No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF 144 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PATRICK STRAWBRIDGE
Counsel of Record
JENNIFER L. MASCOTT
CAROLINE A. COOK
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
patrick@consovoymccarthy.com

Attorneys for Amici Curiae

January 16, 2018

278067

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Statutes

Page

Bills

Cited Authorities

Page

Constitutional Provisions

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are 144 members of Congress, representing both political parties. The Appendix to this brief sets forth a complete list of *amici curiae.*

These members share an interest in upholding America's longstanding and bipartisan tradition of protecting freedom of speech and freedom of conscience. This case involves a state legislature's attempt to infringe on both of these freedoms. The California law at issue compels pregnancy centers opposed to abortion—and only those opposed to abortion—to comply with burdensome requirements that force these centers to provide non-medical information that contradicts their core message and moral beliefs. *Amici* members of Congress have an interest in ensuring that California does not infringe upon constitutional freedoms that Congress, for decades, has specifically legislated to protect. Moreover, as members of the legislative branch, *amici* possess a unique perspective regarding the complex task of drafting laws to ensure neutral, evenhanded treatment of individuals and entities of all viewpoints and faiths that comport with First Amendment guarantees.

---

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

California's Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act ("FACT Act") violates the First Amendment rights of pro-life pregnancy centers, forcing them to engage in speech that directly contradicts their own message and deeply held beliefs. It is well-established that the First Amendment proscribes compelled speech in non-commercial contexts. This is especially true in cases like this one in which the state forces conscientious objectors to carry messages that offend the speakers' moral convictions. By compelling pro-life centers to promote referrals for abortion and include burdensome disclosures in their advertising, the FACT Act violates the First Amendment.

Congress has a longstanding bipartisan tradition of enacting legislation that protects the rights of those whose conscience precludes participation in certain controversial actions, particularly in the abortion context. Since 1973, when the right to an abortion was first pronounced by the Supreme Court, Congress has repeatedly passed legislation shielding pro-life individuals and organizations from being forced to violate their consciences by performing, participating in, or referring for abortions. *See, e.g.*, Church Amendments, Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (codified as amended at 42 U.S.C. § 300a-7(b)-(c), (e) (2000)); Coats/Snowe Amendment, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 245(a)(1), 110 Stat. 1321, 1321-245 (codified at 42 U.S.C. § 238n); Hyde-Weldon Amendment, Consolidated Appropriations Act,

2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(b)(4), 124 Stat. 119, 899 (2010) (codified at 42 U.S.C. § 18023). In particular, many of these statutory provisions protect individuals and entities from discrimination based on their opposition to abortion. These laws recognize our society's deep disagreement over the issue of abortion and, consequently, aim to prevent both federal and state governments from infringing on the First Amendment conscience rights of those who oppose abortion. California's FACT Act creates precisely the constitutional dilemma these statutes seek to prevent.

In upholding the FACT Act, the Ninth Circuit erroneously applied intermediate scrutiny, despite its recognition that the statute is a content-based restriction. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016). The Ninth Circuit's analysis disregards this Court's clear instruction in *Reed v. Town of Gilbert*, that "strict scrutiny applies … when a law is content based on its face." 135 S. Ct. 2218, 2228 (2015).

Further, the FACT Act is not only content-based but viewpoint-based. It imposes burdensome speech requirements that, in practice, apply exclusively to centers opposed to abortion; entities that agree to provide abortifacients and other abortion services are exempt. Moreover, it is evident from the statute's stated purpose that pro-life pregnancy centers were the explicit target of the Act. And it is well-established that government action targeting a specific viewpoint is subject to strict scrutiny, because it is "presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995).

Nevertheless, under either intermediate or strict scrutiny, the FACT Act cannot survive. The requirements imposed on pro-life centers are far too restrictive regardless of the motivating state interest. Requiring pro-life centers to provide referrals for abortion services coercively compels the centers to engage in speech that contradicts their core message. By forcing pro-life centers to promote California's position on a hotly contested public issue, the law targets speech on the "highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 466-67 (1980). The state law also compels individuals and entities to violate their deeply held moral and religious beliefs. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Ninth Circuit's decision flies in the face of this principle and should be reversed.

ARGUMENT

I. The First Amendment Proscribes Mandatory Speech Requirements, Especially When They Violate the Speaker's Conscience.

The First Amendment not only "guards the individual's right to speak his own mind" but also prevents the government from "compel[ling] him to utter what is not in his mind." *Barnette*, 319 U.S. at 634. This well-established principle is known as the compelled speech doctrine. It recognizes that the government cannot "force an American citizen publicly to profess any statement of belief or to engage in any [conduct] of assent." *Id.* Such

protection is crucial to free speech because "speech inherently involves choices of what to say and what to leave unsaid." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986).

In *West Virginia State Board of Education v. Barnette*, this Court held that a public school board's flag-salute requirement violated the First Amendment by forcing individuals to voice the government's preferred message. 319 U.S. at 642. Writing for the Court, Justice Robert Jackson explained that mandatory speech requirements "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642. In a constitutional republic, he wrote, "[a]uthority ... is to be controlled by public opinion, not public opinion by authority." *Id.* at 641.

The right to be free from compelled speech protects entities and organizations as well as individuals. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, a power company challenged the constitutionality of a requirement that the company include in its billing envelopes a newsletter promoting wildlife conservation and other "matters of public interest." 475 U.S. at 5. This Court held that the requirement violated the First Amendment because it "both penalize[d] the expression of particular points of view and force[d] speakers to alter their speech to conform with an agenda they [did] not set." *Id.* at 9.

The compelled speech doctrine also precludes regulations that would indirectly coerce speech by forcing a speaker to carry the message of another. For example,

the Court has held in the past that public-accommodations laws cannot be used to force parade organizers to include particular groups in a privately organized public demonstration. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559 (1995). Justice David Souter wrote for the Court that such use of a "State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The opinion further explains that "this general rule … applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid." *Id.* The state cannot use mandatory speech requirements to "promot[e] an approved message or discourag[e] a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

Freedom from compelled speech is especially important in the context of conscientious objectors. At the core of the First Amendment is the right of individuals and entities to "refuse to foster … an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Thus, the Court has repeatedly rejected states' and local governments' attempts to impose mandatory speech requirements that violate a speaker's conscience. *See, e.g., Barnette*, 319 U.S. at 642 (Jehovah's Witnesses could not be compelled to salute the American flag); *Maynard*, 430 U.S. at 716-17 (Jehovah's Witnesses had right to conceal the state motto "Live Free or Die" on their license plates); *Hurley*, 515 U.S. at 581 (organization could not be forced to include an LGBT-rights group in its parade); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-61 (2000) (Boy Scouts could not be compelled to admit a same-sex marriage

activist as an assistant scoutmaster). It should do so again here, as California's FACT Act violates these core First Amendment rights by compelling pro-life pregnancy centers to engage in speech they oppose on moral and religious grounds.

II. Congress Has a Longstanding Bipartisan Tradition of Enacting Legislation to Ensure Freedom of Conscience is Protected, Particularly in the Abortion Context.

Pursuant to its members' oath to uphold the Constitution, *see* U.S. Const. art. VI, cl. 3, Congress plays a special role in ensuring citizens' free speech and conscience rights are secure. When drafting statutes, Congress must take care that they comport with the First Amendment and afford protections to conscientious objectors whenever necessary.

The Supreme Court has recognized the value of this congressional role in constitutional governance, even evaluating state and local speech regulations against the backdrop of federal law. In *Barnette*, the Court used federal conscience protections as a measuring stick when evaluating the constitutionality of a local school board's flag-salute requirement that had been challenged by religious adherents. *Barnette*, 319 U.S. at 637-38. The Court compared the local regulation with congressional legislation making flag observance voluntary, as well as federal law respecting conscientious military objectors. *Id.* The Court treated federal legislation as the superior guide for discerning First Amendment limits because "small and local authority may feel less sense of responsibility to the Constitution" than Congress. *Id.* at 637.

Likewise, the speech requirements of California's FACT Act should be evaluated against the backdrop of Congress's longstanding and bipartisan legislative tradition of protecting conscientious objectors in the abortion context. Since this Court's decision in *Roe v. Wade*, Congress has consistently sought to protect the speech and conscience rights of individuals and entities that oppose abortion. To that end, it has enacted numerous nondiscrimination laws and appropriations measures shielding pro-life individuals and organizations from being forced to violate their consciences and perform, participate in, or refer for abortions.

In the immediate wake of *Roe*, the Democrat-controlled House and Senate passed the Church Amendments almost unanimously. Church Amendments, Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (codified as amended at 42 U.S.C. § 300a-7(b)-(c), (e) (2000)). The Amendments prohibit conditioning federal funding on an individual's willingness to "perform or assist in the performance of any sterilization procedure or abortion." *Id.* § 300a-7(b). They also prohibit conditioning funds on an entity's willingness to provide facilities or personnel for the performance of abortions. *Id.* Congress was concerned that, in light of the newly pronounced constitutional right to abortion, healthcare personnel and hospitals would be forced to perform or facilitate abortions and sterilizations as a condition of receiving federal funds. These provisions were aimed to protect such individuals and entities from being coerced by the government into violating their "religious beliefs or moral convictions." *Id.*

Numerous statutory provisions also prevent recipients of federal funds from discriminating against conscientious

objectors to abortion. Among the first of these were the Church Amendments, which include provisions prohibiting federal grantees or contract recipients from discriminating against healthcare personnel that object to abortion on moral or religious grounds. *Id.* § 300a-7(c), (e).

In 1996, the Coats/Snowe Amendment was enacted by a Republican-controlled Congress and signed into law by a Democratic president. Coats/Snowe Amendment, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 245(a)(1), 110 Stat. 1321, 1321-245 (codified at 42 U.S.C. § 238n). It prohibits state and local-government recipients of federal funds from discriminating against healthcare entities that refuse to perform abortions, participate in abortion training, or refer for abortions. *Id.*

Then, in 2004, Congress first passed the Weldon Amendment as part of an appropriations act that had strong bipartisan support. Hyde-Weldon Amendment, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004). The provision bars the federal government and any state or local-government recipients of federal funds from discriminating against healthcare entities that refuse to "provide, pay for, provide coverage of, or refer for abortions." *Id.* The Amendment defines "health care entity" broadly and includes "any ... kind of health care facility, organization, or plan." *Id.* Congress has demonstrated its ongoing commitment to protecting conscience objectors by reapproving the Weldon Amendment every year since its original enactment. *See, e.g.,* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d)(1), 121 Stat. 1844, 2209 (2007); Consolidated Appropriations Act, 2010, Pub.

L. No. 111-117, § 508(d)(1), 123 Stat. 3034, 3280 (2009); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 507(d)(1), 125 Stat. 786, 1111 (2011); Consolidated Appropriations Act, 2014, Pub. L. 113-76, § 507(d)(1), 128 Stat. 5, 409 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 507(d)(1), 129 Stat. 2242, 2649 (2015). The recently proposed Conscience Protection Act of 2017 seeks to amend the Public Health Service Act to make these spending policies permanent. Conscience Protection Act of 2017, S. 301, 115th Cong. (2017).

Finally, in 2010, the Democrat-controlled Congress included a provision in the Affordable Care Act prohibiting a qualified health plan from "discriminat[ing] against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(b)(4), 124 Stat. 119, 899 (2010) (codified at 42 U.S.C. § 18023). In addition, President Barack Obama issued Executive Order 13535 to ensure the enforcement of these protections, noting the Act's preservation of "longstanding Federal laws to protect conscience" and "protections prohibit[ing] discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." Exec. Order No. 13535, 75 Fed. Reg. 15599 (March 24, 2010).

Taken together, these statutory provisions reflect Congress's solicitude for freedom of conscience in the context of abortion. Federal law has long protected a wide range of health-related entities and individuals from discrimination and from coerced engagement in any number of controversial acts related to abortion, including referring for abortion. Much like the federal

conscience protections noted in *Barnette,* these provisions "contrast[] sharply" with California's FACT Act, which both discriminates on the basis of entities' opposition to abortion and forces such entities to make referrals for abortion in violation of their deeply held beliefs. *Barnette*, 319 U.S. at 638.

III. The FACT Act Violates the First Amendment by Compelling Pregnancy Centers to Engage in Speech that Contradicts Their Message and Violates Their Moral Convictions.

The FACT Act forces pro-life pregnancy centers to promote the availability of abortion as an option for pregnant women. This mandatory speech requirement not only inhibits the centers' ability to communicate their own message, but also forces them to carry a message that violates their deeply held moral and religious beliefs. The Ninth Circuit erred in upholding the Act under intermediate scrutiny. The state requirement for licensed centers, which effectively applies only to pregnancy centers that oppose abortion, operates as both a content- and viewpoint-based regulation. Therefore, it must surpass strict scrutiny under the First Amendment. Nonetheless, because the FACT Act is prohibitively restrictive on the centers' freedom of speech, it cannot survive either strict or intermediate scrutiny.

A. The Ninth Circuit erred in applying intermediate scrutiny to this content-based regulation.

In *Reed v. Town of Gilbert*, this Court held that content-based restrictions on speech are "presumptively

unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." 135 S. Ct. at 2226; *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as other laws that regulate speech "because of its content."). That decision made it abundantly clear that strict scrutiny applies to content-based regulations "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

The Ninth Circuit recognized that the FACT Act is a content-based regulation, but nevertheless disregarded this Court's unambiguous instruction to apply strict scrutiny to such laws. *Nat'l Inst. of Family & Life Advocates*, 839 F.3d at 834. Instead, the Ninth Circuit upheld the Act under intermediate scrutiny. It justified this departure from *Reed* not by reference to any other decision of this Court but by citing a Ninth Circuit decision. *Id.* at 837. It relied on *United States v. Swisher* for the proposition that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny." 811 F.3d 299, 313 (9th Cir. 2016). The Ninth Circuit's approach of offering its own precedent as justification for ignoring Supreme Court authority is both unpersuasive and mistaken. Strict scrutiny should have been applied upon recognition that the FACT Act was a content-based restriction.

B. Even if intermediate scrutiny were appropriate for content-based restrictions, strict scrutiny is the proper standard for this case because the FACT Act is a viewpoint-based restriction.

"[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Such discriminatory regulation of speech "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *see also Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("To permit viewpoint discrimination … is to permit Government censorship."). Consequently, strict scrutiny applies to any viewpoint-based restriction on speech. *See Reed*, 135 S. Ct. at 2229-30.

The Ninth Circuit erroneously concluded that the FACT Act is viewpoint-neutral. It claimed the Act does not "discriminate on the particular opinion, point of view, or ideology of a certain speaker," because it "applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." *Nat'l Inst. of Family & Life Advocates*, 839 F.3d at 835. This is simply not true. Even a cursory examination of the FACT Act's terms and stated purpose makes clear that it targets those opposed to abortion.

The FACT Act requires licensed family-planning and pregnancy-related service centers to inform each client about her state-funded abortion options. However,

it exempts two categories of clinics from this mandate: those operated by the U.S. government and those enrolled as providers in California's Family Planning, Access, Care, and Treatment Program ("Family PACT"). *Id.* To qualify for Family PACT, providers must agree to offer "comprehensive clinical family planning services," which encompass all "federal Food and Drug Administration approved contraceptive drugs, devices, and supplies." Cal. Welf. & Inst. Code § 14132(aa)(1), (8). Some of these contraceptives are believed to operate as abortifacients.

Under these provisions, pro-life pregnancy centers can qualify for a FACT Act exemption only if they agree to offer to clients what they believe to be abortifacients. Thus, pro-life pregnancy centers in California are put to a choice: either participate in conduct that facilitates abortions or engage in speech promoting abortion. Meanwhile, clinics that do not hold pro-life views—and therefore do not object to providing abortifacients—can easily qualify for exempt Family PACT status without disavowing their convictions. The FACT Act thus "on its face" has the "inevitable effect" of commandeering pro-life centers—and only pro-life centers—to refer women to institutions that commit abortions. *United States v. O'Brien*, 391 U.S. 367, 384-85 (1968) ("[T]he inevitable effect of a statute on its face may render it unconstitutional.").

This Court's recent treatment of an analogous state statute in *Sorrell v. IMS Health Inc.*, confirms the FACT Act's viewpoint-based design. 564 U.S. 552 (2011). In *Sorrell*, this Court confronted a Vermont statute that forbade the sale of pharmacy records revealing individual doctors' prescribing practices. But the statute exempted from its prohibitions the dissemination of

prescriber-identifying information for certain purposes including healthcare research, the enforcement of health insurance policies, patient education, and law enforcement operations. *Id.* at 559-60. When read in light of these exemptions, this Court recognized that the Vermont law in its "practical operation" burdened only pharmaceutical manufacturers who used the information for marketing purposes. *Id.* at 565 (quotation omitted). The law thus went "beyond mere content discrimination, to actual viewpoint discrimination." *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)); *see also id.* (noting that an anti-bias ordinance in its "practical operation" imposed viewpoint-specific punishment).

Likewise, read in light of its exemptions, the FACT Act's practical operation burdens only pro-life pregnancy centers on the basis of their pro-life ideology. The Ninth Circuit refused to apply *Sorrell* in its decision below because it claimed the FACT Act "applies to almost all licensed and unlicensed speakers," characterizing the Act's exemptions as "narrow" and "unrelated to viewpoint." *Nat'l Inst. of Family & Life Advocates*, 839 F.3d at 836. But these assertions overlook Family PACT's position with regard to abortifacients. Just as the viewpoint-based exceptions in *Sorrell* demonstrated Vermont's disfavor of pharmaceutical manufacturers engaged in marketing speech, the FACT Act's viewpoint-based Family PACT exemption demonstrates California's disfavor of pregnancy centers engaged in pro-life speech. The FACT Act "on its face burdens disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 564. Strict scrutiny therefore applies.

This Court has separately held that strict scrutiny applies even to those regulations that are facially

viewpoint-neutral but "were adopted by the government 'because of disagreement with the message convey[ed]" by the underlying speech. *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Thus, even if the FACT Act was not facially viewpoint-discriminatory (and it is), strict scrutiny still would apply because the California legislature intended to target pro-life pregnancy centers with this Act.

California's justifications and stated purpose for passing the FACT Act reveal the state's unabashed hostility toward the ideology of pro-life pregnancy centers. The State Assembly specifically drafted the Act in response to the pro-life centers' speech, condemning the centers' "aim to discourage and prevent women from seeking abortions." JA 84-85. To be sure, the legislature attempted to couch its findings in viewpoint-neutral language, alleging that the centers "confuse" and "misinform" women in their care. *Id.* But these conclusory allegations lack any evidentiary support whatsoever in either the legislative record or the record in this case. *See* Brief of Petitioners, at 51-52 & n.17; *see also Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, __ F.3d __, __, 2018 WL 298142, at *6 (4th Cir. Jan. 5, 2018) ("After seven years of litigation and a 1,295-page record before us, the City does not identify a single example of a woman who entered the [pro-life] Center's waiting room under the misimpression that she could obtain an abortion there."). The state's only basis for its belief that the centers engage in deception is its disagreement with their "unfortunate" pro-life message. JA84-85. And "whenever the government creates 'a regulation of speech because of disagreement with the message it conveys,'" the First Amendment demands the application of strict scrutiny. *Sorrell*, 564 U.S. at 566 (quoting *Ward*, 491 U.S. at 791).

In both its terms and stated purpose, the FACT Act is a viewpoint-based regulation of speech. It is therefore unconstitutional unless it can surpass strict scrutiny. Tellingly, no government has ever succeeded in an attempt to justify a speech regulation that discriminates based on viewpoint. *See* Brief of Petitioners, at 58-60.

C. The FACT Act fails under either level of scrutiny because its means are prohibitively restrictive.

Regardless of which level of scrutiny this Court applies, the FACT Act fails. To survive intermediate scrutiny, a statute must "directly advance[] a substantial governmental interest" and be "drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. Under strict scrutiny, the regulation "must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't*, 529 U.S. 803, 813 (2000). To be narrowly tailored, a regulation must use the "least restrictive means." *Id.*

Under either standard, the FACT Act fails because the requirements it imposes on pro-life centers (and only on pro-life centers) are far too restrictive, regardless of the alleged state interest.[2] When evaluating a mandatory

2. The state's alleged interest lies in remedying a problem that does not exist. The stated purpose of the law is grounded in its conclusory allegation that pro-life centers "confuse" and "misinform" women. JA 84-85. It is from this unsupported premise that the state claims an interest in mandating the various disclosures required by the FACT Act. As explained above, the state's claims lack any support in either the legislative record or the record of this case. *Supra* at 16. Thus, its alleged interest

speech requirement, this Court considers the "nature of the speech" and "the effect of the compelled statement thereon." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). The speech implicated in this case concerns abortion—a hotly contested public issue of great importance. Such speech occupies "the highest rung of the hierarchy of First Amendment values." *Carey*, 447 U.S. at 466-67.

The effects of California's mandatory speech requirements on pro-life centers' protected speech are "impermissible." *Pac. Gas & Elec. Co.*, 475 U.S. at 9. Because the law targets only centers that oppose abortion, it "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set," and one they specifically exist to oppose. *Id.* Although "[m]andating speech that a speaker would not otherwise make" always "alters the content of the speech," that is especially the case here. *Riley*, 487 U.S. at 795. Not only have these pro-life centers chosen "not [to] otherwise make" abortion referrals, *id.*, they exist to communicate precisely the *opposite* viewpoint and offer life-affirming options to women. To promote a mother's

---

in imposing mandatory speech requirements on noncommercial (and in some cases, unlicensed) pregnancy centers falls far short of compelling. *See Brown v. Entmt. Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("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." (citations omitted)); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) (concluding the state interest was insufficient because "no support for the restriction [could] be found in the near barren legislative record relevant to [the] provision," explaining that "the Government must present more than anecdote and supposition").

option to get an abortion would defeat these centers' core message. Moreover, many pro-life centers' deeply held moral convictions and religious beliefs would be violated by forced involvement in abortion referrals.

"[L]ess instrusive and more effective measures" for informing women and preventing fraud are readily available. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 US. 620, 639 (1980). California can publish abortion-access information itself or rigorously enforce its fraud laws to deter any actual deception that occurs. Although censorship of pro-life pregnancy centers may be "the most efficient" way for California to achieve its goals, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795.

The FACT Act's requirements do not merely restrict the pro-life centers' speech, they necessarily and fundamentally alter it—all the while violating the centers' conscience rights. As speakers in a noncommercial context, these centers have absolute "autonomy to choose the content of [their] own message." *Hurley*, 515 U.S. at 573. And they certainly cannot be compelled "to foster … an idea they find morally objectionable." *Maynard*, 430 U.S. at 715. Congress's tradition of protecting the conscience rights of those who in good faith oppose abortion provides an example of alternative legislative approaches that accommodate, rather than suppress, pro-life views. The FACT Act, in contrast, seeks to enlist pro-life speakers to broadcast, and thus implicitly support, the availability of abortion. This state legislative requirement cannot be justified under strict or intermediate scrutiny and is therefore unconstitutional.

CONCLUSION

For the reasons stated, this Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

Patrick Strawbridge
Counsel of Record
Jennifer L. Mascott
Caroline A. Cook
Consovoy McCarthy Park PLLC
George Mason University
Antonin Scalia Law School
Supreme Court Clinic
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
patrick@consovoymccarthy.com

Attorneys for Amici Curiae

January 16, 2018

APPENDIX — LIST OF *AMICUS CURIAE*

U.S. Senate

Steve Daines (MT)

Charles E. Grassley

Rand Paul (KY)

Tom Cotton (AR)

Joni Ernst (IA)

Jerry Moran (KS)

James Lankford (OK)

James E. Risch (ID)

Ted Cruz (TX)

Ben Sasse (NE)

Roy Blunt (MI)

Debra Fischer (NE)

Roger F. Wicker (MS)

Tim Scott (SC)

Pat Roberts (KS)

James Inhofe (OK)

U.S. House of Representatives

Doug LaMalfa (CA-01)

House Majority Leader Kevin McCarthy (CA-23)

Bradley Byrne (AL-01)

Bruce Westerman (AR-04)

Andy Biggs (AZ-05)

Andy Harris, M.D. (MD-01)

House Majority Whip Steve Scalise (LA-01)

Robert Aderholt (AL-04)

Paul A. Gosar, D.D.S. (AZ-04)

Paul Cook (CA-08)

Devin Nunes (CA-22)

Ken Calvert (CA-42)

Dana Rohrabacher (CA-48)

Doug Lamborn (CO-05)

Ted S. Yoho, D.V.M. (FL-03)

Daniel Webster (FL-11)

Dennis A. Ross (FL-15)

Earl L. "Buddy" Carter (GA-01)

Austin Scott (GA-08)

Barry Loudermilk (GA-11)

Steve King (IA-04)

Peter Roskam (IL-06)

Rodney Davis (IL-13)

John Shimkus (IL-15)

Tom McClintock (CA-04)

David G. Valadao (CA-21)

Steve Knight (CA-25)

Mimi Walters (CA-45)

Duncan Hunter (CA-50)

Neal Dunn, M.D. (FL-02)

Ron DeSantis (FL-06)

Gus Bilirakis (FL-12)

Francis Rooney (FL-19)

Drew Ferguson IV, D.M.D. (GA-03)

Jody Hice (GA-10)

Rick W. Allen (GA-12)

Daniel W. Lipinski (IL-03)

Darin LaHood (IL-08)

Randy Hultgren (IL-14)

Jackie Walorski (IN-02)

Appendix

Jim Banks (IN-03)

Luke Messer (IN-06)

Kevin Yoder (KS-03)

Thomas Massie (KY-04)

Clay Higgins (LA-03)

Ralph Abraham, M.D. (LA-05)

Jack Bergman (MI-01)

John Moolenaar (MI-04)

Mike Bishop (MI-08)

Ann Wagner (MO-02)

Sam Graves (MO-06)

Gregg Harper (MS-03)

Walter Jones (NC-03)

Mark Walker (NC-06)

Richard Hudson (NC-08)

Kevin Cramer (ND-At Large)

Todd Rokita (IN-04)

Roger Marshall, M.D. (KS-01)

Ron Estes (KS-04)

Hal Rogers (KY-05)

Mike Johnson (LA-04)

Garret Graves (LA-06)

Bill Huizenga (MI-02)

Tim Walberg (MI-07)

Paul Mitchell (MI-10)

Vicky Hartzler (MO-04)

Jason Smith (MO-08)

Steven Palazzo (MS-04)

Virginia Foxx (NC-05)

David Rouzer (NC-07)

Mark Meadows (NC-11)

Jeff Fortenberry (NE-01)

Appendix

Don Bacon (NE-02)

Christopher H. Smith (NJ-04)

Mark Amodei (NV-02)

Brad Wenstrup (OH-02)

Robert Latta (OH-05)

Bob Gibbs (OH-07)

Michael R. Turner (OH-10)

Tom Cole (OK-04)

Mike Kelly (PA-03)

Bill Shuster (PA-09)

Lou Barletta (PA-11)

Joe Wilson (SC-02)

Ralph Norman (SC-05)

David P. Roe, M.D. (TN-01)

Diane Black (TN-06)

Adrian Smith (NE-03)

Steve Pearce (NM-02)

Steve Chabot (OH-01)

Jim Jordan (OH-04)

Bill Johnson (OH-06)

Warren Davidson (OH-08)

Jim Renacci (OH-16)

Steve Russell (OK-05)

Scott Perry (PA-04)

Tom Marino (PA-10)

Keith Rothfus (PA-12)

Trey Gowdy (SC-04)

Jeff Duncan (SC-03)

Kristi Noem (SD-At Large)

Chuck Fleischmann (TN-03)

Marsha Blackburn (TN-07)

Louie Gohmert (TX-01)

Sam Johnson (TX-03)

John Ratcliffe (TX-04)

Jeb Hensarling (TX-05)

John Culberson (TX-07)

K. Michael Conaway (TX-11)

Mac Thornberry (TX-13)

Randy Weber (TX-14)

Bill Flores (TX-17)

Jodey C. Arrington (TX-19)

Lamar Smith (TX-21)

Pete Olson (TX-22)

Kenny Marchant (TX-24)

Roger Williams (TX-25)

Brian Babin (TX-36)

Mia Love (UT-04)

Rob Wittman (VA-01)

Bob Goodlatte (VA-06)

Dave Brat (VA-07)

H. Morgan Griffith (VA-09)

Jaime Herrera Beutler (WA-03)

Dan Newhouse (WA-04)

Glenn Grothman (WI-06)

Alex Mooney (WV-02)

Evan Jenkins (WV-03)