No. 16-1153

In the Supreme Court of the United States

LIVINGWELL MEDICAL CLINIC, INC., *et al.*,
Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California, in his official capacity, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

INTRODUCTION

"It is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). California's Reproductive FACT Act ("the Act") requires pro-life pregnancy centers to advertise abortions. That cannot be constitutional.

Ignoring teachings of this Court stretching back for decades, and skirting around the conflict between the court below and other federal courts of appeals that have addressed similar abortion-related disclosures, Respondent argues that the Act merely requires the dissemination of neutral, factual information and that mandating such dissemination is permissible in the context of professional relationships.

Respondent is wrong. Deciding what someone else must say or not say—the essence of editorial judgment—is not "neutral" no matter how factual. The Act is a sweeping, content-based speech mandate that compels Petitioners to advertise, over their religious objections, free abortions paid for by the State.

The Act is no incidental burden on speech, but a direct compulsion of what Petitioners "must say" in violation of their moral and religious beliefs. This Court should grant review.

ARGUMENT IN REPLY

I. Respondent's Reliance on *Planned Parenthood v. Casey* is Misplaced.

The decision below conflicts with a long line of decisions of this Court condemning government compelled speech. Pet. Br. at 24-32. Ignoring those cases, including this Court's decision in *Riley v. Nat'l Fed'n of Blind, Inc*., 487 U.S. 781 (1988), Respondent relies principally on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion). Resp. Br. at 15-18. *Casey*, however, provides no support for the broad speech mandate at issue in this case.

Casey's language that a "physician's First Amendment rights not to speak," are "subject to reasonable licensing and regulation by the State," *id*. at 884, cannot mean that the government enjoys *carte blanche* to regulate *all* speech relating to health care. While, for example, the state may have the authority to regulate, at least to some degree, the speech between a doctor and patient regarding the diagnosis and treatment of a specific condition, as in *Casey*,[1] it does not have the authority to compel the insertion of its message into *all* health-related speech, especially when

[1] The disclosures in *Casey*, including information regarding "the assistance available should [the woman] decide to carry the pregnancy to full term," Resp. Br. at 17 (quoting *Casey*, 505 U.S. at 883), were specifically related to a particular client contemplating an individual choice, *i.e.*, abortion. This Court upheld the disclosures because they provided "truthful, nonmisleading information *about the nature of the procedure*." *Id*. at 882 (emphasis added).

the speech relates to a matter of public concern and controversy.

Respondent, like the court below, tries to shoehorn this case into a hypothetical "professional speech" doctrine. That effort fails for multiple reasons.

First, this Court has never embraced a "professional speech" doctrine. The principal basis for that doctrine is only a concurrence. *See Lowe v. SEC*, 472 U.S. 181, 228-33 (1985) (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in result).[2] On the other side is a more recent separate opinion noting that where speech "is subject to independent regulation by canons of the profession . . . the government's own interest in forbidding [or compelling] that speech is diminished." *Garcetti v. Ceballos*, 547 U.S. 410, 446 (2006) (Breyer, J., dissenting); *see also Wollschlaeger v. Governor*, 848 F.3d 1293, 1328 (11th Cir. 2016) (en banc) (Pryor, J., concurring) ("If anything, the doctor-patient relationship provides more justification for free speech, not less.").

Second, even assuming the validity of the "professional speech" doctrine, the Act is still an unconstitutional, poorly tailored speech mandate. The Act regulates entities, not licensed professionals. Nor is the Act limited to professional/client relationships. The Act requires that licensed facilities advertise California's family planning programs (including abortion) to *all* clients, no matter the reason for their

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[2] *See Serafine v. Branaman*, 810 F.3d 354, 359-60 (5th Cir. 2016) ("The Supreme Court has never formally endorsed the professional speech doctrine, though some circuits have embraced it based on Justice White's concurrence in *Lowe*").

visit. Petitioners must therefore tell an individual visiting one of their clinics *for a non-pregnancy related reason* that she might be eligible for a free abortion.[3] The absurdity is patent. A mother seeking diapers for her newborn, but who is not told about California's abortion funding program, will not "discover later, with devastating psychological consequences, that her decision was not fully informed." Resp. Br. at 18 (quoting *Casey*, 505 U.S. at 882).

As this Court has recognized, "[s]peech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by [professionals] the strongest protection our Constitution has to offer." *Fla. Bar v. Went for It*, 515 U.S. 618, 634 (1995). Given the broad and indiscriminate scope of the Act's compelled speech mandate, not to mention its ideologically-based motivation and purpose, *see* Pet. Br. at 22-24, this case poses such a circumstance.[4]

Third, even the "professional speech" doctrine has important limits:

> [T]he principle that the government may restrict entry into professions and vocations through

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[3] In addition to offering pregnancy tests and ultrasounds, Petitioners offer "counseling and emotional support, and practical material assistance for new and expectant mothers." App. 8.

[4] Petitioners do not argue the Act is viewpoint-based "because Family PACT providers are not required to inform women of alternatives to abortion." Resp. Br. at 30, n.20. Rather, the Act is viewpoint-based because it compels pro-life centers to utter speech embodying a particular viewpoint—that abortion is a valid option—and, worse, to facilitate that option.

> licensing schemes has never been extended to encompass the licensing of speech *per se*. . . . At some point, a measure is no longer a regulation of a profession but a regulation of speech.

Lowe, 472 U.S. at 229-30 (White, J., concurring in result). The Act, which forces pro-life centers to advertise abortion, egregiously exemplifies how a measure can exceed the bounds of any fair reading of a "professional speech" doctrine.

Fourth, invocation of that doctrine here ignores the fact that the Act restricts nonprofit charities, not commercial players. *See infra*, Sec. II.

In short, neither *Casey* nor the putative "professional speech" doctrine are large enough sheepskins to clothe this wolf.

II. Respondent Ignores *Riley* and Dodges *In re Primus*.

The Act's compelled speech mandate conflicts directly with this Court's decision in *Riley*. Pet. Br. at 26-30. *Riley*, which applied strict scrutiny to a law compelling *professional* fundraisers for charitable organizations to tell solicited persons what percentage of contributions actually went to such organizations, is clear: a "content-based regulation is subject to exacting First Amendment scrutiny," 487 U.S. at 798, and "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners," *id*. at 791. And even if one were to accept Respondent's assertion that the speech mandated by the Act is merely factual and neutral, *Riley* says that makes no difference. Under the First Amendment, the distinction between "compelled

statements of opinion" and "compelled statements of 'fact'" is irrelevant—"either form of compulsion burdens protected speech." *Id*. at 797-98.

Respondent has, literally, nothing to say about *Riley* with respect to the Act's compulsion of speech by licensed facilities.[5] Respondent's silence speaks volumes.

With respect to *In re Primus*, 436 U.S. 412 (1978), Respondent is correct that the non-profit status of an entity does not give it the right to ignore "ordinary rules regulating the profession." Resp. Br. at 19. Petitioners have already said as much. Pet. Br. at 34. The Act, however, is not an "ordinary" regulation instructing clinics how to administer a medical test, keep and maintain records, or anything of the like. It requires them to speak in a manner that undermines the very purpose of their religious identity and mission. Conscripting Petitioners into engaging in abortion advertising has as much an adverse impact on their pro-life mission as forbidding ACLU lawyers to solicit clients to further the ACLU's mission.

III. Respondent Misses the Gravamen of *Reed v. Town of Gilbert*.

As Petitioners explained, this Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), is unequivocally clear in reaffirming that content-based restrictions (and, thus, compulsions) of speech warrant strict scrutiny. Pet. Br. at 35-37. Because the Act is content-based, as the lower court

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[5] Respondent only discusses *Riley* with respect to the Act's compulsion of speech by *unlicensed* facilities. Resp. Br. at 25.

held, App. 136, it must be subject to that level of review. Respondent argues that "*Reed* did not extinguish the categorically lower levels of scrutiny that apply to certain kinds of speech, such as commercial speech and speech in the context of a professional relationship." Resp. Br. at 20. Though the commercial speech doctrine has been criticized by members of the Court, *see*, *e.g.*, *United States v. United Foods*, 533 U.S. 405, 409-10 (2000) (collecting opinions), that doctrine has been in place for decades. The same cannot be said for the so-called "professional speech" doctrine. This Court has never formally endorsed such a doctrine, much less explained it or established its parameters. It defies logic to argue that *Reed* preserved a lower level of scrutiny for a category of speech that this Court has never before adopted or articulated to any appreciable degree.

In *Wollschlaeger*, the Eleventh Circuit did not have to decide whether *Reed*'s strict scrutiny applies to a professional speech regulation—though one member of that court believed it did[6]—because it found that the regulation in that case failed heightened scrutiny under *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). 848 F.3d at 1301. Here, the Ninth Circuit rejected the notion that *Reed* applies to professional speech, not based squarely on any decision of this Court, but based on its own precedents. The question of *Reed*'s impact on professional speech is therefore a pressing matter of fundamental import that, until resolved by this Court, will leave the free speech rights of professionals susceptible to violation.

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[6] *See* 848 F.3d at 1324-25 (Wilson, J., concurring).

The "State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). Categorizing speech as "professional," and thus open to content-based regulations, does not minimize the dangers posed by content-based speech restrictions in the first place, *i.e.*, "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

Here, the "innocent motive[]" of advertising government family-planning services does "not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed*, 135 S. Ct. at 2229; *see also Wollschlaeger*, 848 F.3d at 1329 (Pryor, J., concurring) ("Could a state prohibit a pro-life doctor from discouraging a patient from aborting her unborn child? Could a state prohibit a doctor from advising a patient about sex-reassignment surgery? . . . . If today the majority can censor so-called 'heresy,' then tomorrow a new majority can censor what was yesterday so-called 'orthodoxy.'").

IV. The Circuit Conflicts Remain.

Respondent's efforts to gloss over the conflict between the decision of the Ninth Circuit and those of the Second and Fourth Circuits fail. *Evergreen Ass'n v. City of New York*, 740 F.3d 233 (2d Cir. 2014); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). Resp. Br. at 22-23.

A. *Evergreen*

Respondent points out that the disclosures in *Evergreen* only applied to centers that were not "licensed . . . to provide medical or pharmaceutical services" and that did not "have a licensed medical provider on staff." Resp. Br. at 22 (quoting 740 F.3d at 239). Those factual distinctions, however, do not create a legal one in this case.

The concerns expressed by the Second Circuit regarding the mandated disclosures apply with equal force whether a pregnancy center is licensed to provide medical services or not. The context is the same: "a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the ordinance] provide alternatives." *Id*. at 259. The content is the same: "mandat[ing] the discussion of controversial political topics." *Id*. at 250. The effects are the same: "mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue." *Id*. The consequences are the same: "requir[ing] pregnancy services centers to state the [State's] preferred message," and "to mention controversial services that some pregnancy services centers, such as Plaintiffs in this case, oppose." *Id*. at 245, n.6.[7]

And, contrary to the decision below, when one fairly considers the context and content of the speech mandated by the Act, there can be no doubt that it *encourages* access to abortion in the same way that the

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[7] *Evergreen* did not have to decide whether to apply strict scrutiny to two of the three required disclosures because they failed intermediate scrutiny. 740 F.3d at 245.

Evergreen disclosures encouraged the message of the government. Pet Br. at 16-17. The fact that the Act doesn't use the word "encourage" is irrelevant. Resp. Br. at 12-13. Billboards advertising "Free Blood Pressure Readings" at a local health clinic would clearly be an encouragement for the public to avail itself of that service.

Moreover, even if *Evergreen* had adopted the rationale of the lower court, which held that the Act's compelled speech mandate warrants intermediate, rather than strict, scrutiny, the two decisions conflict in their ultimate result. Applying *intermediate* scrutiny to two of the three disclosures, *Evergreen invalidated* them, while the court below in this case *upheld* the speech mandate. And while the Second Circuit suggested that New York City could *itself* advertise its own message, 740 F.3d at 250, the lower court here, based on a clear misreading of what level of scrutiny *Evergreen* applied to the services and government disclosures, rejected such a suggestion. Pet. Br. at 19; App. 150-51. Respondent says *nothing* of these conflicting conclusions.

B. *Stuart*

As for the conflict between the Ninth Circuit and the Fourth Circuit's decision in *Stuart*, Respondent suggests that the "statute in *Stuart* did not survive scrutiny because 'the context surrounding the delivery of [the state-mandated message] promote[d] the viewpoint the state wishe[d] to encourage.'" Resp. Br. at 23 (quoting *Stuart*, 774 F.3d at 253). The Act, however, fails for that *very same reason*.

The Act requires Petitioners to advertise a government program that provides free or low cost

abortions. It therefore requires them to advance the viewpoint of the State that abortion is a morally appropriate means of dealing with an unwanted pregnancy. Pet Br. at 22-23. Indeed, California has a "proud legacy of respecting reproductive freedom," including its "forward-thinking" programs that provide "reproductive health assistance to low income women." App. 71. While the State is certainly free to advance its "forward thinking" ideology, just as North Carolina is free to advance a pro-life belief of "preserving, promoting, and protecting fetal life," *Stuart*, 774 F.3d at 250, California cannot conscript objecting voices into promulgating that ideology through the broad, prophylactic means that the State has adopted in this case. As in *Stuart*, the Act requires Petitioners "to speak . . . the very information on a volatile subject that the state would like to convey." *Id.* at 253.

V. The Legal Issues Are Ripe for Review.

Respondent's suggestion that review by this Court would be premature is incorrect. Resp. Br. at 31. As the decision below accurately observed, "[t]his action turns on a question of law." App. 133. The legal issues regarding the Act's constitutionality are thus ripe for review and resolution by this Court. This Court has not hesitated to review preliminary injunction orders in the past, especially in areas touching upon the fundamental freedoms of speech and religion. *See*, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Agency for Int'l Dev.*, 133 S. Ct. 2321; *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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