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 FOR PLANNED PARENTHOOD FEDERATION OF AMERICA AND PHYSICIANS FOR REPRODUCTIVE HEALTH AS AMICI CURIAE SUPPORTING RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Planned Parenthood Federation of America and Physicians for Reproductive Health state that they have no parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Planned Parenthood Federation of America (PPFA) is the oldest and largest provider of reproductive health care in the United States, delivering medical services through over 600 health centers operated by 56 affiliates. Its mission is to provide comprehensive reproductive health care services and education, to provide educational programs relating to reproductive and sexual health, and to advocate for public policies to ensure access to health services. PPFA affiliates provide care to approximately 2.5 million women and men each year. One out of every five women in the United States has received care from PPFA. In particular, PPFA is at the forefront of providing high-quality reproductive health care to individuals and communities facing serious barriers to obtaining such care—especially individuals with low income, individuals in rural and other medically underserved areas, and communities of color.

Physicians for Reproductive Health (PRH) is a doctor-led nonprofit that seeks to assure meaningful access to comprehensive reproductive health services, including contraception and abortion, as part of mainstream medical care. Founded in 1992, the organization currently has over 6,000 members across the country, including over 3,000 physicians who practice in a range of fields: obstetrics and gynecology, pediatrics, family medicine, emergency medicine, cardiology, public health, neurology, radiology, osteopathic medicine, and

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

more. These members, many of whom provide abortion care, include faculty and department heads at academic medical centers and top hospitals.

PPFA and PRH (collectively, Amici) are dedicated to ensuring meaningful access to reproductive health care services, and believe that it is vitally important for women to be able to make fully informed decisions about their reproductive health care. Amici have an interest in ensuring women, including women with low income, are knowledgeable about the full range of options and care available to them. Amici's affiliates, providers, and members have seen firsthand pregnant women who have been misled and misinformed, and thus had their health care delayed, by health centers that deceptively posed as offering a full range of women's health services, although, in fact, they did not. Amici's affiliates, providers, and members have also been subject to laws that force physicians, other medical personnel, and health centers to communicate state-mandated messages to patients—messages that are often inconsistent with medical science and prevailing professional standards and that are harmful both to patients and to the medical profession.

As detailed below, several States have passed laws requiring providers of abortion services to give prospective and current patients scientifically baseless warnings about the supposed harmful effects abortions can have on women, or recommend procedures that, according to the established consensus among medical professionals, are not in patients' best interest. *See* Part II, *infra*. Amici thus have been profoundly affected by laws regulating the speech of medical professionals and have an abiding interest in ensuring that those laws are subject to appropriate judicial scrutiny.

SUMMARY OF ARGUMENT

As licensed health professionals who both provide care to patients and are often subject to government speech regulations, Amici here address the proper degree of constitutional scrutiny to be applied to the Reproductive FACT Act's disclosure requirement for licensed medical facilities and the reasons the requirement survives the applicable heightened scrutiny. *See* Cal. Health & Safety Code § 123472(a) (the "Licensed Notice" provision).

As this Court has long recognized, regulation of speech by professionals, in a professional context, about matters of professional concern implicates a conflict between professionals' substantial First Amendment interest in practicing their profession unencumbered by speech regulations that either compel them to make, or restrict them from making, certain statements to clients and patients, and the State's recognized interest in the protection of public health and patient welfare when patients receive care by licensed purveyors of professional services, who have superior knowledge and clout with respect to the services they provide. California's Licensed Notice provision falls squarely within this constitutional tradition: It regulates speech by licensed medical providers, as they provide reproductive health care to patients in licensed facilities, regarding the particular health care the patient is seeking. And it does so to further the State's recognized interest in ensuring that women seeking reproductive health care services have necessary and accurate information about, and access to, medically accepted options.

Regulation of professional speech like the Licensed Notice is subject to heightened scrutiny under the

First Amendment. Given the acute risk that States will exercise their police powers to suppress disfavored speech by professionals, only heightened scrutiny suffices to smoke out impermissible state justifications for speech regulation and thereby protect professionals' right to be free from government-compelled speech or restraints on the free expression of their professional judgment. While not all regulation of professional speech will satisfy this heightened scrutiny, the Licensed Notice does: It advances an important governmental interest in a narrow and targeted way, requiring licensed health care providers, which have as their "primary purpose" the provision of women's reproductive health care services or counseling about such services, to provide a limited written disclosure entailing indisputably accurate information to their patients who seek their advice on matters of reproductive health about their options, without indicating any preference for one health care service over another.

ARGUMENT

I. THE LICENSED NOTICE PROVISION OF THE FACT ACT MUST BE ANALYZED AS A PROFESSIONAL SPEECH REGULATION

As the Ninth Circuit correctly observed, the Licensed Notice provision regulates speech that occurs "within the confines of a professional's practice," *NIFLA* v. *Harris*, 839 F.3d 823, 839 (9th Cir. 2016), and therefore implicates the particular First Amendment concerns that attach to professional speech.

A. Professional Speech Is A Matter of Special First Amendment Concern

Professional speech creates a First Amendment dilemma. On the one hand, professional speech "occurs in

an area traditionally subject to government regulation." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm. of N.Y.*, 447 U.S. 557, 562 (1980) (discussing the special First Amendment treatment required in another such area, commercial speech). The government has a long-settled interest in "the regulation of certain trades and callings." *Watson* v. *Maryland*, 218 U.S. 173, 176 (1910) (explaining that "the police power of the states" encompasses professional regulation and highlighting in particular professions that "closely concern the public health"). This Court has accordingly recognized that a State may take steps to maintain high standards of professional conduct, through licensing and other means, including speech regulations, to support and justify the trust that consumers repose in professionals when relying on their services. *See, e.g.*, *Edenfield* v. *Fane*, 507 U.S. 761, 770 (1993) ("We have given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions."); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions."); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 768 (1976) (noting the importance of Virginia's "close regulation" of the pharmacist profession as a means of maintaining "high professional standards"); *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (identifying the government's need to protect consumers of professional services from "the untrustworthy, the incompetent, or the irresponsible").

On the other hand, individuals do not forfeit their First Amendment right to free speech when speaking in their professional capacity, even when their profes-

sion is subject to the State's superintendence. Like any other participant in the marketplace of ideas, professionals have a protected First Amendment interest in speaking—and in not speaking. *See Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"); *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *see also Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (recognizing that physicians' "First Amendment rights not to speak are implicated" when a State regulates speech by medical professionals).

When professionals, particularly those in state-regulated professions, speak, these interests often come into conflict with each other. *See Lowe* v. *SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring) (describing the "collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment"). And because "[s]peech by professionals … has many dimensions," *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 634 (1995), context matters enormously where regulation of professional speech is concerned—as it often does in the First Amendment context. *See, e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 453-454 (2011) (explaining that, when evaluating the nature of speech for First Amendment purposes, "it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said"); *Riley*, 487 U.S. at 796 (explaining that courts must look at "the nature of

the speech taken as a whole and the effect of the compelled statement thereon").

For example, a professional's public speech (*i.e.*, outside the context of a client or patient relationship) on a matter of public concern would receive full First Amendment protection. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (explaining that regulations of a professional's public speech, "[w]here [a] personal nexus between professional and client does not exist, … becomes regulation of speaking or publishing as such [and is] subject to the First Amendment's" full protection). But not every case is so straightforward. This Court has repeatedly recognized that speech occurring "as part of the practice of [a profession], subject to reasonable licensing and regulation by the State," is a matter of special First Amendment concern and has distinctive qualities. *Casey*, 505 U.S. at 884 (plurality op.); *see also, e.g.*, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 542 (2001) (observing that a professional does not become "the government's speaker" when speaking in the course of practicing a regulated profession, but rather retains First Amendment interests of his or her own); *Riley*, 487 U.S. at 801 n.13 (explaining that the government's interest in professional licensure was not "devoid of all First Amendment implication"); *Thomas*, 323 U.S. at 531 ("[T]he rights of free speech and a free press are not confined to any field of human interest.").

Professional speech is typically characterized by a knowledge imbalance between professional and client: most clients seek out professional services because they want to capitalize on an enshrined profession's specialized knowledge or expertise. As a result, clients must place their trust in professionals' speech, and States have some power to ensure that trust is appropriately reposed, including by regulating professionals' speech.

See Thomas, 323 U.S. at 545 (Jackson, J., concurring); Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 844-845 (1999) (discussing this "imbalance of authority" and knowledge). At the same time, when professionals speak in the course of practicing their profession, their First Amendment interests extend to conveying information based on their own professional expertise and an interest in delivering messages consistent with their professional judgment. *See* Haupt, *Professional Speech*, 125 Yale L.J. 1238, 1272-1273 (2016) ("The professional not only speaks for herself, but also as a member of a learned profession—that is, the knowledge community. And that community has an interest of its own. Only if the community remains autonomous can it develop and refine the specialized knowledge that is its essence and the source of its social value."); *see also* Part II, *infra* (citing cases to illustrate the risks of permitting excessive government interference with accepted professional consensus).

Drawing on this Court's precedent,[2] several courts of appeals have recognized that government regulation of "professional speech," defined as speech relating to the practice of the profession, presents a special First Amendment dilemma and warrants special First Amendment treatment. *See Harris*, 839 F.3d at 838-841; *Wollschlaeger* v. *Governor of Fla.*, 814 F.3d 1159, 1186 (11th Cir. 2015) (*Wollschlaeger I*), *opinion vacated by reh'g en banc*, 848 F.3d 1293 (11th Cir. 2017) (*Wollschlaeger II*); *King* v. *Governor of N.J.*, 767 F.3d 216,

[2] The principles justifying special First Amendment treatment for professional speech are "implicit in a number of [this Court's] decisions involving government-funded speech, commercial speech, and other areas." Haupt, 125 Yale L.J. at 1241 & nn.6-8, 1258-1264 (collecting and discussing cases).

229-233 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); *Stuart* v. *Camnitz*, 774 F.3d 238, 247-248 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill* v. *Stuart*, 135 S. Ct. 2838 (2015). These decisions commonly recognize that, although the government has a role to play in regulating the professions, professionals do not abandon their free speech rights simply by virtue of their membership in a regulated occupation. *See Stuart*, 774 F.3d at 247 ("[S]peech is speech, and it must be analyzed as such for purposes of the First Amendment." (quoting *King*, 767 F.3d at 229)).

Rather, professional speech is worthy of the Constitution's protection: it is valuable to listeners and, by extension, to society as a whole because of its function as a source of valuable information. *See Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 566 (2011) (noting that "information can save lives" in the context of medicine and public health); *Central Hudson*, 447 U.S. at 561-562; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 ("Purely factual matter of public interest may claim [First Amendment] protection."); *cf. Snyder*, 562 U.S. at 453 (explaining that matters of public concern—"'any matter of political, social, or other concern to the community'" or "'of general interest and of value and concern to the public'"—receive heightened First Amendment protection).

B. The Licensed Notice Provision of the FACT Act Regulates Professional Speech

Applying the common-sense definition drawn from this Court's precedents—professional speech is speech to clients, relating to the practice of the profession—the Ninth Circuit correctly categorized the Licensed Notice provision as a professional speech regulation. *Harris*, 839 F.3d at 839-840. In attempting to redefine

or restrict professional speech so as to exclude the Licensed Notice, petitioners and their amici lose sight of the doctrine's justifications and the interests it serves.

Under the FACT Act, all "licensed covered facilities" must distribute the "Licensed Notice" to their patients. *See* Cal. Health & Safety Code § 123472(a). To qualify as a "licensed covered facility" for purposes of the Licensed Notice provision, a clinic must have a "primary purpose [of] providing family planning or pregnancy-related services" and must also satisfy two or more of the following criteria:

(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.

Cal. Health & Safety Code § 123471(a). As a result, by definition, any patient who visits a licensed covered facility has chosen to seek out a facility—endorsed by the State with a medical license—with a "primary purpose" of offering a particular set of professional medical services. She has also chosen to seek out a facility that publicly offers at least some of the specific family-planning or pregnancy-related procedures and services

enumerated by the FACT Act. *See Harris*, 839 F.3d at 840 ("Clients go to a [licensed covered facility] precisely because of the professional services it offers, and … they reasonably rely upon the clinic for its knowledge and skill.").[3]

Given the constraints of the statute, speech by employees of a licensed covered facility that takes place within the facility and relates to the professional services on offer should be considered professional speech. From the moment a patient walks in the door of a licensed covered facility until the moment she walks out, she has placed her trust in the medical expertise that the facility is licensed to provide and has publicly held itself out as possessing. Speech related to that medical expertise implicates the knowledge imbalance that is at the core of professional speech. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (recognizing the special role played by those who "take[] the affairs of a client personally in hand").

The substance of the Licensed Notice provision clearly relates to the particular medical services sought by women who visit these licensed covered facilities. The Notice provides information about "free or low-cost access to comprehensive family planning services," which is precisely the medical specialty as to which li-

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[3] Even if the facility does not offer the complete range of family-planning or pregnancy-related procedures and services, many facilities use deceptive tactics to attract women seeking those services. *See* Part III, *infra*. Indeed, in adopting the FACT Act, the California Legislature aimed to address the fact that some of the facilities (which do not offer a full range of medical services) intentionally "pose as full-service women's health clinics" in an effort to exploit the trust that laypeople—especially laypeople in acute need of medical care—place in medical professionals. *See* Assem. Comm. on Health, Analysis of Assembly Bill No. 775, at 3.

censed covered facilities, by definition, publicly profess to have professional expertise. And when a client receives that medical information from a facility defined by its expertise in that area of medicine, the client reasonably expects that the information can be trusted, given California's licensing and regulation of the facility and the medical profession. *Cf. Ohralik*, 436 U.S. at 460, 464-465 (identifying the State's "general interest in protecting consumers" and observing that an individual "may place his trust in a lawyer," whether or not that trust is not warranted, on account of the lawyer's apparent expertise); *Virginia State Bd. of Pharmacy*, 425 U.S. at 766-769 (discussing the State's "indisputabl[e]" interest in maintaining and monitoring high professional standards of competence and trustworthiness via "close regulation"). In short, because the Licensed Notice relates to the professional services on offer in licensed covered facilities, it is professional speech.

Petitioners and their amici attempt to avoid this conclusion by proposing restrictive conditions that would exclude speech like the Licensed Notice from the reach of professional speech doctrine.

One of petitioners' amici argues that the Licensed Notice provision does not regulate professional speech because the Notice is a "rote advertisement" for public services and does not require specialized medical knowledge to deliver or explain. *See* Cato Br. 3-6 (arguing that the Licensed Notice "can be understood fully by reading a website or brochure" and is therefore not "unique to the doctor-patient relationship"); *cf.* Cal. Health & Safety Code § 123472(a)(1). But context matters. *See, e.g.*, *Snyder*, 562 U.S. at 453-454 (explaining that, when evaluating the nature of speech for First Amendment purposes, "it is necessary to evaluate all the circumstances of the speech, including what was

said, where it was said, and how it was said"); *see also Stuart*, 774 F.3d at 246 (explaining that, when evaluating required disclosures, "[c]ontext matters" (quoting *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor of Balt.*, 721 F.3d 264, 286 (4th Cir. 2013) (en banc))). Patients receiving the Licensed Notice have, by definition, come to a facility presenting itself to the public as a licensed provider of specialized medical services; they reasonably expect that any information substantively related to those medical services is being delivered within the context of a professional-client relationship.[4] Clients are hardly equipped to assess whether substantive medical speech like the Licensed Notice—or any other medical message delivered during their time at a licensed covered facility—is "unique to the doctor-patient relationship." Indeed, it is not clear how courts could fairly and consistently engage in that line-drawing exercise. The more workable standard—and the standard most responsive to the doctrine's justifications—is to analyze as "professional speech" any

[4] For this reason, the Licensed Notice is professional speech regardless of whether a medical professional, a nonprofessional staff member, or the facility itself is viewed as the speaker. Because the information relates to the medical services that the facility publicly purports to offer, it is information that clients reasonably view as within the context of the professional-client relationship. *See Harris*, 839 F.3d at 840 ("All the speech related to the clinics' professional services that occurs within the clinics' walls … is part of the clinics' professional practice."). By contrast, a staff member's speech to a client in the waiting room about a clearly nonmedical or political topic—for example, the merits of a candidate for elected office or political threats to birth control access—would not be analyzed as professional speech. *See King*, 767 F.3d at 235.

speech that, like the Licensed Notice, relates to the professional services being rendered.[5]

The same amicus also argues that the Licensed Notice provision does not regulate professional speech because its required disclosure is not "tailored to a particular client's circumstances." *See* Cato Br. 6-9. This limiting condition likewise reflects too narrow a view of professional speech. Patients trust and rely upon doctors' or other professionals' speech, even when the speech is not tailored to their particular circumstances. Patients are therefore subject to a knowledge imbalance with respect to speech relating to professional medical services, regardless of whether the speech is individualized. *See Ohralik*, 436 U.S. at 464-465 (explaining that "harmful solicitation" by attorneys, even before the establishment of any individualized attorney-client relationship, presents dangers because of a power and knowledge imbalance that may be especially strong in "circumstances conducive to uninformed acquiescence").

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[5] Petitioners' amicus raises the specter of a hypothetical California statute that would compel California doctors to inform patients where they can buy the cheapest nearby broccoli—evidently to illustrate the purported dangers of ignoring amicus's preferred "limiting principle centered on expert knowledge." Cato Br. 6. As an initial matter, this hypothetical statute compels speech relating more to commerce than to medical services. More to the point, amicus's implication—that the Ninth Circuit's definition of professional speech will lead to a deluge of silly or onerous disclosure laws—is unfounded. If a court were to find that California has only a weak interest in having licensed doctors promote broccoli's nutritional virtues, then the fact that the statute is a professional speech regulation would not preclude the court from striking down the statute under heightened scrutiny. *See* Part II, *infra*.

Casey did not hold to the contrary. In fact, *Casey* upheld a provision requiring a "physician or qualified nonphysician" to inform the patient of the availability of certain printed materials not tailored to the individual client's circumstances, but providing general information. 505 U.S. at 881. To the extent that *Casey* says anything at all about the First Amendment, it simply outlined an approach consistent with the conception of professional speech laid out here. *See id.* at 884 (recognizing that a workable balance must be found between a "physician's First Amendment right[] not to speak" and the State's power to impose "reasonable licensing and regulation" on professionals). Prudently, lower courts have declined to draw precedential First Amendment guidance from a single paragraph in *Casey* that did not clearly articulate a standard of review. *See, e.g.*, *Harris*, 839 F.3d at 837-838; *Wollschlaeger II*, 848 F.3d at 1311; *Stuart*, 774 F.3d at 239, 249 ("[T]he plurality did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review."); *see also* Haupt, 125 Yale L.J. at 1259-1260 & nn.89-91 (observing that scholars, like the courts of appeals, "have been struggling" to draw explicit guidance from *Casey*'s "cryptic" paragraph).[6]

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[6] The Fifth and Eighth Circuits have misinterpreted *Casey*'s holding and conflated *Casey*'s treatment of the Fourteenth and First Amendment claims at issue in that case. *See Texas Med. Providers Performing Abortion Servs.* v. *Lakey*, 667 F.3d 570, 574-576 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D.* v. *Rounds*, 530 F.3d 724, 733-735 (8th Cir. 2008). Those courts incorrectly concluded that if a speech regulation passes muster under *Casey*'s Fourteenth Amendment undue burden analysis—that is, if it compels speech that is truthful and not misleading—then any First Amendment challenge to the regulation necessarily fails. That analysis misreads *Casey*, which treated the undue burden and First Amendment questions as separate inquiries. Simply

Finally, contrary to petitioners' suggestion, it is irrelevant whether a licensed covered facility charges for its services. *Compare* Pet. Br. 21-22, 40-46, *with* U.S. Br. 20-24. To be sure, many professional-client relationships are transactional: a professional provides services, and the client pays for them. But many professionals, particularly doctors and lawyers, regularly offer their services pro bono—either on a full-time basis or as a part-time complement to their ordinary practice.[7] The knowledge imbalance between doctor and patient does not disappear in the pro bono context—nor does a patient's expectation of competent medical care. Professional speech and commercial speech share certain qualities, and there are some shared justifications for giving those two speech categories special First Amendment treatment. But it does not follow that professional speech must be related to a commercial transaction (*i.e.*, money exchanged for professional services) in order to be categorized as professional speech. Moreover, even in the commercial speech context, speech may be commercial (and regulated as such) even if the speech is not a "proposal[] to engage in commercial transactions." *See* U.S. Br. 21-22 (quoting *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).

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put, "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment." *Stuart*, 774 F.3d at 249.

[7] In fact, in the legal profession, most lawyers view themselves as bound by an ethical obligation to perform at least some pro bono work. *See* ABA Model Rule 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

II. PROFESSIONAL SPEECH IS SUBJECT TO HEIGHTENED SCRUTINY

This Court's precedent makes clear that heightened scrutiny strikes the proper balance between the free speech rights of professionals and the power of the government to regulate the professions.

As a general rule, when a "law on its face burdens disfavored speech by disfavored speakers, … [i]t follows that heightened judicial scrutiny is warranted." *Sorrell*, 564 U.S. at 564. Professional speech regulations fit comfortably within this framework; they burden "disfavored speech" within the professional-client relationship (either by proscribing or compelling speech with "particular content") by "disfavored speakers," namely, professionals. *Id.* at 565.

The justification for this general rule is particularly salient in the professional speech context. Professionals have access to a body of specialized knowledge to which laypersons have little or no exposure. *See* Part I.A, *supra*. Clients seek out professionals precisely because clients lack this knowledge. Heightened scrutiny is necessary to ensure that government regulations of professional speech are properly directed to maintaining the integrity of this information flow, not to inhibiting politically-disfavored messages. *See Central Hudson*, 447 U.S. at 561-562 (describing "the societal interest in the fullest possible dissemination of information"); *see also Sorrell*, 564 U.S. at 566 (recognizing the public's interest in the "free flow" of information, especially "in the fields of medicine and public health, where information can save lives").

Moreover, regardless of the government's own interest in regulating professions, this Court's precedents establish that rational basis review cannot adequately

safeguard the important First Amendment concerns implicated with professional speech. *See NAACP* v. *Button*, 371 U.S. 415, 438-439 (1963) ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *District of Columbia* v. *Heller*, 554 U.S. 570, 628 n.27 (2008) ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms."). This Court has implicitly acknowledged as much and, on several occasions, has applied heightened scrutiny to regulations restricting the speech of professionals. *See, e.g.*, *Legal Servs. Corp.*, 531 U.S. at 542-548 (holding that a federal law prohibiting attorneys from advising their clients about challenging welfare laws violated the First Amendment because it limited "constitutionally protected expression" and "alter[ed] the traditional role of the attorneys"); *Button*, 371 U.S. at 438 ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer … to say that the purpose of [a law] was merely to ensure high professional standards[.]"); *cf. Ohralik*, 436 U.S. at 464 (upholding ban on lawyers' in-person solicitation in light of the state's "strong interest" in protecting the public from overreaching and harmful solicitation).

Indeed, in certain circumstances, intermediate scrutiny would be too lenient a standard to apply to professional speech regulations. *See King*, 767 F.3d at 235. For example, a law that compelled a professional to utter ideological speech should be subjected to strict, not intermediate, scrutiny. *See Stuart*, 774 F.3d at 246

(finding that a mandatory ultrasound statute compelled ideological speech); *see also id.* at 255 ("Regulations which compel ideological speech 'pose 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.'" (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994)).

Consistent with these principles, several lower courts have expressed "serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech," explaining that, without heightened scrutiny, "legislatures could too easily suppress disfavored ideas under the guise of professional regulation." *See King*, 767 F.3d at 236; *see also Wollschlaeger II*, 848 F.3d at 1311 ("If rationality were the standard, the government could—based on its disagreement with the message being conveyed—easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on."); *Stuart*, 774 F.3d at 249 ("A heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure.").

The need for heightened scrutiny of professional speech regulations is evidenced by the spectrum of state laws enacted to compel reproductive health providers to make certain disclosures. The Arizona legislature, for example, enacted a law in 2015 mandating that abortion providers tell anyone seeking an abortion

that "it may be possible to reverse the effects of a medication abortion if the woman changes her mind but that time is of the essence," Ariz. Rev. Stat. § 36-2153(2)(h) (2015), in addition to several other required disclosures. *See Planned Parenthood Ariz., Inc.* v. *Brnovich*, 172 F. Supp. 3d 1075 (D. Ariz. 2016). The law required that this statement be made even if the patient was not seeking a medication abortion, thus adding confusion and unnecessary noise to the patient's decision-making process. Moreover, the statement itself lacks scientific support and is opposed by major medical organizations like the American College of Obstetricians and Gynecologists.[8] Other states have similarly sought to compel abortion providers to convey statements without any scientific support or medical justification. *See, e.g.*, Tex. Health & Safety Code § 171.012(a)(1)(B)(iii) (requiring abortion providers to tell patients that abortion increases the risk of developing breast cancer)[9]; *Stuart*, 774 F.3d at 254 (discussing North Carolina law requiring abortion providers to display a sonogram and provide an accurate description of the fetus, "regardless of the psychological or emotional well-being of the patient," even when doing so "could prove psychologically devastating").

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[8] Am. Coll. Obstetricians & Gynecologists, *Facts Are Important: Medication Abortion "Reversal" Is Not Supported by Science* (Aug. 2017) ("Claims regarding abortion 'reversal' treatment are not based on science and do not meet clinical standards. The American College of Obstetricians and Gynecologists (ACOG) ranks its recommendations on the strength of the evidence, and does not support prescribing progesterone to stop a medical abortion." (endnote omitted))

[9] Melbye et al., *Induced Abortion and the Risk of Breast Cancer*, 336 N. Eng. J. Med. 81, 83 (1997) (study of 1.5 million women "uncover[ing] no overall increased risk of breast cancer among women with a history of induced abortion").

Not only do these laws compel abortion providers to alter the content of their professional messages, thereby restricting free speech and damaging the "free flow" of information; but they also affirmatively disrupt the valuable informational function of professional speech by mandating misleading and deceptive statements and/or statements that depart from standard medical practice. Rational review leaves this harmful government interference essentially unchecked. *See, e.g.*, Haupt, 125 Yale L.J. at 1288 (explaining the importance of keeping medical providers' speech "free from outside interference" and that mandated disclosures may not run afoul of the First Amendment only if they are "considered a part of medically necessary information flow within the doctor-patient relationship").

The government may very well have a role to play in regulating professional speech in some circumstances. But, particularly in the patient-provider context, "professionals do not leave their speech rights at the office door." *Stuart*, 774 F.3d at 251. Laws aiming to limit the free speech rights of professionals must face heightened scrutiny to protect the vital First Amendment concerns presented.

III. THE LICENSED NOTICE SURVIVES HEIGHTENED SCRUTINY

As this Court has explained, under heightened scrutiny, a government regulation must (1) "directly advance[] a substantial governmental interest," and (2) be "drawn to achieve that interest." *Sorrell*, 564 U.S. at 572.[10] The Licensed Notice amply satisfies that test.

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[10] Unlike the Vermont statute at issue in *Sorrell*, the Licensed Notice provision was not enacted with the intention of

The Licensed Notice directly advances a substantial government interest. The State has a substantial interest in ensuring that women receive accurate information in their pursuit of reproductive health care. *Harris*, 839 F.3d at 841; *see also Roe* v. *Wade*, 410 U.S. 113, 149-150 (1973). That interest includes ensuring that women receive accurate information on services available to them in a timely fashion. *See* Am. Coll. of Obstetricians & Gynecologists, Comm. on Ethics, *The Limits of Conscientious Refusal in Reproductive Medicine* 5 (2007; reaffirmed 2013) ("Health care providers must impart accurate and unbiased information so that patients can make informed decisions about their health care."). The earlier in pregnancy that women obtain the health care services they desire, the better and safer it is for them. Women must make decisions about their pregnancies in a timely fashion, or the available safe and legal options will be restricted. Assem. Comm. on Health, Analysis of Assembly Bill No. 775, at 3 ("[B]ecause pregnancy decisions are time sensitive, California Women should receive information about their rights and available services at the sites where they obtain care.").

As the legislative history indicates, there is a demonstrated problem with certain health centers who purport to provide a full range of services to pregnant women but instead use deceptive tactics to mislead women about their options. These centers exist to promote their own views against abortion and other legal pregnancy services. *See* Am. Coll. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, *Increasing Access to Abortion* 5

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demonstrating legislative antipathy toward a particular viewpoint. *See Sorrell*, 564 U.S. at 576-577.

(2014; reaffirmed 2017) (noting these centers "operate to dissuade women from seeking abortion care"). The American College of Obstetricians and Gynecologists has stated that centers of this type "often provide inaccurate medical information" to women, which "can divert women from accessing comprehensive and timely care from appropriately trained and licensed providers." *Id.* These deceptive tactics have been well documented in numerous studies from around the country. *See, e.g.*, *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* 7, Prepared for Rep. Henry A. Waxman, U.S. House of Representatives, Committee on Government Reform – Minority Staff, Special Investigations Division (July 2006) (finding 87% of centers in the study provided false or misleading information about the effects of abortion on a woman's health); NARAL Pro-Choice America, *The Truth about Crisis Pregnancy Centers* 2-3 (Jan. 1, 2017) (listing deceptive tactics used by these centers to mislead women seeking reproductive health care services). Given this background, and the weight of significant medical authority on its side, California has a particularly substantial interest in ensuring that women are not misled about the services available to them in the course of their pregnancy.

Further, the statute is properly drawn to achieve the State's substantial interest. The Licensed Notice conveys only accurate information, in a written format, about the services available to low-income women seeking reproductive health care services. The Notice is a clear recitation of information effectively targeted to the population at the center of the State's substantial interest: women seeking information regarding reproductive health care services who are not aware of the services available to them. Assem. Bill No. 775 § 1(b)

("[A]t the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery."). Moreover, the Notice does not require petitioners to express any view about those services, nor does it require petitioners to suggest that women should take advantage of those services, or any particular service over another. *See Harris*, 839 F.3d at 842 (distinguishing *Evergreen Ass'n* v. *City of N.Y.*, 740 F.3d 233 (2d Cir. 2014), and noting that "the Licensed Notice does not use the word 'encourage,' or other language that suggests the California Legislature's preferences regarding prenatal care"). In fact, the statute leaves petitioners free to express disagreement with the services listed on the Licensed Notice.

For all these reasons, the Ninth Circuit properly found that the Licensed Notice directly advances—and is drawn to achieve—a substantial government interest.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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