No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

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

BRIEF OF LEGAL ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT 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 AMICI CURIAE[1]

Amici curiae are professors and legal ethicists at law schools throughout the United States. They teach, write, or practice in the field of legal ethics and professional responsibility for attorneys. While they have no personal interest in the outcome of this case, they have a professional interest in the clear, consistent, and fair application of rules of ethics and professional responsibility.

Amici submit this brief to address a discrete issue raised by Petitioners and their supporting *amici*: whether Petitioners should be exempt from the Reproductive FACT Act's minimum disclosure requirements, on the theory that the First Amendment shields professionals (such as attorneys) from speech regulation as long as they offer services without expectation of "monetary recovery" or "financial gain." *See, e.g.*, Pet. Br. at 41. Petitioners' analogy, however, is based on a flawed premise. In the analogous context of attorney regulation, the rules are developed and clear: *all* attorneys are subject to professional regulations, including affirmative disclosure requirements—and these requirements do not turn on the expectation of payment. Rather they apply, in the same way and with the same force, even if attorneys offer services on a pro bono basis. *Amici* seek to provide this Court with background on

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[1] Pursuant to Supreme Court Rule 37.3, *amici* certify that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no persons other than *amici* or their counsel made a monetary contribution to its preparation or submission.

those regulations and their underlying rationales in order to illuminate why the challenged California provisions may be permissible as a legal matter and may be justifiable as a policy matter.

For these reasons, the following *amici* have joined together to file this accompanying brief:

Professor Nora Freeman Engstrom is a Professor of Law and the Associate Dean for Curriculum at Stanford Law School.[2] She is also a co-author of a leading professional responsibility casebook, Legal Ethics (with Deborah L. Rhode, David Luban, and Scott Cummings).

Deborah L. Rhode is the Ernest W. McFarland Professor of Law, the director of the Center on the Legal Profession, and the director of the Program in Law and Social Entrepreneurship at Stanford University. She is the most frequently cited scholar on legal ethics, and a co-author of the casebook, Legal Ethics.

David Luban is a Professor of Law at Georgetown University Law Center, a nationally recognized expert on legal ethics and professional responsibility, and a co-author of the casebook, Legal Ethics.

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and is an expert on regulations governing lawyers, the legal profession, and legal education.

Robert W. Gordon is a Professor of Law at Stanford Law School, and teaches and writes on the subjects of legal ethics and professional responsibility.

Gillian K. Hadfield, Kirtland Professor of Law and Professor of Economics at USC Gould School of Law, is an expert in the design and regulation of legal markets and institutions.

Leslie C. Levin is the Joel Barlow Professor of Law at the University of Connecticut School of Law, and an expert in the area of professional ethics and media law.

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Stephen Gillers, Elihu Root Professor of Law at New York University School of Law, is the author of the casebook, Regulation of Lawyers: Problems of Law and Ethics (11th edition 2018).

Bruce A. Green is the Louis Stein Chair of Law and Director of the Stein Center for Law and Ethics at Fordham University School of Law, and is the co-author of a casebook on legal ethics.

Richard L. Abel, Connell Distinguished Professor of Law Emeritus and Distinguished Research Professor at UCLA School of Law, taught professional responsibility for thirty-five years and has written extensively on the subject.

Benjamin H Barton, Helen and Charles Lockett Distinguished Professor of Law at the University of Tennessee College of Law, has written on the interaction of the First Amendment and professional duties, including the ethical duties of doctors and lawyers.

SUMMARY OF ARGUMENT

Petitioners' challenge to the Reproductive FACT Act's ("the Act") mandatory disclosure requirements is based in part on a misunderstanding of professional speech regulations. Analogizing to cases that involved attempts to ban public interest attorneys from solicitation in the context of collective activity, Petitioners suggest that professionals are exempt from speech regulation as long as they do not charge for their services. Petitioner's position not only misinterprets the attorney solicitation cases, but is contradicted by numerous rules of professional responsibility and cases upholding minimum disclosure requirements for attorneys.

The reality is that lawyers of all stripes and in all states are subject to a variety of speech regulations, including minimum disclosure requirements. Attorney speech is regulated even before the formation of an attorney-client relationship and even if lawyers offer their services pro bono. Such regulations are designed to protect clients and prospective clients by providing important disclosures, preventing consumer deception, and facilitating informed decisionmaking. Simply put, no attorney enjoys a broad exemption from reasonable professional regulations, and Petitioners' attempt to seek such immunity for themselves should be rejected.

ARGUMENT

This case presents a challenge to two disclosure requirements in the California Reproductive FACT Act ("the Act"), which apply to facilities that

primarily serve pregnant women: (1) unlicensed medical clinics must provide clients a one-sentence disclosure of their unlicensed status; and (2) licensed medical clinics must provide clients a two-sentence notice about the existence of state-funded programs offering free and low-cost reproductive healthcare services. Resp. Br. at 1-2. Petitioners object to these disclosures, but do not otherwise claim that the Act prohibits speech in which they might want to engage. Pet. Br. at i.

To support their claim that these mandatory disclosures impermissibly infringe on their First Amendment rights, Petitioners argue that they are nonprofits that do not "sell any services" or engage in commercial speech. *Id.* at 40. Petitioners also argue that they should not be subject to professional speech regulations, because they are simply providing pregnant women with free information "before any professional relationship has begun." *Id.* at 44. Both arguments are rooted in part in an implied analogy to pro bono services in other professions, particularly the legal profession, and Petitioners repeatedly cite to cases that have struck down broad prohibitions on attorney solicitation. *See id.* at 41, 44 (citing *Button* and *In re Primus*).

Amici, who are trained scholars in the field of legal ethics and professional responsibility, take issue with any suggestion that attorneys are exempt from professional regulation as long as they offer their services for free or their speech occurs prior to the formation of a professional relationship. The reality is that the Model Rules of Professional Conduct, and related State Bar rules, absolutely and permissibly regulate attorney speech, including

requiring affirmative disclosures in many circumstances. And these disclosure requirements for attorneys, not unlike the disclosure requirements in the Act, are intended to protect clients (even prospective or pro bono clients) and prevent undue influence by the regulated professionals.

Therefore, *amici* respectfully urge this Court to reject Petitioners' misplaced argument that professionals can claim a broad exemption from minimum disclosure requirements. No such exception exists for attorneys, not even pro bono attorneys. Permitting such an exception would flout the reasonable policy rationales for providing narrow and accurate disclosures to the clients that professionals hope to serve.

I. All Attorneys Are Subject to Reasonable Regulations of Their Professional Speech, Including the Obligation to Make Affirmative and Accurate Disclosures in Certain Circumstances.

There can be no reasonable dispute that attorney speech is comprehensively regulated. Lawyers of all types, representing all kinds of clients, and practicing in different specialties throughout the United States, are constrained in what they can say, what they cannot say, and even what they must say.

Indeed, many regulations govern attorney speech even *before* the formation of a lawyer-client relationship, as all states regulate how lawyers may recruit and obtain clients. By way of example only, lawyers must comply with certain rules when describing themselves and their firms, *see* Model

Rules of Prof'l Conduct R. 7.5, as well as their experience and practice area, *see id.* at R. 7.4 (a lawyer may not describe herself as a specialist in a particular field of law unless she has been certified by an approved organization). All states regulate the manner in which lawyers may solicit clients. *See id.* at R. 7.3. And lawyers in a majority of states must make affirmative disclosures in their advertisements. *See id.* at R. 7.2(c) ("Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content."); Am. Bar Ass'n, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, at 1–8 (2016) [hereinafter ABA, *Advertising and Solicitation Rules*] (compiling state authority).

Most relevantly, and as explained in more detail below, some of these regulations take the form of required minimum disclosures to ensure that clients, and also prospective clients, are adequately informed, both when it comes to selecting counsel and when making decisions within the context of the attorney-client relationship. Neither *Button* nor *In re Primus*, which are cited by Petitioners, bars such reasonable regulations of professional speech.

A. Examples of permissible regulation of attorney speech abound, including affirmative disclosure requirements.

While lawyers speaking in the professional context enjoy a tremendous amount of discretion, their speech is never completely unfettered. Attorney speech can even be compelled, as in the

long-recognized requirement that lawyers communicate with clients in certain ways and about certain things, and inform prospective, current, and former clients of any conflicts of interest. *See* Model Rules of Prof'l Conduct R. 1.4, 1.18, 1.7, 1.9.

Indeed, states compel lawyers to disclose certain information not just to clients, but also to prospective clients and the public at large. These compelled disclosures are seen most frequently in the context of attorney advertising, where disclosures are commonplace and have been legal in the United States for over four decades.

Compelled disclosures in attorney advertisements can be traced back to this Court's jurisprudence. Striking down a blanket ban on attorney advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court declared that "the preferred remedy" for misleading advertising was "more disclosure, rather than less," *id.* at 375, and explicitly tasked the organized bar with ensuring that lawyer advertisements would be appropriately regulated, for information to "flow[] both freely and cleanly," *id.* at 384. In so doing, the Court explicitly recognized the important role that affirmative disclaimers and warnings may play. *See id.* at 384 ("We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.").

Heeding this Court's call, *many* states compel lawyers to make certain disclosures when

advertising their service. ABA, *Advertising and Solicitation Rules, supra*, at 1–8 (compiling relevant authority). Some states impose simple labeling requirements. *See, e.g.,* Conn. Rules of Prof'l Conduct R. 7.3(c) (mandating inclusion of the words "Advertising Material" in certain written, audio, and visual communications). Numerous states go further by compelling attorneys to accompany their ads with substantive, state-written disclosures in particular languages, types, and fonts. *See, e.g.,* Fla. Rules of Prof'l Conduct R. 4-7.12 (requiring that all "advertisements for legal employment" include certain specified information and mandating that this information "appear in the same language in which the advertisement appears" and "be reasonably prominent and clearly legible if written"); Ala. Rules of Prof'l Conduct R. 7.2(e) (compelling attorneys who advertise to state: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers." and mandating that the disclosure be "clearly legible or audible, as the case may be"); Mo. Rules of Prof'l Conduct R. 4-7.2(f) (compelling the following "conspicuous disclosure: The choice of a lawyer is an important decision and should not be based solely upon advertisements.," while specifying that "'Conspicuous' means that the required disclosure must be of such size, color, contrast, location, duration, cadence, or audibility that an ordinary person can readily notice, read, hear, or understand it.").

Nor is advertising the only site of compelled attorney speech. Two categories of compelled disclosures seem particularly relevant. *First*,

certain states require lawyers to inform prospective clients of the availability of state-subsidized alternatives to their services. *See* Ala. Ethics Op. RO-98-01 (1998) (requiring attorneys seeking to charge a fee for helping to collect back child support to advise prospective clients that the state offers similar assistance for free); Tex. Ethics Op. 485 (1994) (same).

Second, several states have adopted rules that compel those lawyers who do not carry a minimum amount of professional liability insurance to disclose this fact, prior to (and, additionally, sometimes after) attorney retention. *See* Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281, 1284–86 (2016).[3] South Dakota, for example, requires lawyers who carry less than $100,000 in liability insurance to note as much in their letterhead, advertisements, and written communications with clients. S.D. Rules of Prof'l Conduct R. 1.4(c)-(d), 7.2(l). Likewise, if a lawyer "does not have professional liability insurance," California mandates disclosure "at the time of the client's engagement" so long as "it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours." Cal. Rules of Prof'l Conduct R. 3-410(A).[4] *See also, e.g.,* N.H. Rules of

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[3] Seventeen additional states require disclosure on attorney registration forms, with some states posting this information on bar or judicial websites. Levin, *supra*, at 1286.

[4] Tellingly, in enacting this provision, the California Bar considered—but rejected—a proposed exception for when lawyers represent clients pro bono. *See* Devin S. Mills & Galina Petrova, *Modeling Optimal Mandates: A Case Study*

Prof'l Conduct R. 1.19(a); N.M. Rules of Prof'l Conduct R. 16-104(C)(1); Ohio Rules of Prof'l Conduct R. 1.4(c). Much like the Act, these laws seek to ensure that prospective clients are adequately informed—and not inadvertently misled—when it comes to the risks and benefits associated with selecting a particular professional service provider.

It bears emphasizing that the various disclosures discussed in this section do not hinge on the presence of an already-established attorney-client relationship. In fact, because the above regulations govern lawyers' attempts to gain *new* clients, such regulations compel certain attorney speech *before* such a relationship has formed.

B. Attorney speech regulations do not generally exempt attorneys who offer services on a nonprofit or pro bono basis.

As the Ninth Circuit explained below, "We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech." Pet. App. at 32a n.8, 9th Cir. Op. at 31 n.8. This sentiment is consistent with the vast majority of rules regulating attorney speech, which apply to all attorneys regardless of whether the lawyer is charging a fee for her service or is providing the legal service pro bono.

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on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure, 22 Geo. J. Legal Ethics 1029, 1041 (2009) (offering the relevant history).

Only one Model Rule, Rule 7.3, distinguishes between attorneys working for a fee and those working pro bono.[5] Rule 7.3 applies different standards to the limited context of live solicitations, depending on whether the lawyer is significantly motivated by the prospect of "pecuniary gain." Model Rules of Prof'l Conduct R. 7.3(a) (providing, with certain exceptions, "[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain"). But Rule 7.3 does not grant a "free pass" for pro bono attorneys to disobey other Model Rules, which do not distinguish between paid and pro bono attorneys.

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[5] Another Rule, Rule 6.5, is also instructive. Aimed at lawyers providing "short-term limited legal services" through a nonprofit or court-sponsored program, such as a "legal advice hotline[]," Rule 6.5 relaxes conflict-of-interest restrictions as long as "there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation." Model Rules of Prof'l Conduct R. 6.5 & cmt. 1. This temporary relaxation is premised on the theory that the rapid pace and limited duration of this kind of work means that "it is not feasible for a lawyer to systematically screen for conflicts." *Id.* at R. 6.5, cmt. 1. Even then, however, once a lawyer opts to represent a Rule 6.5 client "on an ongoing basis," the regular conflict-of-interest rules kick in. *Id.* at R. 6.5, cmt. 5. Furthermore—and tellingly—"Rule 6.5 and its comment do not . . . make any reference to the client's economic status, nor do they draw any distinctions based upon the participating lawyer's fee, if any." Ellen J. Bennett et al., Am. Bar Ass'n, Annotated Model Rules of Prof'l Conduct R. 6.5, note at 530 (7th ed. 2011). It is the limited nature and short duration of the representation, rather than its pecuniary nature, that matters.

Aside from this narrow exception, the Rules explicitly apply to *all* lawyers—regardless of whether the lawyer works for a fee or provides legal services pro bono. *Id.* at Preamble 12 ("Every lawyer is responsible for observance of the Rules of Professional Conduct."). Indeed, "[t]here is no separate, more relaxed version of applicable ethical precepts for attorneys providing pro bono advice." N.J. Ethics Op. 671 (1993). Accordingly, authorities agree that, even when a lawyer represents a client pro bono, "all ethical rules applicable to [a typical] attorney-client relationship are in force." Lynn A. Epstein, *With A Little Help from My Friends: The Attorney's Role in Assisting Pro Se Litigants in Negotiations*, 13 T.M. Cooley J. Prac. & Clinical L. 11, 38 (2010); *see also Segal v. State Bar,* 751 P.2d 463, 466 (Cal. 1988) ("An attorney's standard of professional conduct to a pro bono client should be no different from his or her responsibility to any other client."); Albert W. Alschuler, *The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel*, 54 U. Colo. L. Rev. 67, 72 (1982) ("A lawyer's ethical obligations are the same when he provides his services pro bono as when he has been retained . . . ."); Danielle R. Cover, *Pro Bono Grievances*, 12 Cardozo Pub. L. Pol'y & Ethics J. 375, 404 (2014) ("As they are currently written, the Rules and their Commentary make no distinction between pro bono cases and paying cases . . . ."); Amber Hollister, *The Ethical Pro Bono Lawyer: Increasing Access to Justice*, Or. St. B. Bull., Oct. 2013 (recognizing that "the same ethics rules apply to paid and pro bono representation").

Therefore, there is no basis for Petitioners to imply that professionals can self-select out of professional regulations by simply offering services for free. If anything, the narrow exception in Rule 7.3 proves that the *default* presumption is that all attorneys, even those acting pro bono, are equally subject to the same rules and regulations. *See* U.S. Br. at 20 ("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.").

C. Neither *Button* nor *In re Primus* granted a broad exemption for attorneys to avoid disclosure requirements and to engage in unfettered speech.

Petitioners' claim of immunity from mandatory disclosure requirements stems in part from a misreading of *Button* and *In re Primus*. *See* Pet. Br. at 41, 44. Although both cases struck down specific state prohibitions on attorney solicitation, neither case established the type of exemption from professional regulation that Petitioners now seek. *See* Resp. Br. at 35-37 (distinguishing both cases).

First, both cases involved *prohibitions* on attorney speech, rather than compelled *disclosures* like the type at issue in this case. In attempting to analogize to *Button* and *In re Primus*, Petitioners "overlook[] material differences between disclosure requirements and outright prohibitions on speech."

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 650 (1985).

"[D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* at 651, 638 (striking down "prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems," but permitting "disclosure requirements relating to the terms of contingent fees"). Where the regulation at issue does not ban attorney speech, "the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [and] the preferred remedy is more disclosure, rather than less." *Bates*, 433 U.S. at 375.[6]

Second, both *Button* and *In re Primus* involved *broad* prohibitions on entire categories of attorney speech and, therefore, turned on whether such regulations were precisely tailored to meet the asserted state interests. In *Primus*, the State

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[6] In fact, this Court has recognized that factually accurate disclosures, which otherwise do not impair a professional's ability to provide service or engage in other speech, are not serious impingements. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (noting that challenged Bankruptcy Code provisions require "only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information"); *Bates*, 433 U.S. at 383. In such cases, the professional has no inviolable right to omit the specific disclosure. *See Zauderer*, 471 U.S. at 651 ("appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal").

"failed to advance any substantial regulatory interest in the form of substantive evils flowing from [the NAACP's activities to] justify the *broad prohibitions* which it has imposed." *In re Primus*, 436 U.S. 412, 425 (1978) (emphasis added). And in *Button*, the State failed to justify "*[b]road prophylactic rules* in the area of free expression [which] are suspect." *In re Primus*, 436 U.S. at 432 (analyzing *Button*) (emphasis added).

In sharp contrast, Petitioners are not challenging any prohibitions but narrow and targeted disclosures, which this Court has historically recognized to be the preferred "remedy in the first instance." *In re R. M. J.*, 455 U.S. 191, 203 (1982). Therefore, Petitioners' reliance on *Button* and *In re Primus* is misplaced. Neither case immunizes Petitioners from the type of targeted disclosures required in the Act.

II. Professional Regulations of Attorney Speech, Including Required Minimum Disclosures, Are Justified by Important Policy Considerations.

This Court has long affirmed—even in *Button* and *In re Primus*—the general principle that professional regulations of attorney speech may be justified by important policy interests. "The State's special interest in regulating members whose profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *In re Primus*, 436 U.S. at 438-39.

As the Ninth Circuit recognized below, where services are offered and rendered *in a professional context*, unique considerations justify additional regulation and mandatory disclosures. Pet. App. at 33a, 9th Cir. Op. at 31 ("non-profit status does not change the fact that they offer medical services in a professional context"). The special treatment of professional speech stems from the recognition that professionals, "through their education and training, have access to a corpus of specialized knowledge that their clients usually do not" and that clients put "their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity." Pet. App. at 29a, 9th Cir. Op. at 28 (citing *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014)). Accordingly, when evaluating Petitioners' challenges to, and Respondents' justifications for, the specific disclosure requirements in the Act, this Court should consider the various policy reasons behind other professional speech regulations.

When prospective clients approach an attorney seeking legal representation, they are often disadvantaged by an imbalance of power and information.[7] "The public's comparative lack of

[7] Because the Model Rules of Professional Conduct presuppose the practice of law by *licensed* attorneys, *amici* focus on how the Rules regulate licensed lawyers. *See Restatement (Third) of the Law Governing Lawyers* § 4 (2000) (explaining restrictions on the unauthorized practice of law). It is worth noting, however, that on those occasions when states permit the provision of quasi-legal services by certified non-attorneys, states carefully constrain what those individuals may do or say. Furthermore, states require these

knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling." *In re R. M. J.*, 455 U.S. at 202. For example, this Court has affirmed that advertising by lawyers may still be regulated, even if commercial speech is protected by the First Amendment, "because the public lacks sophistication concerning legal services [and] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* at 200 (quoting *Bates*, 433 U.S. at 383). Similarly, the affirmative disclosures at issue in this case are intended to target the "particularly vulnerable population" of women who go to medical clinics

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non-lawyers to make certain targeted disclosures to ensure that prospective clients are not inadvertently misled by the non-lawyer's lack of professional qualification. *See, e.g.*, Wash. Admission to Prac. Rules R. 5(j)(5) (requiring all Limited License Legal Technicians to swear an oath, in which they promise to "faithfully disclose the limitations of my services and that I am not a lawyer"); Ariz. St. Code of Jud. Admin. § 7-208(A) (defining a "Legal document preparer" as "an individual or business entity certified pursuant to this section to prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public who is engaging in self representation in any legal matter"); *id.*, § 7-208(J)(5)(c) ("A legal document preparer shall inform the consumer in writing that a legal document preparer is not a lawyer, is not employed by a lawyer, and cannot give legal advice, and that communications with a legal document preparer are not privileged.").

while facing "time sensitive" decisions about pregnancy. Resp. Br. at 52, 3.

Even absent a particularly vulnerable population, the regulation of professional speech, including mandatory disclosures, is sometimes necessary to prevent consumer deception. For example, this Court has upheld a Bankruptcy Code provision that requires a law firm offering bankruptcy assistance to affirmatively "identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252–53 (2010). Mandatory disclosures may also be required to accurately inform clients about the limitations of one professional's services and the availability of alternative services by another. *See* Model Rules of Prof'l Conduct R. 1.2(c), 1.0(e) (requiring lawyer providing limited-scope representation to disclose "adequate information and explanation about the material risks of and reasonably available alternatives to" the representation). These disclosures are designed to "ensure that the client or other person possesses information reasonably adequate to make an informed decision." *Id.* at R. 1.0, cmt. 6.[8]

[8] In this vein, numerous states have enacted rules governing the provision of legal services following the determination of a major disaster. Following a now-familiar script, these rules require the visiting lawyer to notify clients that they are not generally authorized to practice law in the particular state and are doing so only pursuant to a narrow exception. *See, e.g.,* N.J. Ct. R. 1:21-10(g) ("Lawyers who provide legal services pursuant to this Rule shall inform clients in New

Moreover, the potential for consumer deception is heightened in the case of in-person solicitations, which are particularly difficult to police. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978), this Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" was so likely in the context of in-person solicitation, that such solicitation could be prohibited. The Court explained: "[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. . . . In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services . . . ." *Id.* at 457–58.[9] Not unlike the

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Jersey of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in New Jersey except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in New Jersey."); Ill. Sup. Ct. R. 718(g) (declaring that "[l]awyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this rule").

[9] Although Petitioners repeatedly cite *In re Primus*, they tellingly make no mention of *Ohralik*, which was decided on the same day as *In re Primus* and which involved a much more analogous situation to this one. In *Ohralik*, this Court upheld a narrow prohibition on in-person solicitation for pecuniary gain, which targeted the unique harms posed by, and the difficulties of regulating, in-person solicitations by attorneys. "The solicitation of business by a lawyer through

decision whether to retain a particular attorney, the decision whether to use particular medical clinics would benefit from minimum disclosures designed to reduce "practices [that] confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." J.A. at 39.

To the extent that Petitioners' nonprofit services target women with less income and education, that population is in fact especially vulnerable and in particular need of basic information, so as to make an informed choice. *Cf. Ohralik*, 436 U.S. at 465 (recognizing "the very plight of [a victim of misfortune] . . . makes him more vulnerable to influence"). Thus, nonprofit organizations should have no entitlement to entice prospective clients and offer services, without making required minimum disclosures designed to provide accurate information and promote informed decisionmaking.

Lawyers in every state and in every specialty are regulated; they have no entitlement to unfettered speech. That's true, and has long been true, regardless of whether the lawyer is paid or is working pro bono—and regardless of whether the lawyer is working for a Manhattan law firm or small town nonprofit clinic. This Court should reject Petitioners' attempt to suggest otherwise and to carve out a dangerous new exception to professional speech regulation.

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direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client." *Ohralik*, 436 U.S. at 454.

CONCLUSION

For the foregoing reason, *amici* submit this brief in support of Respondents and respectfully request that this Court deny Petitioners' request for a broad exemption from the Act's disclosure requirements.

Respectfully submitted,

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