No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL., PETITIONERS

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

This case concerns whether a state statute that compels family-planning clinics to make certain disclosures violates the First Amendment, applicable to the States through the Fourteenth Amendment. The United States has a substantial interest in protecting citizens' constitutional right of free expression. It also has a substantial interest in the application of numerous statutory and regulatory requirements that persons disclose information to the public related to goods or services they provide.

STATEMENT

1. a. Like other States, California regulates the licensure and practice of medical professionals. See, *e.g.*, Cal. Bus. & Prof. Code §§ 2000 *et seq.* (West 2012) (medical practice); *id.* §§ 4000 *et seq.* (West 2011) (pharmacies); Cal. Health & Safety Code §§ 1200 *et seq.* (West 2016) (clinics). It also provides medical-insurance coverage to low-income individuals through various programs. Medi-Cal, California's Medicaid program, "offers free or low-cost health coverage for California residents who meet eligibility requirements" through a network of participating providers.[1]

The Family Planning, Access, Care, and Treatment (Family PACT) Program is a Medi-Cal initiative that offers "comprehensive clinical family planning services" to lower-income individuals. Cal. Welf. & Inst. Code § 14132(aa)(1) (West Supp. 2018). Those services include contraception, counseling, and diagnosis and treatment of cancer and other conditions related to reproductive health. *Id.* § 14132(aa)(8). Family PACT services do "not include abortion," *ibid.*, but "all [Food and Drug Administration (FDA)] approved contraceptive methods and supplies" are provided.[2] Medi-Cal also provides coverage for abortion services.[3]

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[1] California Dep't of Health Care Servs. (CDHCS), *Medi-Cal Eligibility and Covered California – Frequently Asked Questions*, http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Medi-CalFAQs2014a.aspx#1; see CDHCS, *Medi-Cal Overview*, http://www.dhcs.ca.gov/services/medi-cal/Pages/default.aspx.

[2] CDHCS, *What does Family PACT cover?*, http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

[3] See Health & Human Servs. Agency, CDHCS, *All Plan Letter 15-020* (Sept. 30, 2015), http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2015/APL15-020.pdf; Br. in Opp. 2, 31 n.21.

b. In 2015, California enacted the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act or the Act), 2015 Cal. Stat. 5351-5354 (Cal. Health & Safety Code §§ 123470 *et seq.* (West Supp. 2018)) (Pet. App. 75a-83a). The Act's stated purpose is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." § 2. The Legislature found that, although the State "provides insurance coverage of reproductive health care and counseling to eligible, low-income women," many women who become pregnant are "unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." *Id.* § 1(a) and (b). The Legislature further determined that it is "vital that pregnant women in California know when they are getting medical care from licensed professionals." *Id.* § 1(e). In light of those determinations, the FACT Act imposes two disclosure requirements.

First, the Act requires state-licensed medical facilities that provide pregnancy-related services to inform their clients that California offers public assistance for various family-planning and pregnancy-related services (Licensed Notice). Cal. Health & Safety Code § 123472(a) (West Supp. 2018). The Licensed Notice applies to clinics licensed by California "whose primary purpose is providing family planning or pregnancy-related services" and that satisfy at least two of the following six 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.

Id. § 123471(a). The Act exempts clinics maintained or operated by the United States or its agencies, and those "enrolled as a Medi-Cal provider and a provider in the [Family PACT] Program." *Id.* § 123471(c).

Facilities subject to the Licensed Notice requirement must disseminate the following message to their clients:

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

Cal. Health & Safety Code § 123472(a)(1) (West Supp. 2018). This notice may be disseminated either as a "public notice posted in a conspicuous place," a printed notice distributed to all clients, or as a digital notice printed in the same point type as other digital notices, and it may be combined with other disclosures. *Id.* § 123472(a)(2) and (3).

Second, the Act requires certain facilities that are not licensed by the State and do not employ licensed medical providers to disclose those two facts to their clients (Unlicensed Notice). Cal. Health & Safety Code § 123472(b) (West Supp. 2018). The Unlicensed Notice requirement applies to any facility "that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services," and that satisfies at least two of the following four criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> (2) The facility offers pregnancy testing or pregnancy diagnosis.
>
> (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> (4) The facility has staff or volunteers who collect health information from clients.

Id. § 123471(b). The same two exceptions for federal facilities and for Medi-Cal and Family PACT participants apply. *Id.* § 123471(c).

Clinics subject to the Unlicensed Notice requirement must disseminate the following notice:

> This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

Cal. Health & Safety Code § 123472(b)(1) (West Supp. 2018). The Unlicensed Notice must be communicated both "onsite"—in a sign posted at the facility's entrance "and at least one additional area where clients wait to receive services"—and also "in any print and digital advertising materials including Internet Web sites." *Id.* § 123472(b)(2). It must be provided in the primary threshold languages for Medi-Cal beneficiaries in the county where the facility is located. *Id.* § 123472(b).

Facilities subject to either the Licensed Notice requirement or the Unlicensed Notice requirement that fail to comply are subject to civil penalties of $500 for the first violation and $1000 for each subsequent violation. Cal. Health & Safety Code § 123473(a) (West Supp. 2018).

2. a. Petitioners are three nonprofit organizations. Pet. App. 10a. Petitioner National Institute of Family and Life Advocates is a national organization of family-planning and pregnancy centers, including 111 centers—some licensed, others unlicensed—in California. *Ibid.* Petitioner Pregnancy Care Clinic is a licensed clinic that provides ultrasounds and medical referrals; its staff includes doctors of obstetrics, gynecology, radiology, and anesthesiology. *Id.* at 10a-11a. Petitioner Fallbrook Pregnancy Center is an unlicensed clinic that provides pregnancy tests, educational programs, and medical referrals; it employs nurses, but no doctors, and contracts with a licensed medical provider for referrals for ultrasounds nearby. *Id.* at 11a. All petitioners are strongly opposed to abortion.

In 2015, before the FACT Act became effective, petitioners brought this suit against respondents, California officials who enforce the Act. Pet. App. 11a. As relevant here, petitioners alleged that the Act's disclosure

requirements violate petitioners' freedom of speech and free exercise of religion under the First Amendment. *Id.* at 11a-12a; *id.* at 109a-112a, 114a-116a. They sought a preliminary injunction on both grounds. *Id.* at 12a.[4]

b. The United States District Court for the Southern District of California denied a preliminary injunction. Pet. App. 44a-71a. The court determined that the Licensed Notice is subject to rational-basis review because it does not "ban speech or otherwise prohibit [petitioners] from discussing their message with patients," or is subject at most to intermediate scrutiny as a regulation of professional speech. *Id.* at 61a-64a. Under either standard, the court held, the Licensed Notice survives review because it advances the State's interest in ensuring that women are informed of their rights and treatment options, is "neutral as to any particular view or opinion," and does not preclude petitioners from conveying their views. *Id.* at 64a-65a; see *id.* at 61a-62a.

The district court determined that the Unlicensed Notice "withstands any level of [First Amendment] scrutiny." Pet. App. 66a. The court reasoned that California has a compelling interest in "ensuring pregnant women know when they are receiving medical care from licensed profession[als]," and a "notice that a facility is not licensed and has no licensed medical provider on

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[4] Petitioners' complaint also alleged that the FACT Act violates the Due Process Clause of the Fourteenth Amendment; 42 U.S.C. 238n, which prohibits state and local entities that receive federal aid from discriminating against providers that do not provide or refer patients for abortions; and the California Constitution. Pet. App. 112a-114a, 116a-120a. Petitioners did not seek injunctive relief on those grounds, *id.* at 12a n.3; D. Ct. Doc. 3-1, at 7-25 (Oct. 21, 2015), and the lower courts did not address them, Pet. App. 1a-71a.

staff is narrowly tailored" to that interest. *Id.* at 66a-67a.[5]

3. The court of appeals affirmed. Pet. App. 1a-43a. It held that the Licensed Notice "is subject to intermediate scrutiny" because it "regulates professional speech"—*i.e.*, speech "between professionals and their clients in the context of their professional relationship." *Id.* at 29a, 42a. Such speech, the court reasoned, receives less exacting review because professionals have "specialized knowledge that their clients usually do not" and on which their clients rely. *Id.* at 29a (citation omitted). Although the Act is "content-based," the court held, it is not viewpoint-based; its requirements apply "regardless of what, if any, objections [facilities] may have to certain family-planning services," subject to "two narrow exceptions that do not disfavor any particular speakers." *Id.* at 20a. The court rejected the parties' various other arguments for applying different levels of scrutiny.

The court of appeals held that the Licensed Notice survives intermediate scrutiny. Pet. App. 33a-36a. California, it stated, has a substantial interest in ensuring that its citizens are aware of state-sponsored "medical services relevant to pregnancy." *Id.* at 34a. The court determined that the Licensed Notice is "narrowly drawn to achieve" that interest because it requires facilities merely to inform clients "of the existence of publicly-funded family-planning services"; does not compel "more speech than necessary"; and does not "encourage, suggest, or imply that women should use those state-funded services." *Ibid.*

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[5] The district court also held that petitioners were unlikely to succeed on their free-exercise claim and had not demonstrated irreparable harm. Pet. App. 67a-69a, 71a.

The court of appeals agreed with the district court that the Unlicensed Notice provision would survive First Amendment review under any level of scrutiny. Pet. App. 36a-39a. California, it held, has a compelling interest in informing women seeking medical services whether the facility from which they seek care is licensed. *Id.* at 37a. The Unlicensed Notice, the court concluded, is "narrowly tailored" to that interest. *Ibid.* It "helps ensure that women * * * are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations" applicable to medical professionals. *Id.* at 38a. It "is also only one sentence long" and "merely states that the facility in which it appears is not licensed by California and has no state-licensed medical provider." *Ibid.*[6]

SUMMARY OF ARGUMENT

I. This Court's precedent establishes several principles that guide analysis of petitioners' First Amendment challenges to the FACT Act's disclosure requirements. In the context of fully protected speech, laws that compel private persons to convey a particular message are generally subject to strict scrutiny. In certain other contexts, however, that general rule does not apply, two of which are relevant here. First, laws that require providers of commercial services to disclose factual, uncontroversial information about their services will be upheld if reasonably related to an appropriate governmental interest. *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 650-651 (1985). Second, regulations of speech by professionals related to their own services may be subject to

[6] The Ninth Circuit also rejected petitioners' free-exercise claim. Pet. App. 39a-42a. This Court did not grant review of that claim.

heightened rather than strict scrutiny. See, *e.g.*, *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

The parties' various categorical arguments for lower or higher standards are unpersuasive. Respondents' suggestion below that abortion-related disclosure laws are subject to rational-basis review under *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992) (plurality opinion), is incorrect. Conversely, petitioners' contention that all disclosure requirements are subject to strict scrutiny is also wrong and inconsistent with this Court's precedent. Petitioners further overreach in suggesting that neither *Zauderer* nor heightened scrutiny ever applies to speech by providers who offer services for free.

II. The Licensed Notice violates the First Amendment. It is not subject to deferential review under *Zauderer* because it does not concern uncontroversial information about the licensed clinics' own services; instead, it requires them to advertise services provided by others, including abortion, that are deeply divisive and that they strongly oppose. The Licensed Notice is therefore subject at least to heightened scrutiny.

The Court need not determine here whether heightened scrutiny or strict scrutiny applies because the Licensed Notice fails even the lower standard. Licensed clinics have a strong interest in refraining from speech that advertises third-party services they find morally repugnant. California has not substantiated any particularized interest in having licensed clinics themselves disseminate the notice. Instead, the State has relied on a more generalized interest in public awareness of state-sponsored services, but has not demonstrated any

specific interest in having covered licensed clinics advertise those services, which they oppose. In any event, California's asserted interest is insufficient to justify requiring petitioners to serve as "billboard[s]" for the State's programs, *Wooley* v. *Maynard*, 430 U.S. 705, 713-717 (1977), because the Licensed Notice is not appropriately tailored. There are multiple alternative potential ways the State might pursue it without infringing petitioners' speech, including advertising state-sponsored services itself.

Petitioners argue that the Licensed Notice is also viewpoint-based. If true, that would warrant strict scrutiny, but it is unclear on the current record whether that is correct. The Court need not reach that issue because the Licensed Notice fails heightened scrutiny.

III. By contrast, the Unlicensed Notice survives First Amendment review. That requirement is subject to *Zauderer* because it merely requires service providers to disclose an accurate, uncontroversial fact about their own services: that they are not provided by a state-licensed medical professional. In any event, the Unlicensed Notice survives review even under heightened scrutiny. The State has a strong interest in ensuring that women know whether services such as ultrasounds and sonograms are provided by licensed medical professionals. The Unlicensed Notice is appropriately tailored to that objective: it requires a single-sentence disclosure of the fact that the providers are unlicensed.

Petitioners contend that the requirement will be unduly burdensome because in certain localities they may be required to repeat the notice in multiple languages, making advertising cost-prohibitive. The concern petitioners raise is significant and might provide a valid basis for an as-applied challenge in an appropriate case.

But petitioners do not appear to have developed a record to support that argument here, and the courts below did not address it. This Court should not address that contention in the first instance.

ARGUMENT

I. THE STANDARD OF FIRST AMENDMENT SCRUTINY THAT APPLIES TO LAWS COMPELLING SPEECH DEPENDS ON THE CONTEXT

Laws that compel speech, like laws that restrict speech, warrant careful First Amendment scrutiny. See, *e.g.*, *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 636-642 (1943). As with speech restrictions, the "level of scrutiny to apply to a compelled statement" depends on the context, and the Court's "lodestars" for determining the appropriate standard are "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 796-797 (1988). Thus, "in the context of fully protected expression," *id.* at 797, "[l]aws that compel speakers to utter or distribute speech bearing a particular message" are generally subject to strict scrutiny. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994); see, *e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 713-717 (1977) (law compelling license plate to display ideological message).

Just as speech restrictions in certain contexts are not subject to strict scrutiny, however, see, *e.g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980) (commercial speech), so too some types of compelled disclosures are not subject to strict scrutiny. Two such contexts are potentially relevant here. First, laws requiring providers of commercial services to disclose "purely factual and uncontroversial information about the terms under which" their

"services will be available" generally will be upheld where they are "reasonably related to the State's interest." *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985). Second, laws restricting speech by members of a regulated profession related to their services will be upheld where they satisfy heightened (rather than strict) scrutiny, see, *e.g.*, *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), and the same principle applies to disclosures related to a professional's services. The applicability of these principles here is discussed below, Parts II-III, *infra*. As a threshold matter, the parties have advanced various categorical arguments for applying lower or higher standards in this area, but their arguments are mistaken.

A. Laws That Require Professionals To Make Disclosures Related To Their Own Services Generally Are Subject To Review Under *Zauderer* Or Heightened Scrutiny

1. This Court has declined to apply strict scrutiny to laws that require providers of commercial services in the marketplace to disclose factual, uncontroversial information about their own services. *Zauderer*, 471 U.S. at 651. As the Court has explained, a speaker's "constitutionally protected interest in *not* providing" such "factual information" about its services "is minimal." *Ibid.* Accordingly, the Court has applied a more deferential standard, holding that such requirements pass First Amendment muster "as long as [they] are reasonably related to the State's interest." *Ibid.* Although *Zauderer*'s standard does not permit compelled disclosures that are "unjustified or unduly burdensome," it also does not require the government to use the "'least restrictive means'" available. *Id.* at 651-652 & n.14.

In *Zauderer* itself, for example, this Court upheld a requirement imposed by Ohio bar rules that attorneys who advertise their willingness to represent clients for a contingency fee must also disclose whether the fee arrangement would require clients to pay court costs in the event of a loss. See 471 U.S. at 639-653. The Court expressly declined to apply strict scrutiny, explaining that, "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 651 (brackets in original) (quoting *In re R. M. J.*, 455 U.S. 191, 201 (1982)). An advertiser's First Amendment "rights are adequately protected," the Court explained, "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Ibid.*; see *id.* at 651-652 n.14.

This Court reaffirmed the *Zauderer* standard in *Milavetz, Gallop & Milavetz P. A.* v. *United States*, 559 U.S. 229, 248-253 (2010) (rejecting First Amendment challenge to federal statute requiring persons who advertise debt-relief services to include certain factual disclosures about the nature of their services). The Court "agree[d]" with the government that, because the law there targeted misleading commercial speech and

"impose[d] a disclosure requirement rather than an affirmative limitation on speech, * * * the less exacting scrutiny described in *Zauderer* govern[ed]." *Id.* at 249.[7]

Although the *Zauderer* standard is deferential, it is not toothless. This Court has made clear that *Zauderer* does not shield disclosure requirements that are "unjustified" and "unduly burdensome." *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994) (citation omitted); *id.* at 146-147 (invalidating requirement that certain professionals advertising themselves as "specialists" include a detailed disclaimer, where State identified no "potentially real, not purely hypothetical," harm and disclaimer "effectively rule[d] out" using the "'specialist' designation on a business card or letterhead, or in a yellow pages listing"). And *Zauderer* applies only to required disclosures that are "uncontroversial." 471 U.S. at 651.

2. This Court also has held that the government may regulate speech by members of regulated professions related to their services in certain circumstances without satisfying strict scrutiny. The States have "broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975), and have done so "from time immemorial." *Dent* v. *West Va.*,

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[7] Although *Zauderer* and *Milavetz* involved laws based on the government's interest in preventing deception, *Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 249, courts of appeals have held that *Zauderer* also extends to other interests. See, *e.g.*, *CTIA-The Wireless Ass'n* v. *City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017); *American Meat Inst.* v. *United States Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc), overruling, *e.g.*, *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *New York State Rest. Ass'n* v. *New York City Bd. of Health*, 556 F.3d 114, 132-134 (2d Cir. 2009).

129 U.S. 114, 122 (1889); see *Barsky* v. *Board of Regents*, 347 U.S. 442, 449 (1954). And just as "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," *Ohralik*, 436 U.S. at 456, so too "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech," *Lowe* v. *SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result) (examining SEC prosecution for engaging in investment advising without a license).

Accordingly, the Court has upheld restrictions on professionals' speech related to their services without requiring that they satisfy strict scrutiny. See, *e.g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (upholding disclosure requirements for doctors who perform abortions because "the physician's First Amendment rights not to speak are implicated * * * but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State"); *id.* at 968 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Ohralik*, 436 U.S. at 460 (upholding State's ban on in-person solicitation by lawyers and noting its "special responsibility for maintaining standards among members of the licensed professions"). The Court's decisions indicate that, in general, heightened rather than strict scrutiny is appropriate for disclosure requirements that pertain to services provided by the professional who is subject to the regulation.

In *Ohralik*, for example, the Court explained that, although an attorney's solicitation of business was "entitled to some constitutional protection," it "f[ell] within the State's proper sphere of economic and professional

regulation" and thus was "subject to regulation in furtherance of important state interests." 436 U.S. at 459. The Court upheld the law, explaining that the State had demonstrated that its ban on in-person solicitation furthered "a legitimate and important state interest"—namely, "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" *Id.* at 462; see *id.* at 460-468. Lower courts similarly have applied heightened rather than strict scrutiny to laws requiring professionals to make disclosures related to the services they provide. See *Pickup* v. *Brown*, 740 F.3d 1208, 1228 (9th Cir.), cert. denied, 134 S. Ct. 2871 and 134 S. Ct. 2881 (2014); *King* v. *Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014), cert. denied, 135 S. Ct. 2048 (2015); *Moore-King* v. *County of Chesterfield*, 708 F.3d 560, 568-570 (4th Cir. 2013).[8]

This heightened scrutiny differs from both rational-basis review and strict scrutiny. Whereas rational-basis review requires only that a "law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost," heightened scrutiny "require[s] the government goal to be substantial," requires "the cost to be carefully calculated," and requires that the government "affirmatively establish [a] reasonable fit" between the restriction and the government's interest. *Board of Trs.* v. *Fox*, 492 U.S. 469, 480

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[8] In some circumstances, a law may not be subject to First Amendment scrutiny at all because it proscribes unlawful conduct that is merely "initiated, evidenced, or carried out" through speech. *Ohralik*, 436 U.S. at 456 (citation omitted); *e.g.*, *United States* v. *Williams*, 553 U.S. 285, 297 (2008) (offers to engage in unlawful transactions).

(1989). Unlike strict scrutiny, however, heightened scrutiny does not impose "a least-restrictive-means requirement"; it requires a "fit that is not necessarily perfect, but reasonable." *Ibid.* Under this standard, the government may not ignore obvious, available, and effective alternatives. See *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) (The existence of "numerous and obvious less-burdensome alternatives * * * is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

This heightened-scrutiny standard "take[s] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[s] the Legislative and Executive Branches," as well as the States, "needed leeway in a field" such as the professions "'traditionally subject to governmental regulation.'" *Fox*, 492 U.S. at 480-481 (quoting *Ohralik*, 436 U.S. at 455-456). It also reflects the societal interest in ensuring that licensed professionals do not abuse the influence that they hold over the public as a consequence of their specialized knowledge and training—knowledge and training that is typically communicated through speech.

B. The Parties' Categorical Arguments For Different Standards Of Scrutiny Lack Merit

The parties have advanced several broad arguments that different standards of scrutiny apply to the kinds of disclosure requirements at issue in this case. None of those arguments is persuasive.

1. In the court of appeals, respondents argued that the Licensed and Unlicensed Notices are subject only to rational-basis review under *Casey*, *supra*. Resp. C.A. Br. 23-24. As the court noted, some lower courts have

construed *Casey* to impose a "reasonableness" standard for "abortion-related disclosure law[s]." Pet. App. 25a. The court correctly rejected this reading of *Casey*. *Id.* at 25a-27a.

Casey upheld a Pennsylvania law requiring physicians to make certain abortion-related disclosures to patients. See 505 U.S. at 881-884 (plurality opinion); *id.* at 968 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The plurality reasoned that the "physician's First Amendment rights not to speak are implicated * * * but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," and concluded that there was "no constitutional infirmity" in the requirement at issue. *Id.* at 884. Although neither the plurality nor Chief Justice Rehnquist applied strict scrutiny, they also did not specify which lesser level of scrutiny applied. *Casey* should not be construed to create a special form of First Amendment scrutiny applicable only to abortion-related laws. Pet. App. 25a-26a; see *Stuart* v. *Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014).

2. Petitioners argue (Br. 28-31) that *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), requires applying strict scrutiny to all content-based regulations of speech, including all disclosure requirements. *Reed* held unconstitutional a town ordinance subjecting "ideological signs" and "political signs" to different rules than signs displaying other types of content. *Id.* at 2224-2225. In so holding, the Court stated that "[c]ontent-based laws * * * are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. Petitioners maintain that all disclosure requirements are "content-based" in the sense that they

mandate specific disclosures, and thus are subject to strict scrutiny after *Reed*. Br. 28.

As discussed above, however, this Court has made clear that in certain contexts disclosure requirements and speech restrictions are subject to less demanding forms of scrutiny. See *Milavetz*, 559 U.S. at 250; *Casey*, 505 U.S. at 844; *Zauderer*, 471 U.S. at 649-651; *Central Hudson*, 447 U.S. at 562-563. Nothing in *Reed* called these longstanding principles into doubt. Moreover, *Reed* itself addressed an affirmative restriction on certain speech. 135 S. Ct. at 2226; *id.* at 2224, 2227-2231. The Court had no occasion to address requirements to disclose truthful, factual information regarding one's own services. Indeed, since *Reed* this Court has assumed the continuing vitality of *Zauderer* and related cases. See *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (remanding for lower courts to decide whether law governing price disclosures should be "upheld as a valid disclosure requirement" under *Zauderer*).

3. Petitioners also appear to suggest (Br. 21-22, 40-46) that neither the *Zauderer* standard nor heightened scrutiny ever applies—and therefore strict scrutiny always governs—when professionals offer their services without charge. This categorical rule is also incorrect.

This Court has never held that the applicable level of First Amendment scrutiny for speech related to commercial or professional services depends on the price charged. Courts have not doubted, for instance, that the government may regulate malpractice or misconduct by attorneys, tax preparers, and medical professionals without regard to whether a professional charges for a particular service or provides it pro bono. As the

court of appeals observed, "[a] lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech." Pet. App. 32a n.8; cf. *Polk County* v. *Dodson*, 454 U.S. 312, 323 (1981) (public defenders are subject to ordinary ethics rules); *Barker* v. *Capotosto*, 875 N.W.2d 157, 167 (Iowa 2016) (attorneys serving indigent clients remain subject to ordinary malpractice law). Likewise, the fact that a doctor treats a patient for free should not automatically absolve the doctor from otherwise-applicable professional standards—such as a requirement to apprise the patient of the risks of forgoing certain medical treatments, even if the doctor himself opposes those treatments.

Petitioners appear to contend that *Zauderer* and other commercial-speech principles are inapplicable because commercial speech "'does no more than propose a commercial transaction,'" and providers of free services like petitioners do not "propose commercial transactions." Br. 21 (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). It does not follow from the fact that a professional elects not to charge for a particular service that disclosure requirements governing that service do not regulate commercial speech. A manufacturer that offers free samples as a promotion, or a professional that offers free consultations to attract customers, is still entering the marketplace in competition with other providers, and the government's interest in requiring disclosures about the goods or services does not automatically disappear merely because they are offered without charge.

Accordingly, this Court has held that speech may be commercial even if is not a "proposal[] to engage in commercial transactions." *Bolger* v. *Youngs Drug Prods.*

Corp., 463 U.S. 60, 66 (1983); see *id.* at 62, 65-68 (holding that "informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs' products in particular," but not proposing a transaction, were commercial speech). For example, a service provider may already have entered into a transaction with a client and be in the course of providing the agreed-to service. There is no evident reason why, because the parties' subsequent communications will concern the execution of a commercial transaction rather than its proposal, the government should lose its ability to regulate those communications or require appropriate disclosures.

Petitioners cite (Br. 41, 44) *In re Primus*, 436 U.S. 412 (1978), and *NAACP* v. *Button*, 371 U.S. 415 (1963), but neither held that strict scrutiny always applies to speech by professionals who offer their services for free. Both *Button* and *Primus* addressed prohibitions on soliciting pro bono clients for litigation by advocacy organizations "furthering [their] civil-rights objectives," which the Court held violated the organizations' associational freedoms. See *Primus*, 436 U.S. at 421-432; *Button*, 371 U.S. at 431-445. As the *Primus* Court explained, *Button* applied strict scrutiny because the NAACP's litigation activity itself constituted "expressive and associational conduct at the core of the First Amendment's protective ambit." 436 U.S. at 424. "For such a group," *Button* observed, "association for litigation may be the most effective form of political association." 371 U.S. at 431; see *id.* at 429-445.

Button thus "establish[ed] the principle that 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection

of the First Amendment.'" *Primus*, 436 U.S. at 426 (citation omitted). Applying that same principle, *Primus* held that a prohibition on soliciting pro bono clients for similar litigation was subject to, and failed, strict scrutiny, because it impinged on the associational freedoms of the ACLU and impaired its ability to disseminate the organization's message through litigation. See *id.* at 424. *Button* and *Primus* thus do not establish a categorical rule exempting providers of pro bono services from otherwise-applicable First Amendment principles. It was not the fact that the organizations offered their services without charge standing alone, but rather the fact that those services were a form of political association, that the Court held warranted strict scrutiny.

Petitioners also cite (Br. 21-22) *Riley*, *supra*, but it similarly does not support categorically exempting professionals who do not charge for their services from otherwise-applicable First Amendment principles. *Riley* addressed a state law requiring that paid fundraisers begin their interactions with potential donors by disclosing the percentage of charitable contributions collected by the fundraiser that were actually turned over to charity. 487 U.S. at 795-801. The Court did not apply strict scrutiny because any services were offered for free; indeed, the challenged law required professional (*i.e.*, non-volunteer) fundraisers to disclose their profits from fundraising. Rather, the Court applied strict scrutiny because any commercial component of the speech was "inextricably intertwined with otherwise fully protected speech." *Id.* at 796. *Riley* had no occasion to address whether different First Amendment standards apply to regulation of speech by professionals who provide services pro bono. None of petitioners' cases thus supports

a categorical exception for speech related to pro bono services.

II. THE LICENSED NOTICE VIOLATES THE FIRST AMENDMENT

A. The Licensed Notice Fails Under Heightened Scrutiny

1. Applying the foregoing principles, the Licensed Notice cannot be sustained. The Licensed Notice is not subject to deferential review under *Zauderer* because it does not mandate the disclosure of "purely factual and uncontroversial information about the terms under which [the regulated entity's] services will be available." 471 U.S. at 651. Indeed, the Licensed Notice does not describe petitioners' own services at all. Instead, it effectively conscripts licensed clinics like petitioners into advertising state-supported services, including abortion, that they do not provide and that they strongly oppose.

Moreover, regardless of whether the information conveyed by the Licensed Notice is "factual," the Notice is not "uncontroversial." *Zauderer*, 471 U.S. at 651. This Court has recognized "the controversial nature" of the abortion debate, in which millions of Americans believe "that an abortion is akin to causing the death of an innocent child," while other millions "fear that a law that forbids abortion would condemn many American women to lives that lack dignity." *Stenberg* v. *Carhart*, 530 U.S. 914, 920 (2000). The State has taken its own position on that issue by providing state assistance for abortion services, and the Licensed Notice requires petitioners to advertise the State's efforts. Unlike the "minimal" interest *Zauderer* identified in a professional's withholding factual information about his own services, 471 U.S. at 651, petitioners have a very strong

interest in refraining from advertising services they deeply oppose.

2. The Licensed Notice is accordingly subject at least to the heightened scrutiny applicable to regulation of speech by professionals related to the services they provide. The court of appeals held that heightened (rather than strict) scrutiny applies on that basis. Pet. App. 30a; see *id.* at 28a-33a. This Court, however, need not resolve whether that standard or a more stringent form of scrutiny governs here because the Licensed Notice fails any form of heightened scrutiny. Under heightened scrutiny, "the State bears the burden of justifying its restrictions" by demonstrating that the Licensed Notice's intrusion on private speech furthers a "substantial" interest and is "narrowly tailored" to—*i.e.*, has a "reasonable fit" with—the State's identified interest. *Fox*, 492 U.S. at 480. Respondents have not carried that burden.

a. Petitioners have a very strong First Amendment interest in refraining from speaking. Opposition to abortion is at the core of petitioners' beliefs and a basic purpose of their institutional existence. See, *e.g.*, Pet. App. 92a. The Licensed Notice requires petitioners effectively to advertise—by name—a procedure they fundamentally oppose. Petitioners are compelled to disclose the availability of state-funded abortion services and instruct clients as to how to obtain those services—which distorts petitioners' communications with clients in a manner that petitioners contend violates their most deeply held beliefs and undermines their organizations' purposes. Cf. *Riley*, 487 U.S. at 800 (holding invalid, under strict scrutiny, requirement that professional fundraisers engage in unpopular disclosures in part because "the disclosure will be the last words spoken as

the donor closes the door or hangs up the phone"). Compelled speech of that kind strikes at the heart of the First Amendment's protections. See *Centro Tepeyac* v. *Montgomery County*, 722 F.3d 184, 193 (4th Cir. 2013) (en banc) (Wilkinson, J., concurring) ("[C]ourts must be on guard whenever the state seeks to force an individual or private organization to utter a statement at odds with its most fundamental beliefs.").

Respondents have not demonstrated a substantial interest sufficient to justify that intrusion on petitioners' rights. They have not articulated, much less substantiated, any particularized interest in having the information contained in the Licensed Notice about state-sponsored abortion and other services disseminated by covered licensed clinics themselves, which do not provide those services. For example, the California Legislature did not find that licensed clinics had actively deceived women about the availability of free or low-cost family-planning services from the State, or about the cost or availability of particular health services. In the court of appeals, respondents noted that the bill's "author contend[ed]" that certain "crisis pregnancy centers" engaged in "intentionally deceptive advertising and counseling practices." *Analysis of Assembly Bill No. 775: Assemb. Comm. on Health*, 2015-2016 Reg. Sess. 3 (2015) (C.A. E.R. 86); see Resp. C.A. Br. 1, 5, 30. But the Act

makes no such finding, see FACT Act § 1, and at the petition stage in this Court respondents did not rely on an interest in counteracting deception.[9]

Instead, California's sole asserted interest in enacting the Licensed Notice requirement appears to be a more general interest in having California's programs advertised so that women in California are aware of the state-sponsored services available to them. The Legislature found that "[m]illions of California women are in need of publicly funded family planning services," but "at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available." FACT Act § 1(b). The Act's "purpose" was "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." *Id.* § 2. That generalized interest in having the State's programs advertised is at most loosely related to the services licensed clinics provide. Respondents have failed to demonstrate any specific, substantial state interest that is "direct[ly] and material[ly]" advanced by having state-sponsored services advertised by clinics that do not provide those services. *Turner Broad.*, 512 U.S. at 664 (opinion of Kennedy, J.).

b. Whatever the precise strength of California's interest, the Licensed Notice is "not narrowly tailored to achieve [that] objective," *Fox*, 492 U.S. at 480. California "must affirmatively establish [a] reasonable fit,"

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[9] It is also unclear how the Licensed Notice, which relates to the availability of State funding rather than the provision of medical advice, could remedy the type of deception asserted by the bill's author. Respondents have not identified anything in the legislative history suggesting, for instance, that pregnancy clinics have misled clients regarding the expense or availability of abortion services.

ibid.—namely, that "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner Broad.*, 512 U.S. at 662 (citation omitted). The availability of obvious alternatives, moreover, undermines that fit. Here, because its asserted interest in promoting public awareness of state-sponsored family-planning services is generalized, the State has ample other alternatives at its disposal to further that interest without compelling petitioners to advertise services they oppose.[10] The State's abstract interest in having its own programs advertised thus cannot justify conscripting licensed providers like petitioners into service as "billboard[s]" for those programs. *Maynard*, 430 U.S. at 715.

For example, the State itself may advertise the Family PACT Program and all of its component benefits to the public. See *Riley*, 487 U.S. at 800; *Evergreen Ass'n, Inc.* v. *City of N.Y.*, 740 F.3d 233, 250 (2d Cir.), cert. denied, 135 S. Ct. 435 (2014). Indeed, a state-run advertising campaign might be more effective than the Licensed Notice in increasing public awareness, given

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[10] See *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 371-373 (2002) (invalidating under heightened scrutiny prohibition on soliciting prescriptions for and advertisements of compounded drugs where government had not shown why multiple less-intrusive alternative measures sufficed); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490-491 (1995) (law prohibiting beer labels from displaying alcohol content was "not sufficiently tailored" because the "availability of alternatives that would prove less intrusive" indicated that it was "more extensive than necessary"); *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (state-bar rule banning "targeted, direct-mail solicitation" by lawyers not justified where State had other "obvious," "far less restrictive and more precise means" to address abuses).

that the notice applies only to a limited subset of medical providers in the State. As petitioners note (Br. 32-33), the Licensed Notice exempts federal facilities and clinics that participate in Medi-Cal and Family PACT, and it also appears to exclude individual doctors, general-practice clinics that do not primarily provide pregnancy-related services, and various other medical facilities. Cal. Health & Safety Code § 123471(a) and (c) (West Supp. 2018); see *id.* §§ 1204, 1206(h) (West 2016). Those exclusions suggest that the Licensed Notice lacks a reasonable fit due to its underinclusiveness. See *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 802 (2011). At a minimum, the exclusions indicate that less-intrusive means may exist that could be equally or more effective.

The court of appeals observed that, in the current procedural posture, it was "unclear whether" a state-sponsored "advertising campaign" would have been "as effective[]," and did not resolve that question because under heightened scrutiny California "need not prove that the Act is the least restrictive means." Pet. App. 36a & n.9. Any such uncertainty, however, weighs against upholding the law because the State bore the burden of "affirmatively establish[ing]" that the Act is appropriately tailored, *Fox*, 492 U.S. at 480; see *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993) (State's burden not met with "speculation or conjecture"). And although California need not employ the least restrictive means, it could not simply disregard obvious potential alternatives. See p. 18, *supra*.

At the least, respondents have not shown why it is necessary to require licensed clinics to enumerate specific services they oppose, including abortion, that the Family PACT program offers. In the court of appeals,

petitioners argued that the State "could require licensed centers to merely tell patients a phone number where they can apply for Medi-Cal in general, and that Medi-Cal offers free or low-cost services." Pet. C.A. Br. 42. Although heightened scrutiny does not require the State to adopt the "least restrictive means," *Fox*, 492 U.S. at 479, the existence of multiple, "obvious less-burdensome alternatives," thus far unrebutted by respondents, further supports a determination that the Licensed Notice is not narrowly drawn. *Discovery Network*, 507 U.S. at 417 n.13; see p. 28 n.10, *supra*.

That the Licensed Notice here fails under heightened scrutiny casts no doubt on other federal and state laws that require professional or commercial disclosures.[11] Many such laws that require disclosure related to professional services or transactions in the marketplace, to the extent they are even subject to heightened scrutiny rather than *Zauderer*, would survive because they are appropriately tailored to advance substantial government interests. The Licensed Notice differs from such laws, and fails heightened scrutiny, because of the especially severe burden it imposes on speech and its particular lack of a sufficiently substantial interest and reasonable fit in requiring petitioners to advertise

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[11] See, *e.g.*, 21 U.S.C. 343(r)(6)(C) and (q)(5)(H) (requiring disclosure of nutrition information in certain circumstances and disclaimer that FDA has not evaluated claims regarding dietary supplements); 29 U.S.C. 627, 657(c)(1) (requiring employers to post notices regarding employee rights under age-discrimination and occupational-safety laws); 42 U.S.C. 2000e-10 (same under other antidiscrimination laws); 17 C.F.R. 229.10 *et seq.* (requiring securities issuers to disclose various information including legal proceedings, market risk, and executive compensation); 17 C.F.R. 243.100 (requiring issues to disclose certain information publicly when provided to certain entities, *e.g.*, stock analysts).

third-party services that are fundamentally antithetical to their own services.

B. The Court Need Not Decide Whether The Licensed Notice Discriminates On The Basis Of Viewpoint

1. Petitioners argue (Br. 31-37) that the Licensed Notice should be subject to strict scrutiny because it discriminates against petitioners based on their viewpoint. If that is true, strict scrutiny should apply. *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 565-566 (2011). As *Sorrell* explained, viewpoint-based regulations of speech—*i.e.*, those that regulate speech "because of" the government's opinion of its "message"—are subject to strict scrutiny. *Id.* at 566 (citation omitted). *Sorrell* thus held that a state law was subject to strict scrutiny because both "the legislature's expressed statement of purpose" and the law's "practical operation" showed that it was "aimed at a particular viewpoint." *Id.* at 565 (citation omitted).

Of course, as the Court has made clear, the fact that the effects of a facially neutral law fall disproportionately on speakers who "share the same viewpoint * * * does not in itself demonstrate" that the law is viewpoint-based. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); see *Christian Legal Soc'y Chapter of the Univ. of Cal.* v. *Martinez*, 561 U.S. 661, 700 & n.2 (2010) (Stevens, J., concurring) (collecting cases establishing the "basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination"). Rather, as *Sorrell* recognized, a party contending that a law is viewpoint-based must show that a law singles out speech "*because of*" its "message." 564 U.S. at 566 (emphasis added; citation omitted); see *id.* at 565 (law was viewpoint-based because "[f]ormal legislative findings" showed it was "designed * * * to

target [certain] speakers and their messages for disfavored treatment").

Accordingly, if it were established here that the Licensed Notice targets organizations because of their opposition to abortion, it would be viewpoint-based, see *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, No. 16-2325, 2018 WL 298142, at *6 (4th Cir. Jan. 5, 2018), and strict scrutiny should apply. Indeed, a state law that singled out for disfavored treatment entities that do not provide or refer patients for abortions might violate various federal statutes that specifically prohibit such discrimination. See 42 U.S.C. 238n (prohibiting state and local governments that receive federal assistance from discriminating against a "health care entity" that does not provide or refer patients for abortions); 42 U.S.C. 300a-7(c) (similar).[12]

2. It is not clear whether petitioners have established that the Licensed Notice is viewpoint-based. On its face, the Licensed Notice does not appear to single out clinics based on their proprietors' views on abortion or other subjects. Its definition of licensed facilities encompasses clinics that provide an array of services—including those that offer abortions and those that do not. See Cal. Health & Safety Code §§ 123471(a), 123472(a) (West Supp. 2018). Two types of facilities are excluded: (1) federal facilities, which avoids federal preemption, *id.* § 123471(c)(1); and (2) providers that participate in Medi-Cal and Family PACT, *id.* § 123471(c)(2), which

[12] Petitioners' complaint alleged that the Licensed Notice violates 42 U.S.C. 238n, but they did not press that claim in seeking a preliminary injunction, and the courts below did not address that issue. See p. 7 n.4, *supra*.

can "enroll patients immediately" in California's programs. FACT Act § 1(c). Thus, the manner in which the State defines the scope of the Licensed Notice requirement does not itself indicate viewpoint discrimination.

But petitioners contend (Br. 31) that the Licensed Notice's "operational effect and exemptions" and the "legislative record" show that its purpose is to target clinics that oppose abortion. They maintain (Br. 32, 34-35) that in practice the law's exclusions render the Licensed Notice "uniquely applicable to pro-life pregnancy centers," and the bill's sponsor evinced "hostility" to such "crisis pregnancy centers." It is not clear, however, whether petitioners have developed an adequate factual record demonstrating that the State purposefully targeted them because of their viewpoint. This Court need not resolve that issue because the Licensed Notice fails under any form of heightened scrutiny for the reasons given earlier. See Part II.A, *supra*.

III. THE UNLICENSED NOTICE DOES NOT VIOLATE THE FIRST AMENDMENT

By contrast, the Unlicensed Notice comports with the First Amendment. Unlike the Licensed Notice, the Unlicensed Notice is subject to review under *Zauderer* because it requires covered facilities merely to disclose "purely factual and uncontroversial information about the terms under which * * * services will be available." 471 U.S at 651. The Unlicensed Notice applies only to clinics that are not licensed by the State of California as medical facilities, that do not employ a licensed medical provider, and that provide or advertise particular services that clients might regard as medical in nature—such as pregnancy tests, obstetric ultrasounds, and sonograms. Cal. Health & Safety Code § 123471(b) (West

Supp. 2018). And it requires such clinics to disseminate only a one-sentence notice stating that they are not licensed and do not employ a licensed provider. *Id.* § 123472(b)(1). That disclosure is factual, and it is accurate as to the only entities subject to the Unlicensed Notice, which are unlicensed. Petitioners also have not shown how that factual disclosure is controversial. Petitioners' "constitutionally protected interest in *not* providing [that] particular factual information" is therefore "minimal," and the Unlicensed Notice must be upheld so long as it is reasonably related to an appropriate state interest. *Zauderer*, 471 U.S. at 651.

The Unlicensed Notice satisfies the *Zauderer* standard, and would also survive under heightened scrutiny. The Unlicensed Notice is premised on California's interest in ensuring that pregnant women "know when they are getting medical care from licensed professionals." FACT Act § 1(e). That interest is a substantial one. The Unlicensed Notice advances that interest by requiring providers that are not licensed—but that provide services of a medical nature that their clients might reasonably believe are administered by licensed medical professionals, such as ultrasounds and sonograms—to disclose their unlicensed status to existing clients, and to prospective clients when advertising their services. There is also at least a reasonable fit between the means chosen and the State's interest. The Unlicensed Notice requires a simple, one-sentence disclosure of the fact the Legislature determined its residents should, but may not, know. It accordingly survives even heightened First Amendment scrutiny. See *Evergreen*, 740 F.3d at 247; *Centro Tepeyac*, 722 F.3d at 190, 192.

Indeed, the Unlicensed Notice closely resembles a disclosure requirement regarding one's professional

status that this Court in *Riley* made clear would comport with the First Amendment. Although *Riley* held invalid a requirement that professional fundraisers disclose their past profits, it disclaimed any "suggest[ion] that the State may not require a fundraiser to disclose unambiguously his or her professional status." 487 U.S. at 799 n.11. "On the contrary," the Court stated, "such a narrowly tailored requirement would withstand First Amendment scrutiny." *Ibid.* The Unlicensed Notice satisfies heightened scrutiny for the same reasons.

Petitioners argue (Br. 38) that the Unlicensed Notice imposes an excessive burden on their speech because, in some circumstances, they may be required to reprint the notice in their advertisements in multiple languages, which petitioners assert would be cost-prohibitive. The FACT Act requires a clinic to reproduce the Unlicensed Notice in its advertising in each of the "threshold languages" of the geographic region in which a clinic operates. Cal. Health & Safety Code § 123472(b) (West Supp. 2018). Petitioners contend (Br. 11-13, 38) that, as a result, some centers will be compelled to provide the Unlicensed Notice in as many as 13 languages, rendering effective advertisements infeasible.

The burdens petitioners assert are concerning, and such an argument might provide a basis for an as-applied challenge to the Unlicensed Notice in an appropriate case if properly presented and factually supported. See, *e.g.*, *Ibanez*, 512 U.S. at 146-147. It is unclear, however, whether petitioners pressed such an as-applied claim below based specifically on the threshold-languages requirement; they do not appear to have developed a factual record to support it; and respondents have disputed whether the issue is properly preserved. Br. in Opp. 26-27; see C.A. E.R. 33-64; D. Ct.

Doc. 3-1; D. Ct. Doc. 30 (Nov. 20, 2015). Moreover, neither court below passed upon the threshold-languages issue. Consistent with its ordinary practice as a "court of review, not of first view," the Court should "decline to consider th[is] question[] in the first instance." *Expressions Hair Design*, 137 S. Ct. at 1151 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be vacated as to the Licensed Notice and affirmed as to the Unlicensed Notice, and the case should be remanded for further proceedings.

Respectfully submitted.

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