [the plaintiff's] activity *in fact* involved the type of misconduct" the State is concerned about. *In re Primus*, 436 U.S. at 434 (emphasis added). The District Court committed legal error in failing to require that precision from the State.

The Act also fails the narrow tailoring prong of the compelling interest test for failing to pursue other remedial measures. The State must demonstrate that no less restrictive alternatives would further its alleged interests. But the State has completely failed to pursue a wide range of less restrictive alternatives. It has never chosen to send the allegedly compelling messages mandated by the Act with its own voice, its own funds, its own walls or ads, or through its own employees. "If the First Amendment means anything, it means that regulating speech *must* be a last-not first resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson. v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

In *Riley*, the law at issue compelled professional fundraisers to disclose certain information at the beginning of a call, and the government asserted an interest in ensuring that donors are made aware of certain financial information concerning professional fundraisers. Rejecting the State's attempt to require even professional fundraisers to provide this information to donors over the telephone, the Court explained that the government can spread this message itself: "[f]or example, as a general rule, the State may itself publish the detailed [information it wants the public to know]. This procedure would communicate the desired information to the public without burdening [the] speaker with unwanted speech during the course of a solicitation." *Riley*, 487 U.S. at 800. As noted in *Evergreen*, there is "concern[] that th[e] disclosure[s] require pregnancy services centers to advertise on behalf of the [government]." 740 F.3d at 250. Requiring licensed medical centers to speak about government services "affirmatively espouse[s] the government's position on a contested public issue" and "deprives Plaintiffs of their right to communicate freely on matters of public concern." *Id.* at 250–51 (internal citations omitted).

III. The District Court committed legal error in ruling that the Act satisfies strict scrutiny for unlicensed facilities.

For reasons similar to those showing that the Act fails strict scrutiny in its required disclosures on medical facilities, the District Court also committed legal error in declaring, in a single short paragraph with no legal citations, that the Act passes strict scrutiny as applied to the unlicensed Plaintiff centers. EOR 15.

Being unlicensed, the Act's required disclosures on unlicensed centers is by definition not a regulation of professional speech. And as discussed above, the Plaintiffs engage in no commercial transactions and the requirements of the Act do not require commercial speech as an element of its regulation. Nor can unlicensed Plaintiff centers be deemed commercial by somehow quantifying their speech, diapers, and baby clothes as competitive with abortion centers. *Valle Del Sol* declares that commercial speech "does no more than propose a commercial transaction," and the District Court found as a factual matter that Plaintiffs' services are all "free." EOR 4.

Thus the District Court was correct to suggest that strict scrutiny applies to the forced speech on the unlicensed Plaintiff centers. Being a content-based law, it is presumptively unconstitutional. *R.A.V.*, 505

U.S. at 382. The District Court committed legal error in skimming over the presumptive character of that test, however.

First, as discussed above, the strict scrutiny test requires the State to meet a heavy evidentiary burden to demonstrate a compelling interest supported by scientific evidence. But the District Court simply credited the State's assertion that it has a general interest in "ensuring pregnant women know when they are receiving medical care from licensed professions and when they are not." Under *Brown v. Entm't Merchs. Assn.*, the government has the burden to meet the "demanding standard" that there is an "actual problem" at Plaintiff centers, with evidence of causation, and that the disclosures are necessary to solve that problem. 131 S. Ct. at 2738. The government did no such thing. There are no *scientific* studies showing that unlicensed centers cause women physical harm by not telling them they are not doctors in a sign on the front door, in the waiting room, and on every single advertisement in English, Spanish, Arabic, Vietnamese, and Tagalog. As discussed above, there are simply "reports" prepared by pro-abortion advocacy organizations accusing the pro-life viewpoint—that abortion is a negative experience—of being "deceptive" for that reason alone.

The Act's disclosures on Plaintiff centers are also not narrowly tailored as the government must show. The District Court engaged in mere conclusory reasoning by saying, in one sentence, that when the Act "merely requires a notice that a facility is not licensed" it is "narrowly tailored." EOR 15. This is a legally incorrect application of *Riley*. *Riley* specifically declared the State must show it cannot achieve its goals by engaging in its own speech, and the District Court was dismissive of this suggestion. 487 U.S. at 799–801.

Riley further declared that "[b]road prophylactic rules in the area of free expression are suspect," defining compelled speech itself as "prophylactic" when it is imposed on speakers the state merely worries might implicate some harm." 487 U.S. at 801. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* Plaintiff unlicensed centers *provide no medical services*, so it is not a "narrowly tailored" approach to require them to say no doctor is there to provide their services. Doctors are not needed to talk to give women diapers and baby clothes, teach parenting classes and talk about how they can provide social support to give birth. The idea that "access" to important information can require a speaker to

proclaim views he would not otherwise recite was rejected in *Miami Herald*, 418 U.S. at 256–57.

Moreover, the Act, as a matter of law, does not merely require "a notice" as the District Court characterized it, as if it were one sign in the lobby. It requires the disclosure in multiple languages on every Internet or public advertisement. Even if the ad itself is only the size of a web search result declaring, "Pregnant? Need Help" Call [phone number]," the Act requires that those five words be augmented with the statement "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services" in English and the county's "threshold languages" which, in San Diego, includes Spanish, Arabic, Vietnamese, and Tagalog.[3] Assuming the same average number of words for each of those languages, that requires Plaintiff centers to add 145 words in a "clear and conspicuous" size and font on top of every five-word Google search ad. This would not be possible—as Plaintiffs testified in their complaint, it would crowd out or eliminate entirely advertising of their expressive enterprise. EOR 46, 48, 50, 52–53, 55

[3] See *supra* note 1.

(VC ¶¶ 79–81, 101–02, 118, 136, 155). There is nothing narrowly tailored about such an extensive effect.

The Act's lack of narrow tailoring can also be seen by comparison to cases that the government has cited. *First Resort, Inc. v. Herrera*, 80 F. Supp. 3d 1043 (N.D. Cal. 2015), currently on appeal, No. 15-15434 (9th Cir. filed Mar. 10, 2015), regulates pregnancy centers but not by imposing prophylactic disclosures—the law there "prohibits the use of false or misleading advertising." *Id.* at 1047. The Act here, in contrast, applies its disclosures to centers even if they are not engaged in any false statements. Likewise *Fargo Women's Health Center v. Larson*, 381 N.W. 2d 176 (N.D. 1986), involved a particular pregnancy center that was engaged in commercial advertisements for payment ("financial assistance is available and [] major credit cards are accepted"), the court found the center's advertising to have been actually false, and "the trial court's order was narrowly drawn [to] focus[] only upon the prohibition of deceptive or misleading activity." *Id.* at 179–80. The Act here applies to centers engaged in no commercial advertising and no wrongdoing.

To the extent that the Second Circuit in *Evergreen* held a disclosure about licensed status could satisfy strict scrutiny, that ruling

is neither binding nor persuasive to the Supreme Court's application of strict scrutiny in *Brown*, nor to this Court's rigorous protection for free speech from government compulsion.

IV. The Act violates the Plaintiff centers' rights under the Free Exercise Clause.

The District Court committed legal error in deeming the Act "neutral" under the Free Exercise of Religion Clause, and in failing to apply strict scrutiny under this Court's recognition of hybrid rights with a colorable free speech claim.

The First Amendment's Free Exercise of Religion Clause requires the government to satisfy strict scrutiny (which, as discussed above, it cannot meet) because the Act burdens an organization's exercise of religion in a non-neutral way. Plaintiff centers are religious organizations and pursue their pro-life goals based on religious motives. EOR 40–41 (VC ¶¶ 36, 40, 42, 48). Being forced to recite unwanted speech in the course of that religiously expressive activity is a burden on Plaintiff centers' religious exercise.

Under *Lukumi*, 508 U.S. at 546, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." As discussed above, however, the Act is

explicitly viewpoint-motivated, with the stated purpose to target pro-life "crisis pregnancy centers" that discourage abortion and offer information the State disagrees with. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. Therefore the District Court committed error in declaring that the Act is not subject to strict scrutiny due to the appearance of facial neutrality, without regard to the Act's stated discriminatory purposes. In addition, the Act's alleged general applicability is undermined by the fact that it explicitly does not apply to centers that participate in certain family planning and Medi-Cal programs. By declaring that many women receiving pregnancy services do not need to be told the State's allegedly urgent messages, the Act has left "appreciable damage to th[e government's] supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 546–47.

The Act moreover is subject to strict scrutiny under this Court's repeated recognition of the "hybrid" effect of the free speech and free exercise of religion interests at issue in this case. Under *Employment Division v. Smith*, 494 U.S. 872 (1990), "strict scrutiny [is] imposed in

'hybrid situation[s]' in which a law 'involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections," exempting such "hybrid rights" from *Smith's* general "rational basis test." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (citing *Smith*, 494 U.S. at 881–82). This Court went on to reaffirm that "to assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated—that is, a fair probability or a likelihood, but not a certitude, of success on the merits." *San Jose Christian Coll.*, 360 F.3d at 1032 (quoting *Miller*, 176 F.3d at 1207).

As discussed in detail above, the Plaintiffs have established that the Act violates Plaintiffs' First Amendment right to freedom of speech. They have certainly "made out a colorable claim" that the Act is constitutionally suspect, since it is (1) content-based and therefore presumptively unconstitutional; (2) it is explicitly viewpoint-motivated in its stated purposes; (3) it is not subject to intermediate scrutiny as a professional or commercial speech regulation; and (4) that the government has a heavy burden, which it did not meet, to show evidence-based necessity for the disclosures and the lack of alternative

means that the Supreme Court insisted are adequate in *Riley*. But the District Court did not even consider this aspect of the claim, even though Plaintiffs raised it in their briefing below. *See* EOR 27 (docket no. 3-1, Plaintiffs' Memo. Supp. Mot. Prelim. Inj., at 24).

V. Plaintiff pregnancy centers demonstrated the remaining preliminary injunction factors, including against the City Attorney of El Cajon.

A. The District Court erred in deciding the Act's First Amendment violations do not constitute irreparable harm or otherwise weigh in Plaintiff centers' favor.

The District Court committed a parallel legal error in rejecting Plaintiffs' showing of the remaining preliminary injunction factors. The District Court was correct to declare that "serious questions are raised" by Plaintiffs under the preliminary injunction standard. EOR 17. The court erred, however, when it declared that because, "as discussed in detail above, Plaintiff fail to support their argument of a constitutional violation," Plaintiffs fail the remaining injunctive relief factors. EOR 18.

As discussed herein, the District Court's holdings on those merits issues are based on extensive legal error. Moreover, any loss of constitutional rights is presumed to be irreparable injury. *Elrod v.*

Burns, 427 U.S. 347, 373 (1976). "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists 'the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [the movant's] favor.'" *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002) (quoting *Viacom Int'l, Inc. v. FCC*, 828 F. Supp. 741, 744 (N.D. Cal. 1993)).

Further, this Court has "consistently recognized the 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people' subjected to the same restrictions." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Sammartano*, 303 F.3d at 974). "[F]ree speech 'serves significant societal interests'. . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec.,* 475 U.S. at 8. There is no public "interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft,* 322 F.3d 240, 251 n. 11 (3d Cir. 2003). It was improper for the District Court

to engage in a "balancing of the value of the speech against its societal costs"; "[a]s a free-floating test for First Amendment coverage, that sentence is startling and dangerous." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

An injunction serves the public interest. As discussed above, the Act burdens Plaintiffs' First Amendment rights both to the freedom of speech and under the Free Exercise of Religion Clause. This tips the balance of hardships and public interest sharply in favor of the Plaintiffs. Moreover, the status quo in this case is to allow freedom of speech. California had never imposed these disclaimers when the injunction motion was filed. The State lacks any actual evidence that without the disclosures a specific harm will occur, and it could ameliorate any alleged harms with its own speech but has not done so.

B. The City Defendant-Appellee was improperly deemed not subject to injunctive relief.

Finally, the District Court erred in ruling that even if Plaintiffs had been entitled to preliminary injunctive relief, "any facial challenge cannot be brought against [the City Defendant] because he did not draft or enact the Act." EOR 17.

Any government entity with enforcement authority of a law is a

legitimate defendant and subject to suit. *See L.A. Cnty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992) (those responsible for enforcement of a law are subject to suits challenging state laws as violate of federal law); *see also N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[W]hen a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it.").

The Act provides that "[t]he Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to" the Act. EOR 73. The Attorney General, city attorneys, and county counsel are all granted enforcement authority under the Act, and therefore Defendant-Appellee Foley, as the City Attorney of El Cajon where PCC is located, is vested with enforcement authority and is a proper party to Plaintiffs' request for injunctive relief. There is no "authorship" requirement to the propriety of suing officials that possess enforcement authority—the question is simply whether they are responsible for enforcement. *Cf. Eu*, 979 F.2d at 704.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that this Court reverse the judgment of the District Court and remand with instructions to enter the requested preliminary injunction.

Dated: March 17, 2016

Respectfully submitted,

s/ Matthew S. Bowman

Matthew S. Bowman
David A. Cortman
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
mbowman@ADFlegal.org
dcortman@ADFlegal.org

Dean R. Broyles
California Bar No. 179535
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, California 92025
(760) 747-4529
dbroyles@nclplaw.org

Anne O'Connor
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930
AOConnor@nifla.org

Kristen K. Waggoner
Kevin H. Theriot
Elissa M. Graves
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
kwaggoner@ADFlegal.org
ktheriot@ADFlegal.org
egraves@ADFlegal.org

Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to 9th Cir. Rule 28-2.6, Plaintiffs advise the Court that currently pending before it are *A Woman's Friend Pregnancy Resources Clinic v. Harris*, No. 15-17517 (9th Cir. filed Dec. 24, 2015) and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497 (9th Cir. filed Dec. 22, 2015). These cases both involve a First Amendment challenge to the same law at issue here, the Reproductive FACT Act.

CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,777 words, excluding the parts of the brief exempted under Rule32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Matthew S. Bowman
Matthew S. Bowman
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 17, 2016; I also served it upon the following CM/ECF participants:

Anthony R. Hakl, III, Esq.
California Department of Justice, Office of the Attorney General
1300 I Street, 17th Floor
Sacramento, CA 95814
(916)322-9041; (916)324-8835 (fax)
Anthony.Hakl@doj.ca.gov
Attorneys for Def-Appellees Kamala Harris and Edmund G. Brown, Jr.

Thomas D. Bunton, Esq.
County of San Diego Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469
619-531-6456
Thomas.bunton@sdcounty.ca.gov
Attorneys for Defendant-Appellee Thomas Montgomery

Steven Eugene Boehmer, Esq.
Carrie Lynn Mitchell, Esq.
McDougal Love Eckis Boehmer & Foley
8100 La Mesa Blvd., Suite 200
La Mesa, CA 91942
(619)440-4444; (619)440-4907 (fax)
sboehmer@mclex.com; cmitchell@mclex.com
Attorneys for Defendant-Appellee Morgan Foley

s/ Matthew S. Bowman
Matthew S. Bowman
Attorney for Plaintiffs-Appellants