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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

A WOMAN’S FRIEND PREGNANCY
RESOURCE CLINIC, CRISIS
PREGNANCY CENTER OF NORTHERN
CALIFORNIA, ALTERNATIVES
WOMEN’S CENTER,

Plaintiffs,

v.

KAMALA HARRIS, Attorney General of
the State of California, In Her Official
Capacity,

Defendant.

No. 2:15-cv-02122-KJM-AC

ORDER

Crisis pregnancy centers devoted to providing alternatives to abortion and discouraging abortion, also known as CPCs, have been operating in this country for several decades at least. Recently, the practices of some CPCs have prompted several state and municipal legislative bodies to adopt regulations governing the information provided to women seeking reproductive care. The changing landscape effected by implementation of the federal Affordable Care Act also has provided a backdrop to state and local legislative action. In the last year, the California Legislature adopted a provision known as the FACT Act, AB 775, which governs all clinics providing family planning or pregnancy-related services, including CPCs. In

1 passing AB 775, the Legislature articulated its intent to supplement its own prior efforts to advise
2 women of the state's reproductive health programs. As applicable here, the new law, scheduled to
3 take effect January 1, 2016, requires licensed facilities that meet certain criteria to provide a
4 notice to clients regarding the availability of free or low-cost public family planning services.
5 Three CPCs operating in this judicial district challenge AB 775 as unconstitutional, in violation of
6 their First Amendment Free Speech and Free Exercise rights. In the pending motion for
7 preliminary injunction they seek to block the new law's taking effect pending full litigation of this
8 action. Having carefully considered the parties' briefs, the parties' arguments at a specially set
9 hearing, and the applicable law, the court DENIES plaintiffs' motion for the reasons set forth
10 below.

11 I. PROCEDURAL HISTORY

12 Plaintiffs filed this action in this court on October 10, 2015. Compl., ECF No. 1.
13 Before the State answered, plaintiffs amended the complaint. First Am. Compl. (FAC), ECF
14 No. 4. The amended complaint alleges the California Reproductive Freedom, Accountability,
15 Comprehensive Care, and Transparency Act (the Act) is unconstitutional both on its face and as
16 applied. FAC ¶ 4. It includes two claims: (1) the Act is unconstitutional because it violates
17 plaintiffs' rights to freedom of speech under the First Amendment to the United States
18 Constitution, *id.* ¶¶ 44–47; and (2) the Act is unconstitutional because it violates plaintiffs' rights
19 to free exercise of religion under the same Amendment, *id.* ¶¶ 48–51. Plaintiffs request
20 declaratory judgment that the Act is unconstitutional on its face and as applied, preliminary and
21 permanent injunctive relief prohibiting enforcement of the Act, attorneys' fees and costs, and all
22 other appropriate relief.

23 The State answered on November 9, 2015. ECF No. 7. It denies the Act is
24 unconstitutional, Answer ¶¶ 44–51, and it advances one affirmative defense: It asserts the action
25 is barred because the claims are not ripe for review, *id.* at 9.

26 Plaintiffs filed this motion for a preliminary injunction on November 13, 2015,
27 Mot. Prelim. Injunction, ECF No. 8; Mem. P. & A., ECF No. 9. At hearing, plaintiffs clarified
28 their motion is based on an as-applied challenge only. The State opposed the motion on

1 December 4, 2015, ECF No. 16, and plaintiffs replied on December 11, 2015, ECF No. 17. The
2 court held a hearing on December 18, 2015. Kevin Snider and Matthew McReynolds appeared
3 for plaintiffs, and Noreen Skelly and Marc LaForestier appeared on behalf of the State.

4 II. THE ACT

5 A. Text of Statute

6 California Assembly Bill (AB) 775 enacts new sections of the California Health
7 and Safety Code, comprising “the Reproductive FACT (Freedom, Accountability,
8 Comprehensive Care, and Transparency) Act or Reproductive FACT Act.” Cal. Health & Safety
9 Code § 123470. The Act provides in pertinent part, that a

10 “licensed covered facility” means a facility licensed under Section
11 1204 or an intermittent clinic operating under a primary care clinic
12 pursuant to subdivision (h) of Section 1206, whose primary purpose
is providing family planning or pregnancy-related services, and that
satisfies two or more of the following:

- 13 (1) The facility offers obstetric ultrasounds, obstetric sonograms, or
14 prenatal care to pregnant women.
- 15 (2) The facility provides, or offers counseling about, contraception
or contraceptive methods.
- 16 (3) The facility offers pregnancy testing or pregnancy diagnosis.
- 17 (4) The facility advertises or solicits patrons with offers to provide
18 prenatal sonography, pregnancy tests, or pregnancy options
counseling.
- 19 (5) The facility offers abortion services.
- 20 (6) The facility has staff or volunteers who collect health
21 information from clients.

22 *Id.* §123471. A facility covered by the Act is required to disseminate a notice to clients:

23 (a) A licensed covered facility shall disseminate to clients on site
24 the following notice in English and in the primary threshold
25 languages for Medi-Cal beneficiaries as determined by the State
Department of Health Care Services for the county in which the
facility is located.

- 26 (1) The notice shall state:

27 “California has public programs that provide immediate free or
28 low-cost access to comprehensive family planning services
(including all FDA-approved methods of contraception), prenatal

1 care, and abortion for eligible women. To determine whether you
2 qualify, contact the county social services office at [insert the
telephone number].”

3 (2) The information shall be disclosed in one of the following ways:

4 (A) A public notice posted in a conspicuous place where
5 individuals wait that may be easily read by those seeking services
6 from the facility. The notice shall be at least 8.5 inches by 11
7 inches and written in no less than 22-point type.

8 (B) A printed notice distributed to all clients in no less than 14-
9 point type.¹¹

10 (C) A digital notice distributed to all clients that can be read at the
11 time of check-in or arrival, in the same point type as other digital
12 disclosures. A printed notice as described in subparagraph (B) shall
13 be available for all clients who cannot or do not wish to receive the
14 information in a digital format.

15 (3) The notice may be combined with other mandated disclosures.

16 *Id.* § 123472.

17 The law imposes civil penalties for failure to comply with the notice requirements:

18 (a) Covered facilities that fail to comply with the requirements of
19 this article are liable for a civil penalty of five hundred dollars
20 (\$500) for a first offense and one thousand dollars (\$1,000) for each
21 subsequent offense. The Attorney General, city attorney, or county
22 counsel may bring an action to impose a civil penalty pursuant to
23 this section after doing both of the following:

24 (1) Providing the covered facility with reasonable notice of
25 noncompliance, which informs the facility that it is subject to a civil
26 penalty if it does not correct the violation within 30 days from the
27 date the notice is sent to the facility.

28 (2) Verifying that the violation was not corrected within the 30-day
period described in paragraph (1).

(b) The civil penalty shall be deposited into the General Fund if the
action is brought by the Attorney General. If the action is brought
by a city attorney, the civil penalty shall be paid to the treasurer of
the city in which the judgment is entered. If the action is brought

¹ During the hearing, both parties agreed the second option provided by the Act, if exercised by a clinic, mandates a printed notice be distributed to all clients at the time of check-in or arrival. The court having consulted that language of the Act after hearing continues to read the applicable text as allowing the printed notice to be distributed on site to clients at any time before, during, or after the time of check-in or arrival.

1 by a county counsel, the civil penalty shall be paid to the treasurer
2 of the county in which the judgment is entered.

3 *Id.* § 123473.

4 The Act exempts two types of facilities from the new regulation:

5 (1) A clinic directly conducted, maintained, or operated by the
6 United States or any of its departments, officers, or agencies.

7 (2) A licensed primary care clinic that is enrolled as a Medi-Cal
8 provider and a provider in the Family Planning, Access, Care, and
Treatment Program.

9 *Id.* § 123471.

10 B. Legislative History and Purpose²

11 Federal health care policy provides a backdrop to the state law at issue here. In
12 2010, Congress passed the federal Patient Protection and Affordable Care Act (ACA), a law
13 which made millions of Californians, 53 percent of them women, newly eligible for Medi-Cal.
14 *Hearing on AB 775 Before the Assembly Comm. on Health, 2015–2016 Sess. 2 (Cal. 2015), ECF*
15 *No. 11-2 (Pls.’ Ex. 2)*. The ACA allowed California to establish or expand several programs that
16 provide reproductive health care and counseling to low-income women. AB 775 § 1.

17 In California, more than 700,000 women become pregnant every year. AB 775
18 § 1. Of those pregnancies, approximately one-half are unintended. *Id.* In 2010, 64.3 percent of
19 unplanned births in California were publicly funded. *Id.* By 2012, more than 2.6 million
20 California women were in need of publicly funded family planning services. *Id.* At the moment
21 they learn they are pregnant, thousands of women remain unaware of the California programs

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23 ² This background is drawn from the filings by both parties, which include documents
24 from the Official California Legislative Information Website, and thus constitute public
25 documents and statements. The court takes judicial notice of these public statements, available
26 generally at <http://leginfo.ca.gov>. *See also* Fed. R. Evid. 201 (governing judicial notice); *Ellis v.*
27 *J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1080 n.17 (N.D. Cal. 2013) (publicly available
28 documents published on a government website may be subject to judicial notice); *In re Charles*
Schwab Corp. Sec. Litig., 257 F.R.D. 534, 561 n.18 (N.D. Cal. 2009) (same; court may take
judicial notice of such a document *sua sponte*).

1 available that provide them with contraception, health education and counseling, family planning,
2 prenatal care, abortion, or delivery. *Id.*

3 In order to ensure California residents can make their personal reproductive health
4 care decisions in an informed manner, the California Legislature passed the Act. As noted above,
5 the Act requires licensed clinics that give family planning or pregnancy-related services to
6 provide a notice to consumers regarding their reproductive rights and the availability of such
7 services in California.³ *Id.* But the state Legislature identified a need to supplement its own
8 efforts to advise women of the state’s reproductive health programs, particularly because
9 pregnancy decisions are time sensitive. AB 775 § 1. The Act was seen as the “most effective
10 way” to ensure women quickly obtain the information and services needed to make and
11 implement timely reproductive decisions. *Id.*

12 Assemblyman David Chiu first introduced the Act on February 25, 2015, with the
13 goal of providing “technical, non-substantive changes” to a law that prohibited a person from
14 “selling, offering for sale, giving away, distributing, or otherwise furnishing materials intended to
15 determine the presence of pregnancy, unless that person has obtained a certificate of acceptability
16 from the State Department of Public Health declaring that the materials have been approved as to
17 efficacy and safety by the department.” *Assemb. Chiu Intro. AB 775, 2015–2016 session,*
18 *99 (Cal. 2015).*

19 On March 26, 2015, Chiu’s bill was amended to include text more similar to the
20 statutory language ultimately adopted. *See Assemb. Chiu First Amend. AB 775, 2015–2016*
21 *session, 98 (Cal. 2015) (“Assemb. First Amend.”).* Specifically, the amendment included
22 provisions requiring a licensed covered facility to disseminate a notice to all clients stating that
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24

25 ³ The Act also requires unlicensed facilities that provide pregnancy-related services to
26 disseminate and post a notice informing consumers that they are not licensed medical facilities
27 and to include the notice in their advertising materials. *Pls.’ Ex. 2 at 2.* Plaintiffs do not
28 challenge portions of the bill that address unlicensed facilities. Thus, this order only applies to
portions of the bill that address licensed facilities, including the CPCs at issue in this case.

1 “every pregnant woman has a right to decide whether to have a child or to obtain abortion care.”

2 *Id.*

3 On April 8, 2015, the bill was again amended, removing the language added in the
4 March 26 amendment. *See Assemb. Chiu Second Amend. AB 775, 2015–2016 session*, 97 (Cal.
5 2015) (“Assemb. Second Amend.”). In its place, a provision was added to state the following:

6 California has public programs that provide immediate free or low-
7 cost access to comprehensive family planning services, prenatal
8 care, and abortion, for eligible women.

8 *Id.*

9 By incorporating this language, the Legislature sought to address a concern
10 regarding crisis pregnancy centers (“CPCs”), facilities used by many pregnant women throughout
11 California. *Id.* CPCs, which may be licensed or unlicensed, provide a wide array of resources
12 related to reproductive health. *Id.* at 7. Many CPCs, however, do not offer services other than
13 what they describe as “pro-life” pregnancy options, so they do not make abortion referrals or
14 procedures. *Hearing on A.B. 775 Before the Senate Comm. on Health, 2015–2016 Sess.* 6 (Cal.
15 2015), ECF No. 11-6 (Pls.’ Ex. 6). This is because CPCs are commonly affiliated with
16 organizations that do not believe women should have abortions. Pls.’ Ex. 2 at 7. Many CPCs are
17 Christian belief-based organizations. Pls.’ Ex. 6 at 6.

18 As perceived by the Legislature, these beliefs lead CPCs to interfere with a
19 woman’s ability to be fully informed and exercise her reproductive rights, primarily by posing as
20 full-service women’s health clinics but discouraging women from seeking abortions. *Id.* To
21 prevent women from accessing abortion resources, some CPCs use “intentionally deceptive
22 advertising and counseling practices [which] often confuse, misinform, and . . . intimidate women
23 from making fully-informed, time-sensitive decisions about critical healthcare.” *Id.*

24 Assemblyman Chiu and Assemblywoman Autumn Burke, the co-authors of AB
25 775, based their findings in part on a 2015 report by the National Abortion Rights Action League
26 (NARAL), a vocal pro-choice organization. Pls.’ Ex. 2 at 2. For the report, NARAL sent several
27 researchers into CPCs to receive the counseling offered. *Id.* Many of the researchers reported
28 being provided with inaccurate information regarding the risks of abortion, including being told

1 that many women commit suicide after having an abortion and that abortions can cause breast
2 cancer. *Id.*

3 On April 25, 2015, the Assembly Judiciary Committee held a hearing on the bill.
4 *Hearing on A.B. 775 Before the Assembly Comm. on Judiciary, 2015–2016 Sess. 1 (Cal. 2015),*
5 ECF No. 11-3 (Pls.’ Ex. 3). The committee considered whether the Act as proposed would
6 regulate all pregnancy centers or just CPCs. *Id.* Legislators took account of a 2010 report issuing
7 from the University of California, Hastings College of Law regarding CPC practices and potential
8 legislative options for regulating them. Pls.’ Ex. 2 at 5-6. The options identified in the report
9 ranged from creating new regulations to leveraging existing regulations aimed specifically at
10 medical services. *Id.* Cognizant of the potential for First Amendment challenges, legislators
11 decided to regulate all pregnancy centers, including but not limited to CPCs. *Id.*

12 After two additional amendments, eliminating a reference to a right to privacy in
13 the findings and substituting the language appearing in the law enacted,⁴ the Assembly passed AB
14 775 on May 26, 2015 by a vote of 49 to 26. *Assemb. Unoff. Ballot AB 775, 2015-2016 Sess. (Cal.*
15 *2015).* The Senate adopted the bill later in the year on September 3, 2015 by a vote of 24 to 14.
16 *Sen. Unoff. Ballot. AB 775, 2015-2016 Sess. (Cal 2015).* The bill was forwarded to the Governor
17 on September 16, 2015, who signed it into law on October 9, 2015. *Id.*; *see Complete Bill*
18 *History of AB 775.*

19 Attorney General Kamala Harris was a primary co-sponsor, along with NARAL
20 and Support Black Women for Wellness. *Hearing on A.B. 775 Before the Senate Comm. on*
21 *Rules, 2015–2016 Sess. 6 (Cal. 2015) (Pls.’ Ex. 7).* Supporters included the California Religious
22 Coalition for Reproductive Choice, the California Immigrant Policy Center, and California
23 Latinas for Reproductive Justice. *Id.* Organizations in opposition to AB 775 included the
24 Alliance for Defending Freedom, the Alternatives Pregnancy Center, the California Catholic
25 Conference, and the California Right to Life Committee. *Id.*

26 ⁴ *See Assemb. Chiu Third Amend. AB 775, 2015–2016 session, 97 (Cal. 2015) (“Assemb.*
27 *Third Amend.”); see also See Assemb. Chiu Fourth Amend. AB 775, 2015–2016 session, 97 (Cal.*
28 *2015) (“Assemb. Fourth Amend.”)*

1 III. THE PARTIES

2 A. A Woman's Friend Pregnancy Resources Clinic (A Woman's Friend)

3 A Woman's Friend is a tax-exempt, non-profit religious corporation established
4 under section 501(c)(3) of the Internal Revenue Code and located in Marysville, California.
5 Dodds Decl. ¶ 2, ECF No. 10-1; FAC ¶ 9. It is licensed under California Health and Safety Code
6 section 1204.⁵ FAC ¶ 9. It offers all of its services free of charge. Dodds Decl. ¶ 28. It was
7 organized "for the express purpose of providing alternatives to abortion for women experiencing
8 unplanned pregnancies." *Id.* ¶ 2. Its bylaws provide more specifically that its purpose "is to help
9 a pregnant woman in crisis to understand [and] work through alternatives so she can make an
10 informed decision about the outcome of her pregnancy." *Id.* ¶ 3. "In addition, A Woman's
11 Friend seeks to provide counsel and practical help to all parties experiencing a crisis produced by
12 an unplanned pregnancy." *Id.* "A Woman's Friend finds abortion an unacceptable alternative."
13 *Id.*

14 A Woman's Friend requires its employees, volunteers, and board members to read
15 and sign a statement of faith. *Id.* ¶ 4. Among other affirmations, the statement of faith confirms
16 the person believes "the Bible to be the inspired, the only infallible authoritative Word of God";
17 "that there is one God, eternally existent in three persons: Father, Son, and the Holy Spirit"; and
18 that "salvation is received through faith in Jesus Christ as Savior and Lord and not as a result of
19 good works." *Id.* A Woman's Friend also incorporates prayer throughout its operations,
20

21 ⁵ "Only the following defined classes of primary care clinics shall be eligible for licensure
22 [under section 1204]: . . . A 'free clinic' means a clinic operated by a tax-exempt, nonprofit
23 corporation supported in whole or in part by voluntary donations, bequests, gifts, grants,
24 government funds or contributions, that may be in the form of money, goods, or services. In a
25 free clinic there shall be no charges directly to the patient for services rendered or for drugs,
26 medicines, appliances, or apparatuses furnished. No corporation other than a nonprofit
27 corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section
28 501 of the Internal Revenue Code of 1954 as amended, or a statutory successor thereof, shall
operate a free clinic; provided, that the licensee of any free clinic so licensed on the effective date
of this section shall not be required to obtain tax-exempt status under either federal or state law in
order to be eligible for, or as a condition of, renewal of its license. No natural person or persons
shall operate a free clinic." Cal. Health & Safety Code § 1204(a)(1)(B).

1 including at the beginning of every employee’s or volunteer’s shift and in every board meeting.
2 *Id.* ¶ 5. A Woman’s Friend’s “motivation for the ministry is spiritual,” and “[n]o commercial
3 transactions take place at the clinic.”⁶ *Id.* ¶ 28.

4 A Woman’s Friend refers to those who seek its services as “clients.” *See, e.g., id.*
5 ¶ 6. Clients may call or walk in to the clinic. *Id.* Clients are greeted by a receptionist, who
6 usually schedules an appointment for the same day or the next business day. *Id.* The receptionist
7 helps clients fill out a form to request a service and what services clients need. *Id.* ¶ 7. The
8 receptionist also copies the clients’ picture ID. *Id.* A registered nurse, whom A Woman’s Friend
9 refers to as a “Client Advocate,” then meets with clients in a consultation room and fills out an
10 information sheet. *Id.* ¶¶ 8, 13–19. The nurse instructs clients on the administration of a
11 pregnancy test, and the test is administered. *Id.* ¶ 9.

12 If the test is positive, the nurse estimates a client’s due date and the date her
13 pregnancy began. *Id.* ¶ 10. The nurse collects statistical and medical information, including the
14 client’s vital signs, blood type, contraceptive use, history of pregnancies, surgeries,
15 hospitalizations, sexually transmitted infections, other illnesses, substance abuse, current
16 medications, and other information.⁷ *Id.* ¶ 15. The nurse alerts the client to symptoms that
17 indicate immediate or more comprehensive medical care is necessary, including the symptoms of
18 ectopic pregnancy and miscarriage. *Id.* ¶ 10. The nurse also offers brochures, pamphlets,
19 referrals, and a medical appointment. *Id.* The nurse explains the services A Woman’s Friend
20 offers, which include pre-parenting classes and a selection of used and new children’s clothing,

21 ⁶ The State points out the qualifier “at the clinic.” *See* Opp’n 10, ECF No. 16 (“[Ms.
22 Dodd’s declaration] is . . . ambiguous about whether transactions, be they commercial or
23 charitable, do occur. . . . The statement [“at the clinic”] suggests that transactions occur elsewhere
24 or in other circumstances.”). The record includes no evidence of transactions other than
25 transactions at the clinic. The evidence before the court suggests none take place. *See* Dodds
Decl. ¶ 28 (“A Woman’s Friend provides all of its services (as well as all products, such as
literature, vitamins, maternity and infant clothing, and baby furniture) free of charge.”).

26 ⁷ Ms. Dodds’s declaration does not specify whether this information is collected from all
27 clients or from only those whose pregnancy tests are positive, but the context suggests this
28 information is collected only if the test is positive. *See id.* ¶¶ 15–19.

1 maternity clothing, baby furniture, and other childcare supplies, *id.*, all of which a Woman’s
2 Friend offers free of charge, *id.* ¶ 28. The nurse advises the client to obtain health insurance
3 benefits for prenatal care. *Id.* ¶ 16. The nurse teaches the client about prenatal health and well-
4 being, nutrition, and fetal development and offers to perform a limited first trimester ultrasound.
5 *Id.* ¶ 17. Usually an ultrasound appointment is scheduled for a later date, although sometimes an
6 ultrasound may be provided the same day. *Id.*

7 If the pregnancy test is negative, the nurse encourages the client to seek
8 confirmation from a physician and offers information about sexually transmitted infections or
9 diseases and sexual abstinence. *Id.* ¶ 12.

10 Whether the test is positive or negative, before the client leaves, the nurse informs
11 her it is a “life-affirming faith based organization” and gives her a copy of the New Testament,
12 two DVDs, a gospel tract, and popcorn and candy. *Id.* The nurse asks the client for permission to
13 pray together and asks her to fill out a client-service questionnaire. *Id.*

14 The medical staff at A Woman’s Friend includes a medical doctor, a doctor of
15 obstetrics and gynecology, and several registered nurses. *Id.* ¶ 20. Its medical director is a
16 medical doctor licensed to practice in California. *Id.* ¶ 27. He reviews A Woman’s Friend’s
17 services annually to ensure these services comply with evidence-based medical standards and
18 provide clients with true, correct, and current information. *Id.* ¶ 21. A Woman’s Friend is
19 “committed to providing its clients with accurate and complete information about both prenatal
20 development and abortion” and “assisting women to carry to term by providing emotional support
21 and practical assistance.” *Id.* ¶ 23. “It is not a practice of A Woman’s Friend to discuss birth
22 control with clients unless the client asks a direct question.” *Id.* ¶ 25. “All questions regarding
23 this and other medical information are directed to licensed medical personnel for a response.” *Id.*
24 Nevertheless, A Woman’s Friend does distribute literature that states abstinence is the only sure
25 way to avoid pregnancy and sexually transmitted infections. *Id.* A Woman’s Friend does not
26 provide ongoing prenatal care or emergency services, and it advises its clients to obtain these
27 services from a physician or local hospital. *Id.* ¶ 16.

28

1 Carol Dodds, the CEO of A Woman’s Friend, *id.* ¶ 1, has submitted a declaration
2 to express her belief that the Act’s notice provisions are “utterly contrary to our faith and what the
3 organization wishes to say,” *id.* ¶ 30. Under her understanding of the Act, if A Woman’s Friend
4 does not display the notice, it will be fined \$500 for the first offense and \$1,000 for each
5 subsequent offense. *Id.* She avers that these penalties “would financially jeopardize the work of
6 the clinic.” *Id.* ¶ 31.

7 B. Crisis Pregnancy Center of Northern California (CPCNC)

8 CPCNC is a religious non-profit corporation established under section 501(c)(3) of
9 the Internal Revenue Code and located in Redding, California. FAC ¶ 10. It is licensed under
10 California Health and Safety Code section 1204. *Id.* It offers all of its services free of charge.
11 Gibbs Decl. ¶ 22, ECF No. 10-2. It is an affiliate of Care Net, and has adopted Care Net’s
12 mission statement and statement of faith. *Id.* ¶¶ 4–5. Care Net is a national organization whose
13 mission states that “every human life begins at conception and is worthy of protection.” *Id.* ¶ 5.
14 “Care Net envisions a culture where women and men faced with pregnancy decisions are
15 transformed by the gospel of Jesus Christ and empowered to choose life for their unborn children
16 and abundant life for their families.” *Id.* ¶ 6. Care Net’s statement of faith explains its belief that
17 the Bible is “the inspired, the only infallible, authoritative Word of God”; that “there is one God,
18 eternally existent in three persons; Father, Son and Holy Spirit”; and that “salvation is received
19 through faith in Jesus Christ as Savior and Lord and not as a result of good works,” among other
20 tenets. *Id.* ¶ 7. In the same vein, CPCNC is a “religiously based organization” and exists “to help
21 women and men in need” rather than to “engage in commercial transactions.” *Id.* ¶¶ 2, 22.

22 CPCNC refers to those who seek its services as “clients.” *See, e.g., id.* ¶ 9.

23 CPCNC’s day-to-day activities “are focused on offering free services to families that are in need
24 of assistance throughout pregnancy and through their child’s third year.” *Id.* ¶ 10. It offers its
25 clients pregnancy tests, first trimester ultrasounds, referrals, an educational program, counseling,
26 and mentoring. *Id.* ¶¶ 10, 22. CPCNC also offers classes on nutrition, labor and delivery,
27 parenting, pregnancy, community resources and referrals, and other topics. *Id.* It also offers
28

1 information about sexually transmitted infections or diseases, and offers information about sexual
2 abstinence if requested. *Id.* ¶ 23.

3 CPCNC's staff includes four registered nurses and a registered diagnostic medical
4 sonographer. *Id.* ¶ 15. Its medical director is a licensed obstetrician and medical doctor. *Id.* The
5 medical director oversees its medical procedures, reviews, approves, and signs off on ultrasounds,
6 and accepts referrals for clients in need of prenatal and pediatric care. *Id.* The medical director
7 also regularly consults with CPCNC's medical sonographer. *Id.* CPCNC's staff includes other,
8 non-medical personnel, but they do not provide medical advice. *Id.* ¶ 19. CPCNC trains its staff
9 members over a period of six to twelve months before they begin work with clients. *Id.* ¶ 13. Its
10 staff takes care not to answer questions beyond their scope of practice and refers clients to
11 medical doctors, the emergency room, and other local medical facilities as necessary. *Id.*

12 CPCNC is "extremely adamant" about its commitment to care and competence.
13 *Id.* ¶ 20. When CPCNC's clients are pregnant, its services are intended to provide them with
14 information about the options available to them, including carrying a child to term, raising the
15 child, obtaining an adoption, or abortion. *Id.* CPCNC desires that each client "make an educated
16 choice with the proper information," based on facts and the truth and after thorough consideration
17 of all available options. *Id.* ¶ 21.

18 Shelly Gibbs, CPCNC's CEO, *id.* ¶ 1, has submitted a declaration explaining her
19 understanding that the Act "requires that a licensed clinic like CPCNC provide a notice that girls
20 and women may receive free or low cost abortions." *Id.* ¶ 24. She understands that "the notice
21 requires CPCNC to communicate that our clients contact the County social services and actually
22 provide the phone number." *Id.* She believes the notice is "diametrically opposed to the
23 religiously based mission and goals of CPCNC," and explains that "[b]ecause the notice is to be
24 conspicuously posted in the waiting room so that it can easily be read, it is among the first
25 communications, if not the first communication, made to a client." *Id.*

26 C. Alternatives Women's Center (AWC)

27 AWC is a religious non-profit corporation established under section 501(c)(3) of
28 the Internal Revenue Code and located in Escondido, California. DeArmas Decl. ¶ 2, ECF No.

1 10; FAC ¶ 11. It is licensed under Health and Safety Code section 1204. FAC ¶ 11; DeArmas
2 Decl. ¶ 7. It offers its services free of charge. DeArmas Decl. ¶¶ 18–19. It describes itself as a
3 “Christian-based community medical clinic.” *Id.* ¶ 3. Its objective “is to provide to pregnant
4 women, the community and to others, a Biblically guided and based Christian response to
5 pregnancy, parenting and sexuality.” *Id.* ¶ 4. According to its bylaws, AWC must not “support
6 nor promote abortion as an acceptable option available to pregnancy, including pregnancy
7 resulting from rape or incest.” *Id.*

8 “AWC is a religious ministry and is motivated by spiritual concerns.” *Id.* ¶ 18. It
9 “does not act out of economic interest.” *Id.* AWC’s staff and volunteers sign a statement of faith
10 as part of their application. *Id.* ¶ 3. This statement explains the person believes “that the Bible is
11 the only inspired Word of God and is free from error”; that “there is one God, the creator and
12 preserver of all things” and “He exists eternally in three persons: the Father, the Son, and the
13 Holy Spirit, who are of one substance and equal in power and glory”; that “man can only be saved
14 by the grace of God, through faith on the basis of the work of Jesus Christ and by the agency of
15 the Holy Spirit”; and “that human life begins at conception and is valued by God from conception
16 onward.” *Id.* In short, “all Board Members, officers, employees, and volunteers must be
17 Christians.” *Id.* ¶ 5.

18 AWC refers to those who seek its services as “patients.” *See, e.g., id.* ¶ 12. When
19 a patient arrives at AWC, she receives a packet from a receptionist, who leads her to a
20 consultation room. *Id.* The receptionist gets to know the patient and confirms AWC’s
21 understanding of her expectations for the appointment. *Id.* A nurse then gives the patient a
22 “Decision Guide,” and the nurse helps the patient complete the guide if necessary. *Id.* This
23 decision guide is part of AWC’s “holistic (whole person) approach to healthcare,” which follows
24 a “PIESS” assessment looking to the patient’s “Physical . . . , Intellectual, Emotional, psycho-
25 Social and Spiritual” needs. *Id.* ¶ 12. The nurse then shows the patient where and how to
26 complete a pregnancy test. *Id.* If the test is positive, the nurse records the patient’s vital signs,
27 height, and weight, and reviews the patient’s medical history. *Id.* If a patient exhibits symptoms
28 of a condition requiring further medical attention, AWC refers her to appropriate treatment. *Id.*

1 AWC then offers education on the patient’s medical options using a website, and a nurse offers a
2 same-day ultrasound. *Id.* At the conclusion of the appointment, AWC provides any requested
3 educational materials, gives the patient prenatal vitamins, and requests permission to follow up
4 with the patient to learn whether she has obtained prenatal care or an abortion and to confirm her
5 well-being. *Id.*

6 If a patient is not pregnant, AWC offers information about reproductive health,
7 including menstrual cycles, fertility, methods of birth control, and sexually transmitted diseases
8 and infections. *Id.* ¶ 15. AWC offers referrals if the patient requests tests for sexually transmitted
9 diseases and infections. *Id.* It recommends sexual abstinence “as the best and safest way for
10 single women to protect their health which includes their sexual/medical, intellectual, emotional,
11 psycho-social and spiritual health.” *Id.*

12 AWC’s medical staff consists of medical doctors, obstetricians and gynecologists,
13 and registered nurses. *Id.* ¶ 10. It has a Medical Director and Obstetrics Director. These doctors
14 are available by phone and can consult a patient’s medical records and test results. *Id.* ¶ 17.
15 Tamara DeArmas, AWC’s CEO, *id.* ¶ 1, submitted a declaration explaining that “AWC provides
16 accurate evidence-based education to all their patients and does not now nor has it ever
17 knowingly given false or inaccurate medical advice,” *id.* ¶ 13. AWC takes time to ensure each
18 patient has the information she needs to make an informed choice about her pregnancy. *Id.*

19 Ms. DeArmas also explains that “[r]eferring girls and women, who come through
20 our doors, to where they can get a low cost or free abortion runs directly against the mission and
21 goals of AWC.” *Id.* ¶ 20. She understands the Act’s notice requirements will force AWC “to
22 advertise for the County regarding abortion services against our will.” *Id.* She finds the notice
23 provisions particularly problematic because, as she understands them, a notice must be posted in
24 the waiting area, and it will be the first message AWC’s patients receive. *Id.*

25 D. Defendant Harris

26 Defendant Harris is the Attorney General of the State of California. As noted
27 above, she was one of AB 775’s sponsors. Pls.’ Ex. 7, at 1. Upon passage of AB 775 into law,
28 defendant issued a statement that she was “proud to have co-sponsored the Reproductive FACT

1 Act, which ensures that all women have equal access to comprehensive reproductive health care
2 services, and that they have the facts they need to make informed decisions about their health and
3 their lives.” Attorney General Kamala D. Harris Issues Statement on Governor Brown Signing
4 Reproductive FACT Act into Law (Oct. 9, 2015).⁸ She “commend[ed] Governor Brown for
5 signing AB 775 and thank[ed] Assemblymembers David Chiu and Autumn Burke for
6 championing this important law.”

7 Under section 123473(a), Defendant will have authority to enforce the Act’s notice
8 provisions. *See* Cal. Health & Safety Code § 123473(a). She has introduced no evidence and has
9 not argued she will exercise her discretion to defer civil enforcement of the Act against plaintiffs.

10 **IV. JURISDICTION; RIPENESS**

11 The State argues this action is unripe such that the court is without jurisdiction.
12 Ripeness is a question of timing. *See Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d
13 1134, 1138 (9th Cir. 2000) (en banc). It is a doctrine “designed to ‘prevent the courts, through
14 avoidance of premature adjudication, from entangling themselves in abstract disagreements.’” *Id.*
15 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). It includes “both a constitutional
16 and a prudential component.” *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir.
17 1993). The court addresses each component in turn.

18 **A. Constitutional Ripeness**

19 Generally speaking, “the constitutional component of ripeness is synonymous with
20 the injury-in-fact prong of the standing inquiry.” *Cal. Pro-Life Council, Inc. v. Getman*
21 (*Getman*), 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). In other words, the constitutional aspects of
22 ripeness may often be characterized as “standing on a timeline.” *Thomas*, 220 F.3d at 1138. As
23 does the doctrine of standing, ripeness “focuses on whether there is sufficient injury.” *Portman*,
24 995 F.2d at 903. A sufficient injury is an injury-in-fact: “an invasion of a legally protected

25 _____
26 ⁸ The court takes judicial notice of this public statement, published on the official website
27 for the Office of the Attorney General of the State of California, available currently at
28 <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-statement-governor-brown-signing>.

1 interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or
2 hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation
3 marks omitted). “A claim is not ripe for adjudication if it rests upon contingent future events that
4 may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S.
5 296, 301 (1998) (citation and quotation marks omitted).

6 When a plaintiff challenges a statute’s constitutionality, “neither the mere
7 existence of a proscriptive statute nor a generalized threat of prosecution satisfies the ‘case or
8 controversy’ requirement.” *Thomas*, 220 F.3d at 1139. That is, a statute’s passage does not alone
9 make for a ripe claim. *Id.* Rather, the plaintiffs must face a “genuine threat of imminent
10 prosecution.” *Id.* In other words, “[a] plaintiff who challenges a statute must demonstrate a
11 realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.”
12 *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). “To show such a
13 ‘realistic danger,’ a plaintiff must ‘allege[] an intention to engage in a course of conduct arguably
14 affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of
15 prosecution thereunder.’” *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Babbitt*,
16 442 U.S. at 298) (alterations in *Lopez*). The Ninth Circuit has listed three factors that may aid the
17 court’s decision on this front: “(1) ‘whether the plaintiffs have articulated a concrete plan to
18 violate the law in question,’ (2) ‘whether the prosecuting authorities have communicated a
19 specific warning or threat to initiate proceedings,’ and (3) ‘the history of past prosecution or
20 enforcement under the challenged statute.’” *Getman*, 328 F.3d at 1094 (quoting *Thomas*, 220
21 F.3d at 1139). Similar considerations inform the court’s decision when the question is expressed
22 in terms of standing and injury in fact. *See, e.g., Lopez*, 630 F.3d at 786.

23 The *Thomas* court took care to clarify that this test allows pre-enforcement
24 challenges of laws that allegedly infringe on a plaintiff’s constitutional rights. 220 F.3d at 1137
25 n.1. Under longstanding federal precedent, a plaintiff need not “await the consummation of
26 threatened injury to obtain preventive relief.” *Getman*, 328 F.3d at 1094; *see also LSO, Ltd. v.*
27 *Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (“Courts have found standing where no one had ever
28 been prosecuted under the challenged provision.”). This is particularly true in the context of First

1 Amendment free-speech cases. *Getman*, 328 F.3d at 1094; *LSO*, 205 F.3d at 1155. For example,
2 “when the State of Virginia passed a law banning the display of certain sexually-explicit material
3 where juveniles could examine it, the Supreme Court found that booksellers had standing to
4 object, even though the law had not yet been enforced.” *LSO*, 205 F.3d at 1155 (citing *Va. v. Am.*
5 *Booksellers Ass’n, Inc.*, 484 U.S. 383, 386, 392–93 (1988)). To reach this decision, the Court
6 considered that Virginia “ha[d] not suggested that the newly enacted law will not be enforced”
7 and concluded the plaintiffs had “alleged an actual and well-founded fear that the law will be
8 enforced against them.” *Am. Booksellers*, 484 U.S. at 393.

9 Both the Ninth Circuit’s decision in *LSO* and the Supreme Court’s decision in
10 *American Booksellers* concerned statutes that risked the chilling of constitutionally protected
11 speech. See *Am. Booksellers*, 484 U.S. at 393; *LSO*, 205 F.3d at 1155–56. This was also the case
12 in *Getman*. See 328 F.3d at 1094–95. Here, by contrast, plaintiffs argue the Act compels rather
13 than chills their speech; however, the court sees no reason to distinguish the cases on that basis.
14 The Supreme Court has held that “the right of freedom of thought protected by the First
15 Amendment against state action includes both the right to speak freely and the right to refrain
16 from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Moreover, the alleged
17 injury motivating the reasoning in *American Booksellers*, *Getman*, and *LSO*—self-censorship—
18 may logically be substituted in this case for the alleged injury of compelled speech; that is, just as
19 a plaintiff may be constitutionally injured by self-censorship, a plaintiff may be injured if
20 compelled to speak. See also *Riley v. Nat. Fed. of the Blind of N.C.*, 487 U.S. 781, 796–97 (1988)
21 (“There is certainly some difference between compelled speech and compelled silence, but in the
22 context of protected speech, the difference is without constitutional significance . . .”).

23 Here, the Act imposes notice requirements on “licensed covered facilities,” which,
24 as set forth above, are defined in three parts: (1) the facility is licensed under California Health
25 and Safety Code section 1204; (2) the facility’s “primary purpose is providing family planning or
26
27
28

1 pregnancy-related services”; and (3) two or more of the listed conditions are satisfied.⁹ Cal.
2 Health & Safety Code § 123471(a); *see also id.* § 123472(a) (notice requirements). Under this
3 definition, each of the three plaintiff organizations is a “licensed covered facility.” Each is
4 licensed under Health and Safety Code section 1204. FAC ¶¶ 9–11. Each plaintiff’s primary
5 purpose is the provision of pregnancy-related services. *See* Dodds Decl. ¶ 3; Gibbs Decl. ¶ 10;
6 DeArmas Decl. ¶ 4. And each satisfies two or more of the conditions listed in section 123471(a).
7 *See* Dodds Decl. ¶¶ 9-12, 15, 17 (A Woman’s Friend offers and provides obstetric ultrasounds,
8 offers pregnancy testing, and collects health information from clients); Gibbs Decl. ¶¶ 10, 23
9 (CPCNC offers pregnancy tests, obstetric ultrasounds, and “offer[s] abstinence information
10 resources if requested or as needed”); DeArmas Decl. ¶¶ 12, 15 (AWC conducts pregnancy tests,
11 reviews patients’ medical history, conducts obstetric ultrasounds, and offers counseling and
12 contraceptive methods).

13 As “licensed covered facilities,” all three plaintiffs are subject to the notice
14 requirements of Health & Safety Code section 123472(a). Should the law be upheld, they will
15 face two choices: comply with the Act’s notice provisions come January 1, 2016 or not. Should
16 plaintiffs elect to comply with the notice provisions, they argue they will be compelled to make a
17 statement contrary to both their religious beliefs and the purposes of their formation. Should they
18 elect not to comply, they risk an enforcement action and may face civil penalties of five hundred
19 dollars for a first offense and one thousand dollars for each later offense. *See* Cal. Health &
20 Safety Code § 123472(a) (notice requirements); *id.* § 123473(a) (civil penalty provisions). The
21 Act is not yet effective, but the State has not suggested it will decline to enforce it. Indeed it
22 argues that should enforcement of the Act be enjoined, the State would be unable to prevent harm
23

24 ⁹ Again, those conditions are as follows: “(1) The facility offers obstetric ultrasounds,
25 obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers
26 counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy
27 testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to
28 provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility
offers abortion services. (6) The facility has staff or volunteers who collect health information
from clients.” Cal. Health & Safety Code § 123471(a) (line breaks removed).

1 to “the millions of California women who ‘are in need of publicly funded family planning
2 services, contraception services and education, abortion services, and prenatal care and delivery,’
3 but are unaware of the public programs available to provide them with those vital services.”
4 Opp’n at 19 (quoting AB 775 § 1(b)).

5 Two of the three *Getman* factors weigh in favor of the claims’ ripeness. One, the
6 plaintiffs have articulated a concrete plan to violate the Act in question. The court disagrees with
7 the State that plaintiffs have not expressly professed their intent to disobey with the Act’s notice
8 provisions. The plaintiffs’ declarations leave no doubt they believe displaying or distributing the
9 notices would conflict with their religious beliefs and the purposes of their organizations. *See*,
10 *e.g.*, Dodds Decl. ¶¶ 29–31; Gibbs Decl. ¶ 24; DeArmas Decl. ¶ 20; *see also LSO*, 205 F.3d at
11 1156 (“We are not persuaded by the [defendants’] contention that [the plaintiff] was required to
12 plead that a particular . . . licensee had in fact refused to lease premises to [it] . . .”). Two, the
13 State has in effect communicated its intent to enforce the Act. *See Getman*, 328 F.3d at 1094.
14 The court recognizes that the state has not, strictly speaking, “communicated a specific warning
15 or threat to initiate proceedings,” *id.*, and has not given notice as required by section
16 123473(a)(1), but in light of applicable Supreme Court authority, this shortfall does not yet
17 deprive the court of jurisdiction. *See, e.g., Am. Booksellers*, 484 U.S. at 393 (“The State has not
18 suggested that the newly enacted law will not be enforced, and we see no reason to assume
19 otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law
20 will be enforced against them.”). The State has not disavowed plans to enforce the Act. *See LSO*,
21 220 F.3d at 1155. Defendant Harris’s recent co-sponsorship of the Act, her future role in its
22 enforcement and the absence of any suggestion she will not enforce the Act also show the case is
23 ripe. *See Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996).

24 The court finds that although plaintiffs cannot at this time possibly show a history
25 of prosecution or enforcement prior to the Act’s taking effect, this action is constitutionally ripe.
26 *See, e.g., LSO*, 205 F.3d at 1155 (“[E]nforcement history alone is not dispositive. Courts have
27 found standing where no one had ever been prosecuted under the challenged provision.”). This is
28 not a case of uncertainties, hypotheticals, or contingencies. The parties do not dispute the Act

1 applies to plaintiffs’ organizations. The Act requires the provision of a specific notice, which the
2 plaintiffs argue violates specific tenets of their religious beliefs and specific provisions of their
3 charters or bylaws. The Act foresees only one consequence of noncompliance: a fine. The Act
4 was signed recently and will go into effect on January 1, 2016. The State has made no effort to
5 advise the court or plaintiffs it intends not to enforce it against them. Plaintiffs’ alleged
6 impending injuries suffice to ensure constitutional ripeness.

7 B. Prudential Ripeness

8 The prudential component of ripeness “focuses on whether there is an adequate
9 record upon which to base effective review.” *Portman*, 995 F.2d at 902–03. The decision is
10 discretionary. *Thomas*, 220 F.3d at 1142. The court must “evaluate both [1] the fitness of the
11 issues for judicial decision and [2] the hardship to the parties of withholding court consideration.”
12 *Texas v. United States*, 523 U.S. at 300; *Thomas*, 220 F.3d at 1141 (9th Cir 1991).

13 1. Fitness for Judicial Decision

14 The Supreme Court and Ninth Circuit have recognized the difficulty of deciding
15 constitutional questions without the necessary factual context. *See, e.g., W.E.B. DuBois Clubs of*
16 *Am. v. Clark*, 389 U.S. 309, 312 (1967) (per curiam); *Thomas*, 220 F.3d at 1141; *Am.-Arab Anti-*
17 *Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510.

18 For example, in *W.E.B. Du Bois Clubs*, the Attorney General requested a hearing
19 and order that the plaintiffs must register as a “communist-front organization.” 389 U.S. at 310.
20 In response, the plaintiffs challenged the statute that granted the Attorney General authority to
21 make this request. *Id.* The statute in question provided that before the government could punish
22 the plaintiffs for failure to register, the “Subversive Activities Control Board,” an administrative
23 agency, was required to find that the plaintiffs in fact operated a communist-front organization
24 and issue an order to that effect. *Id.* at 311. And before such an order could issue, the statute
25 required a full, public evidentiary hearing in which the plaintiffs could be represented by counsel,
26 present evidence, and conduct cross-examination. *Id.* The plaintiffs challenged the registration
27 requirement and sought to enjoin any hearing as unconstitutional. *Id.* But the Supreme Court
28 found the action premature because “important and difficult constitutional issues would be

1 decided devoid of factual context” and because it was unclear whether the plaintiffs were covered
2 by the statute. *Id.* at 312.

3 Similarly, in *American-Arab Anti-Discrimination Committee*, the U.S.
4 Immigration and Naturalization Service (INS) detained the plaintiffs, who were non-immigrant
5 aliens, because they were members of the Popular Front for the Liberation of Palestine (PFLP).
6 970 F.2d at 504–05. The government alleged the PFLP advocated and taught the “international
7 and governmental doctrines of world communism,” which meant the detainees would be
8 deported. *Id.* at 505.¹⁰ Citing *W.E.B. DuBois Clubs*, the Ninth Circuit found the case was not
9 ripe. *Id.* at 510–12. It was unclear to the court whether the detainees were actually members of
10 the PFLP and what actions had allegedly brought them within the parameters of the statute in
11 question. *Id.* at 510–11. In addition, the statute had never been interpreted by any court. *Id.* at
12 511. Neither had the INS offered an interpretation. *Id.*

13 In *Thomas v. Anchorage Equal Rights Commission*, several landlords challenged
14 an Alaska statute that banned discrimination on the basis of marital status, arguing the statute
15 violated the First Amendment’s Free Exercise and Free Speech Clauses. 220 F.3d at 1137. The
16 Ninth Circuit found the case was not ripe. *Id.* It summarized its holding as follows:

17 No prospective tenant has ever complained to the landlords, let
18 alone filed a complaint against them. Neither the Alaska State
Commission for Human Rights nor the Anchorage Equal Rights

19 ¹⁰ At the time, 8 U.S.C. § 1251 provided as follows, in relevant part:

20 (a) Any alien in the United States . . . shall, upon order of the Attorney General,
21 be deported who—

22 . . .

23 (6) is or at any time has been, after entry, a member of the following classes of
24 aliens:

25 . . .

26 (D) Aliens . . . who are members of or affiliated with any organization that
27 advocates the economic, international, and governmental doctrines of world
28 communism or the establishment in the United States of a totalitarian dictatorship,
either through its own utterances or through any written or printed publications
issued or published by or with the permission or consent of or under the authority
of such organization or paid for by the funds of, or funds furnished by, such
organization

1 Commission has ever initiated an investigation into the landlords’
2 rental practices or commenced a civil enforcement action or
3 criminal prosecution under the challenged laws. No violation of the
4 laws is on the horizon and no enforcement action or prosecution is
5 either threatened or imminent. Indeed, the principal enforcement
6 agencies had never even heard of these landlords before they filed
7 this action. Simply put, at this stage the dispute is purely
8 hypothetical and the injury is speculative.

9 *Id.* Later on in the circuit court’s opinion, it called the record before it “remarkably thin and
10 sketchy, consisting only of a few conclusory affidavits.” *Id.* at 1141.

11 In *Thomas*, the court acknowledged that some pre-enforcement actions may be
12 ripe from a prudential point of view, especially if they concern “purely legal” issues. *Id.* at 1141–
13 42; accord *San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1132 (“[P]ure legal questions that
14 require little factual development are more likely to be ripe.”). But that was not the situation in
15 *Thomas*; no “concrete factual scenario” demonstrated how the laws, as applied, infringed the
16 landlords’ constitutional rights. *Id.*

17 Here, unlike in *W.E.B. DuBois Clubs, American-Arab Anti-Discrimination*
18 *Committee*, and *Thomas*, plaintiffs’ claims are concrete and clearly delineated by evidence,
19 including their declarations, the text of the Act, and the Act’s legislative history. Plaintiffs’
20 declarations are detailed, specifying what they understand the Act will require of them and how
21 the notice provisions they challenge conflict with their constituents’ religious convictions and
22 provisions of their charters and bylaws. Moreover, the disputes here concern questions for which
23 the record includes sufficient evidence: the scope of the protection provided by the First
24 Amendment’s Free Exercise and Freedom of Speech Clauses given a specific notice required by
25 California law.

26 The State’s arguments to the contrary are framed in only general terms. It argues
27 the plaintiffs’ claims “appear to include as-applied components” and therefore it believes
28 adjudication of this case “depends on the facts surrounding any conceivable application of the
statute.” Opp’n at 7. But the State identifies no particular difficulty or uncertainty that will arise
if the case goes forward now. The court also notes other federal courts have recently adjudicated
similar disputes, apparently without the sort of difficulties that arise in unripe cases. *See, e.g.,*

1 *Evergreen Ass'n of N.Y. v. City of N.Y.*, 740 F.3d 233 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 435
2 (2014); *Greater Balt. Ctr. v. Mayor and City Council of Balt.*, 721 F.3d 264 (4th Cir. 2013) (en
3 banc). This case is suited for judicial decision now.

4 2. Hardship to the Parties Should the Court Withhold Consideration

5 As noted above, the prudential ripeness doctrine also countenances the court's
6 consideration of whether the parties will suffer a hardship if the court withholds a decision.
7 *Texas v. United States*, 523 U.S. at 300–01. This analysis “dovetails, in part, with the
8 constitutional consideration of injury.” *Thomas*, 220 F.3d at 1142.

9 When a plaintiff challenges a statute or regulation, hardship is more likely if the
10 statute has a direct effect on the plaintiff's day-to-day operations. *See Texas v. United States*,
11 523 U.S. at 301. Hardship is less likely if the statute's effect is abstract. *See id.* (rejecting
12 argument that ongoing “threat to federalism” or “threat to personal freedom” could constitute
13 hardship “unless the person's primary conduct is affected”). The court may also consider whether
14 the parties' dispute may be adjudicated more concretely in a later proceeding, or if the denial of
15 relief would foreclose later resolution. *See Thomas*, 220 F.3d at 1142; *Am.-Arab Anti-*
16 *Discrimination Comm.*, 970 F.2d at 511.

17 Here, the court is satisfied the plaintiffs stand to suffer a hardship should the court
18 withhold a decision. The Act impacts the plaintiffs' day-to-day operations by requiring they
19 either post a notice, hand out a printed notice, or provide digital notice. Starting January 1, 2016,
20 the plaintiffs face a difficult decision: display a notice they argue violates their First Amendment
21 rights or risk stiff civil penalties. The State has identified no specific advantage associated with
22 delaying this litigation.

23 This case is ripe from both constitutional and prudential perspectives. The court
24 thus proceeds to the merits of plaintiffs' motion.

25 V. LEGAL STANDARD

26 A preliminary injunction is an extraordinary remedy awarded only upon a clear
27 showing the moving party is entitled to such relief. *Winter v. Natural Res. Defense Council, Inc.*,
28 555 U.S. 7, 22 (2008). Federal Rule of Civil Procedure 65 provides a court may issue a

1 preliminary injunction to preserve the relative position of the parties pending a trial on the merits.
2 *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The party seeking a preliminary
3 injunction must show it is “likely to succeed on the merits,” “likely to suffer irreparable harm in
4 the absence of the preliminary relief,” “the balance of equities tips in [its] favor,” and “an
5 injunction is in the public interest.” *Winter*, 555 U.S. at 20.

6 Alternatively, in the Ninth Circuit, if a plaintiff cannot show a likelihood of
7 success but can show “serious questions going to the merits” with the “balance of hardships
8 tip[ping] *sharply* in the plaintiff’s favor,” and can satisfy the other two *Winter* factors, then a
9 preliminary injunction can also be proper. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d
10 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
11 1134–35 (9th Cir. 2011) (finding the “serious question” sliding scale test survived *Winter*))
12 (emphasis in *Shell*). Lastly, a court need not reach the other prongs if the moving party cannot as
13 a threshold matter demonstrate a “fair chance of success on the merits.” *Pimentel v. Dreyfus*, 670
14 F.3d 1096, 1111 (9th Cir. 2012) (quoting *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2008)
15 (internal quotation marks omitted).

16 In deciding on whether to grant a preliminary injunction, the court may rely on
17 declarations, affidavits, and exhibits, among other things, and such evidence does not need to
18 conform to the standards of Federal Rule of Civil Procedure 56. *Johnson v. Couturier*, 572 F.3d
19 1067, 1083 (9th Cir. 2009); *see also Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.
20 1984) (“The trial court may give even inadmissible evidence some weight, when to do so serves
21 the purpose of preventing irreparable harm before trial”); *Bracco v. Lackner*, 462 F. Supp. 436,
22 442 n.3 (N.D. Cal. 1978) (evidence considered in ruling on preliminary injunction does not need
23 to conform to standards for summary judgment). “The urgency necessitating the prompt
24 determination of the preliminary injunction; the purpose of a preliminary injunction, to preserve
25 the status quo without adjudicating the merits; and the [c]ourt’s discretion to issue or deny a
26 preliminary injunction are all factors supporting the considerations of affidavits.” *Bracco*, 462 F.
27 Supp. at 442 n.3. The trial court has discretion to decide how much weight to give to each
28

1 affiant’s statement. *See Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377
2 (9th Cir. 1985).

3 VI. LIKELIHOOD OF SUCCESS ON THE MERITS

4 A. Claim One: First Amendment Freedom of Speech

5 The court first considers plaintiffs’ likelihood of success on their free speech
6 claim. The parties disagree about the appropriate level of scrutiny to apply to the Act. Plaintiffs
7 contend the Act is subject to strict scrutiny because the required notice amounts to a content-
8 based regulation. “Mandating speech that a speaker would not otherwise make necessarily alters
9 the content of the speech.” *Riley, supra*, 487 U.S. at 795. Accordingly, laws compelling speech
10 are considered to be content-based regulations generally subject to strict scrutiny, albeit with
11 some exceptions.¹¹ *Id.*; *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). The
12 State argues the court should instead adopt one of the lesser levels of scrutiny applicable to either
13 compelled commercial speech, professional conduct, professional speech within the confines of
14 the patient-provider relationship, or abortion-related disclosures. At hearing, the State, while
15 maintaining its position that the speech at issue is both commercial and professional,
16 acknowledged that of the two doctrines, professional speech is the better fit.

17 As discussed below, after considering the alternatives, the court finds the Act
18 regulates professional speech within the confines of the patient-provider relationship, which is
19 reviewed under no greater than intermediate scrutiny. The court next finds the Act survives
20 intermediate scrutiny for professional speech and would likely survive even strict scrutiny for
21 fully protected speech. The court concludes plaintiffs are not likely to succeed on the merits of
22

23 ¹¹ “[T]he violation of the First Amendment is all the more blatant” when the government
24 targets particular views taken by speakers on the subject. *Rosenberger v. Rector*, 515 U.S. 819,
25 829 (1995) (“Viewpoint discrimination is . . . an egregious form of content discrimination.”).
26 Plaintiffs do not appear to argue that the Act discriminates based on their viewpoint, and the
27 record does not suggest the State’s rationale for the Act was to discriminate against a certain
28 viewpoint. The required notice notifies the public about the full spectrum of reproductive health
care services available in California and does not express an ideological viewpoint on the services
mentioned. In addition, the Act also applies to all pregnancy-related health providers regardless
of their beliefs on abortion.

1 their free speech claim, but have raised serious questions going to the merits under the Ninth
2 Circuit’s “serious questions” approach.

3 1. Commercial Speech

4 a) Legal Standard

5 Content-based regulations are subject to lesser scrutiny when they concern
6 commercial speech. Compelled commercial speech is subject to either intermediate scrutiny,
7 *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–66 (1980), or, if the
8 law compels disclosure of “purely factual and uncontroversial information,” rational basis review,
9 *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)
10 (“[A]n advertiser’s rights are adequately protected as long as disclosure requirements are
11 reasonably related to the State’s interest in preventing deception of consumers.”); *see also*
12 *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248–53 (2010). The Supreme
13 Court has articulated several justifications for its differential treatment of commercial speech: an
14 advertiser may easily verify the truth of the information it disseminates about a specific product
15 or service, *Central Hudson Gas*, 447 U.S. at 564 n.6; *Virginia State Bd. of Pharmacy*, 425 U.S. at
16 772 n.24; commercial speech may be more durable and less likely to be chilled than other types
17 of speech due to the advertiser’s economic self-interest, *Central Hudson Gas*, 447 U.S. at 564
18 n.6; *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24; and the State has an interest in
19 regulating the underlying commercial transaction, *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

20 The Supreme Court has defined commercial speech as “expression related solely
21 to the economic interests of the speaker and its audience,” *Central Hudson Gas*, 447 U.S. at 561,
22 and as speech that “does no more than propose a commercial transaction,” *Va. State Bd. of*
23 *Pharmacy*, 425 U.S. at 752; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)
24 (describing proposal of a commercial transaction as “the core notion of commercial speech”); *Am.*
25 *Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (reviewing definition of
26 commercial speech). However, the Court has recognized the difficulty of “drawing bright lines
27 that will clearly cabin commercial speech as a distinct category.” *City of Cincinnati v. Discovery*
28 *Network, Inc.*, 507 U.S. 410, 419 (1993). Accordingly, when it is not clear whether speech is

1 commercial, the Court in *Bolger* set out three factors relevant to the determination: (i) whether the
2 speech is an advertisement, (ii) whether the speech refers to a specific product, and (iii) whether
3 the speaker has an economic motive for the speech. 463 U.S. at 66–68; *see also Ass’n of Nat.*
4 *Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728 (9th Cir. 1994) (reviewing *Bolger* factors). While
5 “[t]he combination of all these characteristics . . . provides strong support for the . . . conclusion
6 that [speech is] properly characterized as commercial speech,” *Bolger*, 463 U.S. at 67, it is not
7 necessary that each of the characteristics “be present in order for speech to be commercial,” *id.* at
8 67 n.14. When commercial speech is “inextricably intertwined with otherwise fully protected
9 speech,” the court applies the test for fully protected expression. *Riley*, 487 U.S. at 796. “Our
10 lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature
11 of the speech taken as a whole and the effect of the compelled statement thereon.” *Id.* The court
12 does not “parcel out the speech, applying one test to one phrase and another test to another
13 phrase.” *Id.*

14 The context of the speech affected also plays a role in a court’s decision. For
15 example, in *Riley*, the Supreme Court considered whether North Carolina had impermissibly
16 compelled disclosures by professional fundraisers and noted “the context of a verbal solicitation”:
17 “if the potential donor is unhappy with the disclosed percentage” of charitable contributions
18 collected during the previous 12 months that were actually turned over to charity, “the fundraiser
19 will not likely be given a chance to explain the figure; the disclosure will be the last words
20 spoken as the donor closes the door or hangs up the phone.” *Id.* at 799–800. Referencing *Riley*,
21 the Second Circuit in *Evergreen* considered the fact that the compelled speech was to be made in
22 the context of the “public debate over the morality and efficacy of contraception and abortion.”
23 *Evergreen, supra*, 740 F.3d at 249; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886,
24 913 (1982) (“[E]xpression on public issues has always rested on the highest rung on the hierarchy
25 of First Amendment values.”).

1 b) Analysis

2 Here, each plaintiff clinic has submitted a declaration stating it does not charge
3 fees for any of its services or otherwise conduct commercial transactions. The declaration of
4 AWC, for example, avers

5 AWC does not charge any fee to girls and women who use its
6 services, providing all of its services free of charge. Additionally,
7 AWC does not solicit a donation from girls or women who are at
8 the clinic seeking services. Moreover, AWC does not have a
9 cashier to receive a payment from a patient should a girl or woman
attempt to pay for services. In sum, AWC is a religious ministry
and is motivated by spiritual concerns and does not act out of
economic interest.

10 To be clear, there are no monetary transactions between the patients
and those at the clinic. . . .

11 DeArmas Decl. ¶¶ 18–19. Similarly, Ms. Dodds and Ms. Gibbs state that A Woman’s Friend and
12 CPCNC, respectively, provide all of their services free of charge. *See* Dodds Decl. ¶ 28; Gibbs
13 Decl. ¶ 22.

14 Rather than being driven by an economic motive, the declarations state that the
15 clinics’ motivation is “spiritual,” DeArmas Decl. ¶ 18; Dodds Decl. ¶ 28, and “to help women and
16 men in need,” Gibbs Decl. ¶ 22. The plaintiff clinics are all religiously based organizations, and
17 their services are guided by their religious beliefs. *See* DeArmas Decl. ¶¶ 2–4 (stated objective is
18 to provide Biblically guided and Christian response to pregnancy); Dodds Decl. ¶¶ 2, 4, 10, 12,
19 19, 23; Gibbs Decl. ¶¶ 2–7 (clinic provides Christ-centered support). During client appointments,
20 the declarations state that the plaintiff clinics provide their clients with accurate information about
21 pregnancy, abortion, and other health topics. *See, e.g.,* DeArmas Decl. ¶¶ 13–15; Dodds Decl. ¶¶
22 3, 12, 16, 21, 25; Gibbs Decl. ¶¶ 10, 13, 21, 23. This includes counseling clients through their
23 health and pregnancy decisions and presenting them with alternatives to abortion. *See* DeArmas
24 Decl. ¶¶ 4, 15; Dodds Decl. ¶¶ 2–3 (purpose of clinic is to help a woman work through
25 alternatives when she experiences unplanned pregnancy); Gibbs Decl. ¶¶ 5–6, 20–21. In the
26 course of client counseling, the plaintiff clinics do not support or promote abortion as an
27 acceptable alternative to pregnancy. *See* DeArmas Decl. ¶¶ 4, 20; Dodds Decl. ¶ 3; Gibbs Decl.
28 ¶¶ 6, 9, 24.

1 Based on the limited evidence before the court at this stage, plaintiffs have shown
2 that their speech is non-commercial. First, plaintiffs’ speech is not consistent with the core notion
3 of commercial speech: it does not appear to relate solely to their economic interests, *see Central*
4 *Hudson Gas*, 447 U.S. at 561, and does not simply propose a commercial transaction, *see Va.*
5 *State Bd. of Pharmacy*, 425 U.S. at 762. Neither is plaintiffs’ speech commercial under the three
6 *Bolger* factors. Under the first two factors, at least some of plaintiffs’ speech relates to the
7 solicitation of clients for patronage of their medical services, which several courts have found to
8 constitute an advertisement for a “specific product,” *see, e.g., Am. Acad. of Pain Mgmt.*, 353 F.3d
9 at 1106; *Fargo Women’s Health Organization, Inc. v. Larson*, 381 N.W.2d 176, 180–81 (N.D.
10 1986). However, plaintiffs appear to have no economic motive for their speech under the third
11 factor, because they do not charge any fees for their services or use their services to solicit
12 donations directly. In addition, the nature of plaintiffs’ services and speech bears little
13 resemblance to other contexts in which courts have applied the commercial speech doctrine. *See,*
14 *e.g., New York State Rest. Ass’n v. New York City Bd. of Health*, 556 F.3d 114, 131–36 (2d Cir.
15 2009) (requiring restaurants to post calorie-content information on menus); *Nat’l Elec. Mfrs.*
16 *Ass’n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2011) (requiring manufacturers to label products
17 and packaging to inform consumers products contain mercury); *Zauderer*, 471 U.S. at 626
18 (requiring lawyers to include statement on advertisements for contingency-fee-based
19 representation that client faces potential liability for legal costs if the lawsuit is unsuccessful).
20 Here, the clinics’ activities are integrally connected to their religious and political beliefs, and the
21 speech required by the Act brushes up against a controversial public debate revolving around
22 abortion. *Evergreen*, 740 F.3d at 249.

23 Although the State suggests the goods or services plaintiffs provide have value and
24 argue this value is sufficient for a transaction to be considered commercial, even if no money is
25 exchanged, the State cites no authority for this proposition in the free speech context.¹² *Cf.*

26 ¹² The State cites cases finding that non-profits engaged in “commerce” within the
27 meaning of the Commerce Clause or antitrust laws. *See* ECF No. 16 at 10–11 (citing *Camps*
28 *Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997) (Commerce Clause),

1 Black’s Law Dictionary (9th ed. 2009) (defining commerce as the “exchange,” as opposed to free
2 provision, “of goods and services”). Indeed, other district courts have expressed concern that
3 such a definition would expand the commercial speech doctrine too far, and diminish the
4 constitutional protection for speech made by organizations such as churches, which distribute
5 goods of value to their members for religious purposes. *See Evergreen Ass’n, Inc. v. City of N.Y.*,
6 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011), *aff’d in part, vacated in part*, 740 F.3d 233 (2d Cir.),
7 *cert. denied*, 135 S. Ct. 435 (2014); *O’Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d
8 804, 814 (D. Md. 2011), *aff’d sub nom. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor*
9 *& City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012), *aff’d in part, vacated in part en banc*, 721
10 F.3d 264 (4th Cir. 2013); *cf. Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 464 (D. Md.
11 2011), *aff’d in part, rev’d in part*, 683 F.3d 591 (4th Cir. 2012), *aff’d en banc sub nom. Centro*
12 *Tepeyac v. Montgomery Cty.*, 722 F.3d 184 (4th Cir. 2013). The court likewise declines to adopt
13 the expanded definition of commercial speech the State advances.

14 Even if the court assumes some of plaintiffs’ speech is commercial under a broad
15 reading of the *Bolger* factors, the Act potentially impacts additional types of speech beyond
16 advertisement of the clinics’ medical services. Because the Act requires plaintiffs to disseminate
17 the written notice on site, the Act may have some potential to impact the communications
18 plaintiffs typically make to their clients during clinic visits, including protected informative and
19 ideological speech relating to abortion. Plaintiffs’ declarations state the clinics provide their
20 clients with accurate information about pregnancy, abortion, and other health topics, and that they
21 counsel their clients through their pregnancy decisions from a Christian perspective. As a result,
22 plaintiffs’ speech bears some resemblance to the charitable solicitations at issue in *Riley, supra*.
23 In *Riley*, the Supreme Court recognized that “solicitation is characteristically intertwined with

24
25 and *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.- Connecticut*, 156 F.3d 535 (4th Cir. 1998)
26 (antitrust laws)). However, courts apply a different definition of “commerce” and consider
27 different policy considerations in classifying speech as commercial speech in the Commerce
28 Clause and antitrust environments, as contrasted to the free speech context here. *See Camps*
Newfound/Owatonna, Inc., 520 U.S. at 573–74; *Virginia Vermiculite, Ltd.*, 156 F.3d at 540–41.

1 informative and perhaps persuasive speech.” 487 U.S. at 796 (citation omitted). The Court held
2 that speech does not retain its commercial character when it is so intertwined with fully protected
3 speech that the court cannot parcel out one component part of speech from another. *Id.* Here, as
4 in *Riley*, it would be “artificial and impractical” to try to separate plaintiffs’ speech intended to
5 solicit patronage of its services from its informative or persuasive speech. *See id.* Accordingly,
6 plaintiffs have established at least a colorable claim that any arguably commercial speech they
7 make during the course of client visits is “inextricably intertwined with otherwise fully protected
8 speech,” and thus has lost its purely commercial character. *See Centro Tepeyac*, 722 F.3d at 189.
9 The intermediate level of scrutiny established in *Central Hudson Gas*, 447 U.S. at 563–66,
10 therefore does not apply.

11 In addition, because plaintiffs’ speech is not “commercial,” it is not appropriate to
12 apply the rational basis test articulated in *Zauderer*, 471 U.S. at 651. Although the State contends
13 “[a] non-profit can just as easily deceive a consumer of pregnancy-related services as a for-profit
14 entity,” ECF No. 16 at 11, and “[m]andated disclosure of accurate, factual, commercial
15 information does not offend the core First Amendment values,” *id.* at 12 (quoting *Nat’l Elec.*
16 *Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2011)), *Zauderer’s* rational basis test only
17 applies in the commercial context. In *Hurley v. Irish–American Gay, Lesbian & Bisexual Group*
18 *of Boston*, 515 U.S. 557 (1995), the Supreme Court clarified:

19 Although the State may at times prescribe what shall be orthodox in
20 commercial advertising by requiring the dissemination of ‘purely
21 factual and uncontroversial information,’ outside that context it may
22 not compel affirmance of a belief with which the speaker disagrees.
23 Indeed this general rule, that the speaker has the right to tailor the
speech, applies not only to expressions of value, opinion, or
endorsement, but equally to statements of fact the speaker would
rather avoid, subject, perhaps to the permissive law of defamation.

24 *Id.* at 573 (citations omitted) (quoting *Zauderer*, 471 U.S. at 651); *cf. Riley*, 487 U.S. at 796 n.9
25 (“Purely commercial speech is more susceptible to compelled disclosure requirements.”).
26 Moreover, the factual nature of the information in the notice does not in itself entitle the Act to
27 rational basis review. In *Riley*, the Supreme Court held that a required disclosure is not upheld
28 simply because it involves compelled statements of fact, rather than opinions. 487 U.S. at 797–98

1 (reasoning that both compelled statements of opinion and compelled statements of fact burden
2 protected speech).

3 In sum, the Act is not subject to intermediate scrutiny for the regulation of
4 commercial speech, or rational basis review for laws requiring the disclosure of “purely factual
5 and uncontroversial information” under *Zauderer*.

6 2. Professional Speech

7 Courts have construed the First Amendment as allowing some leeway for the state
8 to regulate professionals to protect the health, morals, and general welfare of its citizens, even if
9 the state’s regulation has an incidental effect on protected speech or other constitutional rights.
10 *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–84 (1992) (plurality
11 opinion); *Shea v. Bd. of Med. Examiners*, 81 Cal. App. 3d 564, 577 (1978). However, the
12 Supreme Court has never directly addressed the appropriate level of scrutiny for professional
13 speech regulations, and the framework for professional speech remains murky at best. The Ninth
14 Circuit’s decision in *Pickup v. Brown*, 740 F.3d 1208 (2013), articulates some guiding principles
15 and establishes a continuum of protection for professional speech. But because *Pickup* ultimately
16 addressed professional conduct, *id.* at 1229, uncertainty still exists as to what level of scrutiny
17 applies at the midpoint of protection, especially in the context of abortion-related disclosures.
18 Circuit courts are currently split as to whether *Casey* announced a distinct “reasonableness” test
19 for mandated disclosures that provide truthful, non-misleading information relevant to a patient’s
20 decision to have an abortion, and the Ninth Circuit has not reached the issue.

21 Here, the court first finds the Act regulates what is best characterized as
22 professional speech, and the speech lands at the midpoint of the continuum described in *Pickup v.*
23 *Brown*. The court next finds the applicable level of scrutiny is either intermediate scrutiny or the
24 less-demanding “reasonableness” test under *Casey*. The court need not decide which of the two
25 tests applies, because the court ultimately holds the Act survives intermediate scrutiny.

26 a) Does The Act Regulate Professional Speech?

27 Although the Supreme Court has not articulated a precise test for what constitutes
28 professional speech, several lower courts have looked to Justice Jackson’s concurrence in *Thomas*

1 v. *Collins*, 323 U.S. 516 (1945), and Justice White’s concurrence in *Lowe v. SEC*, 472 U.S. 181
2 (1985), for guidance. See, e.g., *Wollschlaeger v. Governor of the State of Fla.*, No. 12-14009,
3 ___F.3d___, 2015 WL 8639875, at *20 (11th Cir. Dec. 14, 2015); *Pickup*, 740 F.3d at 1228;
4 *Accountant’s Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (Justice White’s
5 concurrence provides “sound, specific guidelines” for defining professional speech); *Locke v.*
6 *Shore*, 682 F. Supp. 2d 1283, 1291–92 (N.D. Fla. 2010), *aff’d*, 634 F.3d 1185 (11th Cir. 2011); *In*
7 *re Rowe*, 80 N.Y.2d 336, 342 (Ct. App. 1992).

8 In *Thomas*, Justice Jackson said,

9 [A] rough distinction [between a valid professional regulation and
10 an impermissible restriction on speech] always exists, I think,
11 which is more shortly illustrated than explained. A state may forbid
12 one without its license to practice law as a vocation, but I think it
13 could not stop an unlicensed person from making a speech about
14 the rights of man or the rights of labor, or any other kind of right
. . . . Likewise, the state may prohibit the pursuit of medicine as an
occupation without its license but I do not think it could make it a
crime publicly or privately to speak urging persons to follow or
reject any school of medical thought.

15 323 U.S. at 544–45 (Jackson, J., concurring); see also *Bailey v. Huggins Diagnostic & Rehab.*
16 *Ctr., Inc.*, 952 P.2d 768, 773 (Colo. Ct. App. 1997) (holding that First Amendment does not
17 permit a court to hold a dentist liable for statements published in book or made during news
18 program, even when statements were contrary to opinion of medical establishment); cf. Robert
19 Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician*
20 *Speech*, 2007 U. Ill. L. Rev. 939, 949 (2007) (“When a physician speaks to the public, his
21 opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion
22 within the medical establishment.”). Building on Justice Jackson’s statement, Justice White in
23 *Lowe* wrote:

24 One who takes the affairs of a client personally in hand and
25 purports to exercise judgment on behalf of the client in the light of
26 the client’s individual needs and circumstances is properly viewed
27 as engaging in the practice of a profession. Just as offer and
acceptance are communications incidental to the regulable
transaction called a contract, the professional’s speech is incidental
to the conduct of the profession.

28 472 U.S. at 232 (White, J., concurring); cf. *Pickup*, 740 F.3d at 1228.

1 Courts have interpreted these concurrences as describing two characteristics that
2 can make a person’s speech “professional” under the First Amendment: being a member of a
3 profession, and having a quasi-fiduciary relationship with a client. *See, e.g., Wollschlaeger*, 2015
4 WL 8639875, at *19; *accord Pickup*, 740 F.3d at 1228–29. For example, in *Evergreen, supra*,
5 the district court concluded the pregnancy center plaintiffs did not engage in professional speech
6 because they were not licensed to practice medicine and did not tailor their services to the
7 individual needs and circumstances of their clients. 801 F. Supp. 2d at 207 (considering
8 mandatory disclosures about the clinics’ medical licensing status and services offered). The
9 district court in *Tepeyac v. Montgomery County* similarly interpreted the concurrences in *Thomas*
10 and *Lowe, supra*, as suggesting that “speech may be labeled ‘professional speech’ when it is
11 given in the context of a quasi-fiduciary—or actual fiduciary—relationship, wherein the speech is
12 tailored to the listener and made on a person-to-person basis.” 779 F. Supp. 2d at 467. The court
13 concluded the clinic in that case did not engage in professional speech because it provided general
14 pregnancy-related information, rather than individualized advice tailored to particular cases. *Id.*

15 Here, the challenged provision of the Act applies only to “licensed covered
16 facilities.” Cal. Health & Safety Code § 123472(a). As described above, a licensed covered
17 facility is defined as a facility licensed under California Health and Safety Code section 1204, or
18 an intermittent clinic operating under a primary care clinic as provided by subdivision (h) of
19 section 1206. *Id.* § 123471(a). For a clinic to be licensed, an applicant must provide
20 “[d]iagnostic, therapeutic, radiological, laboratory and other services for the care and treatment of
21 patients for whom the clinic accepts responsibility.” Cal. Code Regs. tit. 22, § 75026. In
22 addition, “[e]very medical clinic shall have a licensed physician designated as the professional
23 director,” and “[a] physician, physician’s assistant or a registered nurse shall be present whenever
24 medical services are provided.” *Id.* § 75027. Unlike the pregnancy centers in *Evergreen* and
25 *Tepeyac*, plaintiffs’ declarations here establish that each clinic holds a medical license in the State
26 of California, has Licensed Medical personnel on staff, and provides medical services. *See*
27 DeArmas Decl. ¶¶ 7, 10–17; Dodds Decl. ¶¶ 10, 14–22, 27, 29; Gibbs Decl. ¶¶ 9, 10, 14–17.

28

1 These facts weigh in favor of treating the relationship between plaintiffs and their clients or
2 patients as a professional relationship.

3 Moreover, under the test provided in Justice White’s concurrence in *Lowe*,
4 plaintiffs appear to “exercise judgment on behalf of the client in the light of the client’s individual
5 needs and circumstances,” 472 U.S. at 232 (White, J., concurring), creating a quasi-fiduciary
6 relationship with their clients. For example, as noted above, plaintiff AWC performs a holistic
7 Physical, Intellectual, Emotional, psycho-Social, and Spiritual (PIESS) assessment of each patient
8 and reviews each patient’s medical history. DeArmas Decl. ¶ 12. AWC’s doctors are available
9 to consult “specific patient ultrasound findings, medical documentation and needs.” *Id.* ¶ 17.
10 Similarly, registered nurses at A Woman’s Friend create a medical chart and take a medical
11 history and assessment of each client. Dodds Decl. ¶¶ 14–15, 19. CPCNC offers a variety of
12 health services “depending upon the needs and requests of the client.” Gibbs Decl. ¶ 10. A
13 volunteer medical director signs off on the clinic’s ultrasounds, accepts referrals for clients in
14 need of prenatal care, and connects with the nurse sonographer “for specific needs for the center
15 or clients.” *Id.* ¶ 15. Each clinic counsels each woman so she understands the alternatives to
16 abortion and makes the best choice for her particular pregnancy. *See* DeArmas Decl. ¶ 13; Dodds
17 Decl. ¶ 3; Gibbs Decl. ¶ 21.

18 Plaintiffs’ licensing status and the facts provided in their declarations support the
19 characterization of their communications as professional speech uttered in the context of
20 individualized client care, as described in the concurrences in *Thomas* and *Lowe*. Although the
21 compelled speech may be disseminated by staff in the waiting room rather than by a doctor in the
22 examining room, the State’s regulatory licensing structure extends to the clinic as a whole, and
23 the individualized medical relationship between plaintiffs and their clients can properly be
24 characterized as extending at least as far as the walls of the clinic. In addition, the content of the
25 required notice itself relates to the medical profession, because it provides information relevant to
26 patients’ medical decisions. The Act is therefore properly analyzed under the precedent on
27 professional speech. The court next considers how plaintiffs’ professional speech should be
28 categorized under *Pickup v. Brown*.

b) Pickup Continuum

In *Pickup v. Brown*, the Ninth Circuit described the First Amendment protection available to professionals with reference to a continuum. At one end of the continuum, First Amendment protection is at its greatest where a professional is engaged in public dialogue on matters of public concern. 740 F.3d at 1227. At the midpoint, First Amendment protection of a professional’s speech is “somewhat diminished” within the confines of a professional relationship. *Id.* at 1228. Examples of this type of speech include informed consent requirements, licensing requirements, professional disciplinary proceedings, and negligence actions. *Id.* At the other end of the continuum, the state’s power is at its greatest where the state primarily regulates professional conduct, such as prohibiting the administration of certain drugs or forms of treatment. *Id.* at 1229. Other circuits have made similar distinctions when deciding the appropriate level of scrutiny to apply to laws regulating professional speech. *See Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill v. Stuart*, ___ U.S. ___, 135 S. Ct. 2838 (2015); *King v. Governor of the State of New Jersey*, 767 F.3d 216, 224–29, 233–37 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015); *Wollschlaeger*, 2015 WL 8639875, at *20–21.

In *Pickup*, the Ninth Circuit determined that a statute prohibiting licensed health providers from offering sexual orientation change efforts (SOCE) therapy to minors landed at the conduct end of the continuum, even though the treatment was performed in part through the spoken word. *See* 740 F.3d at 1229. Because the regulated activities were therapeutic, not symbolic, the court reasoned they were not “an act of communication” that transforms conduct into First Amendment speech. *See id.* at 1230 (quoting *Nev. Comm’n on Ethics v. Carrigan*, ___ U.S. ___, 131 S. Ct. 2343, 2350 (2011)). The court compared the statute to a ban on a particular drug: the ban primarily regulates conduct, even though it has the incidental effect of prohibiting a doctor from using words to write a prescription for the drug. *See id.* at 1229.

Here, the State’s briefing argues the Act primarily regulates professional conduct, where the State’s power is at its greatest. Alternatively, in a position embraced at hearing, the State argues the speech regulated by the Act belongs at the midpoint of the continuum as speech

1 within the confines of a professional relationship. The court concludes the Act lands at the
2 midpoint of the continuum.

3 The Act does not primarily regulate professional conduct. In contrast to the law at
4 issue in *Pickup*, the Act is not directed at regulating specific treatment or services performed by
5 health providers; its primary purpose is to communicate information to patients about
6 reproductive medical services. *See, e.g., Assembly Committee on Health Hearing, Def.’s Ex. A,*
7 *at 3* (stating purpose of bill is to inform California women about their reproductive rights and
8 available health services). In interpreting previous Ninth Circuit opinions, the *Pickup* court
9 clarified that “doctor-patient communications *about* medical treatment receive substantial First
10 Amendment protection, but the government has more leeway to regulate the conduct necessary to
11 administering treatment itself.” 740 F.3d at 1227 (emphasis in original) (citing *Nat’l Ass’n for*
12 *Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000), and
13 *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002)); *see also id.* at 1231 (“Certainly, under *Conant*,
14 content- or viewpoint-based regulation of communication about treatment must be closely
15 scrutinized. But a regulation of only *treatment itself*—whether physical medicine or mental
16 health treatment—implicates free speech interests only incidentally, if at all.” (emphasis in
17 original)). Because the Act requires providers to communicate prescribed speech about available
18 reproductive medical services, the court finds it does not primarily regulate conduct.

19 Neither does the Act restrict a professional’s ability to engage in public dialogue at
20 the other end of the spectrum. The only speech the Act compels is the dissemination of a notice
21 that provides truthful, nonmisleading information to the clinics’ clients during their appointments
22 at the clinic site. The Act does not otherwise restrict speech. The clinics and their staff remain
23 free to publicly advocate on public matters and even to criticize the Act during appointments with
24 their clients. This narrow scope suggests the Act’s purpose is to regulate speech within the
25 professional relationship, rather than to suppress a disfavored message within the public debate or
26 advance a favored viewpoint.

1 Because the Act regulates speech within the confines of a professional
2 relationship, the speech at issue here falls at the midpoint of the *Pickup* continuum. The court
3 next considers what level of scrutiny the court should apply to the Act.

4 c) Level of Scrutiny

5 In *Pickup v. Brown*, the Ninth Circuit described speech at the midpoint of the
6 continuum as receiving “somewhat diminished” First Amendment protection, but the court did
7 not specify the appropriate level of scrutiny accorded speech within the confines of a professional
8 relationship. *See* 740 F.3d at 1228. The court therefore turns to persuasive out-of-circuit
9 authority for guidance in determining the appropriate level of scrutiny.

10 In the context of abortion-related disclosures, circuit courts are split as to whether
11 the Supreme Court’s decision in *Casey* announced a less demanding “reasonableness” test, or
12 whether some formulation of an intermediate level of scrutiny should apply. In *Casey*, the
13 plurality upheld under the First Amendment a regulation requiring a doctor to disclose certain
14 information to a patient before performing an abortion to ensure she understands the full
15 consequences of her decision:

16 All that is left of petitioners’ argument is an asserted First
17 Amendment right of a physician not to provide information about
18 the risks of abortion, and childbirth, in a manner mandated by the
19 State. To be sure, the physician’s First Amendment rights not to
20 speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705(1977),
21 but only as part of the practice of medicine, subject to reasonable
licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S.
589, 603 (1977). We see no constitutional infirmity in the
requirement that the physician provide the information mandated by
the State here.

22 505 U.S. at 884. The Fifth and Eighth Circuits have read *Casey* to mean that the state does not
23 violate the First Amendment when it enacts reasonable regulations requiring a physician to
24 provide truthful, non-misleading information relevant to a patient’s decision regarding an
25 abortion. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575–77 (5th
26 Cir. 2012) (describing *Casey*’s response to the First Amendment claim as “clearly not a strict
27 scrutiny analysis,” and “if anything, the antithesis of strict scrutiny”); *Rounds II*, 686 F.3d at 893
28 (quoting *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 734

1 (8th Cir. 2008) (en banc) (“*Rounds I*”). Drawing on *Casey* and *Gonzales v. Carhart*, 550 U.S.
2 124 (2007), the Fifth and Eighth Circuits reasoned that such regulations are justified because the
3 state has a significant role in regulating the medical profession, and the state has a legitimate
4 interest in respecting the life within a woman. *See* 667 F.3d at 575–76; *Rounds I*, 530 F.3d at
5 734–35.

6 In contrast, the Fourth Circuit in *Stuart* concluded the “single paragraph” in *Casey*
7 responding to the First Amendment challenge did not intend to announce a guiding standard of
8 scrutiny superseding traditional First Amendment considerations in the context of abortion-
9 related disclosures. *Stuart*, 774 F.3d at 248–49; *cf. Wollschlaeger*, 2015 WL 8639875, at *21
10 (noting the “brief treatment” of the First Amendment issue in *Casey* did not provide much insight
11 into how to analyze regulations of professional speech or why the statute at issue survived
12 scrutiny under the First Amendment). Instead, the court in *Stuart* adopted the intermediate
13 standard of scrutiny applied in the commercial speech context, because it is “consistent with
14 Supreme Court precedent and appropriately recognizes the intersection . . . of regulation of
15 speech and regulation of the medical profession in the context of an abortion procedure.” 774
16 F.3d at 248–49. The court ultimately concluded that the statute at issue, which required doctors
17 to perform an ultrasound, display the sonogram, and describe the fetus to women seeking
18 abortions, did not withstand intermediate scrutiny, because it was not narrowly drawn to achieve
19 the government’s interest in protecting fetal life. *Id.* at 250, 255.

20 In *Wollschlaeger*, the Eleventh Circuit considered the appropriate level of scrutiny
21 to apply to a statute restricting physicians’ ability to inquire about their patients’ firearm
22 ownership. 2015 WL 8639875. The court ultimately did not conclusively determine what level
23 of scrutiny should apply, finding the statute at issue survived even strict scrutiny; it did however
24 provide a helpful discussion of the professional speech framework. *See id.* at *19–24. The court
25 suggested in dicta that an intermediate level of scrutiny likely applied to the statute at issue,
26 because the restriction implicated both the state’s interest in regulating the practice of the
27 professions to protect the public, and the state’s interest in regulating relationships of a fiduciary
28 character to prevent undue advantage. *See id.* at *22–24. However, the court noted that a broad

1 reading of the Supreme Court’s recent decision in *Reed v. Town of Gilbert, Ariz.*, 576 U.S. ____,
2 135 S. Ct. 2218 (2015), may suggest that all content-based regulations, including commercial and
3 professional speech, are now subject to strict scrutiny. *Id.* at *24.

4 In consideration of all that is before it, the court finds the Act is subject to no
5 greater than intermediate scrutiny. Intermediate scrutiny properly accounts for the intersection of
6 compelled speech and the government’s regulatory interests in the context of the facts of this
7 case. As in *Wollschlaeger* and the cases involving abortion-related disclosures, the speech here
8 implicates the State’s interests both in regulating the medical profession and in regulating
9 fiduciary relationships, which supports the application of a level of scrutiny lower than strict
10 scrutiny. Again, the speech is made within the confines of the patient-provider relationship in the
11 course of a client’s visit to the clinic site, and the speech provides information relevant to the
12 client’s medical decisions. In addition, intermediate scrutiny is consistent with the Ninth
13 Circuit’s conclusion in *Pickup* that speech at the midpoint of the continuum is accorded
14 “somewhat diminished” protection under the First Amendment. *See* 740 F.3d at 1228. At this
15 point, the court need not determine whether the Act is subject to the specific holding of *Casey* or
16 whether *Casey* announces a less demanding “reasonableness” test in the context of abortion-
17 related disclosures, because the court ultimately holds the Act survives even intermediate
18 scrutiny.

19 Although the court concludes the Act is subject to a lesser level of scrutiny for
20 professional speech, the court finds plaintiffs have raised “serious questions” regarding the
21 applicable level of scrutiny, specifically whether strict scrutiny should apply, for purposes of the
22 Ninth Circuit’s “serious questions” approach to preliminary injunctions. As discussed above, the
23 Supreme Court has not directly addressed the applicable level of scrutiny for professional speech,
24 and a broad reading of the Supreme Court’s recent decision in *Reed* may lead reasonable jurists to
25 conclude that all content-based regulations are now subject to strict scrutiny. In addition, one
26 could make the case that certain factual differences between this action and the relevant precedent
27 support the application of strict scrutiny here. For example, the required notice is not necessarily
28 disseminated by a doctor in the examining room, and plaintiffs’ medical speech may be more

1 intertwined with their religious and political speech than the medical speech in the cases
2 discussed. In light of this legal landscape, the court analyzes the Act under both intermediate and
3 strict scrutiny to evaluate plaintiffs' likelihood of success on the merits.

4 3. Application of Scrutiny

5 a) Intermediate Scrutiny

6 To survive intermediate scrutiny, the Act must "directly advance[] a substantial
7 governmental interest" and be "drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, 131 S.
8 Ct. 2653 at 2667-68 (2011). "There must be a fit between the Legislature's ends and the means
9 chosen to accomplish those ends." *Id.* at 2668 (citation and quotation marks omitted). This
10 formulation seeks to ensure "not only that the State's interests are proportional to the resulting
11 burdens placed on speech but also that the law does not seek to suppress a disfavored message."
12 *Id.* At this stage, the court finds the Act survives intermediate scrutiny.

13 (1) Governmental Interest

14 Here, the stated purpose of the Act is to ensure that California residents know their
15 rights and the health care resources available to them when they make their personal reproductive
16 health care decisions. *See* AB 775 §§ 1, 2. The State has a strong interest in ensuring that
17 pregnant women are fully advised of the range of health care options available to them in
18 California at the time they are making their reproductive decisions. *See Madsen v. Women's*
19 *Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) ("[T]he State has a strong interest in protecting a
20 woman's freedom to seek lawful medical or counseling services in connection with her
21 pregnancy."); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995) (noting, in Free
22 Exercise Clause challenge, that government has compelling interest in "promoting unobstructed
23 access to reproductive health facilities"). The State also has a compelling interest in regulating
24 the practice of the professions, regulating fiduciary relationships, and promoting the public health
25 more broadly. *See, e.g., Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("States have a
26 compelling interest in the practice of professions within their boundaries, and . . . as part of their
27 power to protect the public health, safety, and other valid interests they have broad power to
28 establish standards for licensing practitioners and regulating the practice of professions.");

1 *Watson v. Maryland*, 218 U.S. 173, 176 (1910); *Aid for Women v. Foulston*, 441 F.3d 1101,
2 1119–20 (10th Cir. 2006); *cf. Varandani v. Bowen*, 824 F.2d 307, 311 (4th Cir. 1987) (observing,
3 in Due Process context, that government has “compelling interest in assuring safe health care for
4 the public”).

5 As noted above, according to AB 775’s author, the federal ACA has made millions
6 of Californians, 53 percent of them women, newly eligible for Medi-Cal. Assembly Committee
7 on Health, Def.’s Ex. A, at 3; *see also* AB 775 § 1. More than 700,000 California women become
8 pregnant every year, approximately half of them unintentionally. AB 775 § 1. Although 64.3
9 percent of unplanned births in California in 2010 were publicly funded, the Legislature found that
10 thousands of women remain unaware of the public programs available to them. *Id.* Plaintiffs do
11 not challenge these findings. The court finds the statute advances substantial governmental
12 interests.

13 (2) Whether the Act is Properly Drawn to Achieve the
14 Governmental Interest

15 The court finds the Act directly advances the State’s interest in informing women
16 of the availability of publicly funded health resources and the manner in which the woman can
17 access those resources. *See* AB 775 § 1. In addition, the court finds the Act is narrowly drawn to
18 achieve that interest and does not overly burden speech. The required notice provides no more
19 compelled speech than is necessary to convey the desired factual information. The notice
20 provides the information in neutral language and does not incorporate ideological commentary or
21 convey an opinion. Although it includes the word “abortion,” the word appears in the context of
22 a list describing the full spectrum of reproductive health care services available in California.
23 The notice includes the phone number of the local county social services office, which provides
24 women with a direct and efficient manner in which to access the listed resources. As noted
25 above, the Act does not otherwise restrict plaintiffs’ speech. Plaintiffs remain free to advocate
26 their viewpoint, or even to communicate disagreement with the Act or required notice. The Act
27 does not seek to suppress a disfavored message. *See Sorrell*, 131 S. Ct. at 2668.

28 Although plaintiffs argue the Act is overly burdensome because it would be the
first message clients receive when they walk through the clinics’ doors, posting the notice

1 “conspicuously” in the waiting area is just one of the three options allowed under the Act. Under
2 the second option, the Act does not specify when the clinic must distribute the printed notice to its
3 clients, saying only that it must be distributed to all of its clients in the specified typeface and
4 size. Moreover, the notice may be combined with other mandated disclosures. Cal. Health &
5 Safety Code § 123472(3). The court finds the Act is narrowly drawn to achieve its interest while
6 providing plaintiffs with manageable options, and that the means chosen accomplish the State’s
7 ends. *See id.* at 2667–68.

8 b) Strict Scrutiny

9 Alternatively, if the court applies strict scrutiny, the Act “must be narrowly
10 tailored to promote a compelling Government interest,” and must use the least restrictive means
11 to achieve its ends. *Playboy Entm’t*, 529 U.S. at 813. However, the government is only required
12 to choose an alternative means when it would be “at least as effective in achieving the legitimate
13 purpose that the statute was enacted to serve,” *Reno*, 521 U.S. at 874.

14 Whether the Act would also survive strict scrutiny is a closer question, but the
15 court finds the Act would likely survive even this highest level of scrutiny. The interests
16 advanced by the Act are likely compelling governmental interests, and the Act is narrowly
17 tailored to promote those interests. The required notice affects speech no more than is necessary
18 to convey the desired factual information. In addition, the less restrictive alternative means
19 proposed by plaintiffs would likely not be as effective in achieving the statute’s purpose.
20 Plaintiffs first suggest the State could use selective funding to give clinics incentives to make the
21 notice, but it is not clear the State would be able to disseminate the information as widely through
22 selective funding. For example, plaintiffs do not receive governmental funding and their position
23 suggests government funding would not be an effective method of persuading them to
24 disseminate the notice. Plaintiffs next argue the State could disseminate the information itself.
25 However, this argument ignores the Legislature’s finding that “the most effective way to ensure
26 women quickly obtain the information and services they need to make and implement timely
27 reproductive decisions is to require licensed health care facilities . . . to advise each patient at the
28 time of her visit of the various publicly funded family planning and pregnancy-related resources

1 available in California, and the manner in which to directly and efficiently access those
2 resources.” AB 775 § 1. Although the State could increase its efforts to promote public
3 awareness through its own ad campaign, the court at this stage finds that plaintiffs have not
4 refuted the Legislative determination that requiring dissemination of the notice at the time of a
5 clinic visit is more likely to reach the intended recipients at the time they are making their time-
6 sensitive reproductive decisions.

7 c) Evergreen

8 The Second Circuit’s decision in *Evergreen* does not change the court’s
9 conclusions above. In *Evergreen*, the Second Circuit considered an ordinance requiring
10 pregnancy services centers, New York’s equivalent to CPCs, to make the following three
11 disclosures: (1) whether or not they have a licensed medical provider on staff (the “Status
12 Disclosure”); (2) “that the New York City Department of Health and Mental Hygiene encourages
13 women who are or who may be pregnant to consult with a licensed provider” (the “Government
14 Message”); and (3) whether or not they “provide or provide referrals for abortion,” “emergency
15 contraception,” or “prenatal care” (the “Services Disclosure”). See 740 F.3d at 238. The
16 ordinance required the CPCs to provide the disclosures at their entrances and waiting rooms, on
17 advertisements, and during telephone conversations. *Id.* The legislative history of the ordinance
18 suggested its purpose was to prevent deceptive advertising and misleading practices by CPCs in
19 order to ensure women have prompt access to the type of care they seek. See *id.* at 239–41. For
20 example, testimony had been offered that certain CPCs intentionally selected locations in
21 proximity to a Planned Parenthood facility and used misleading tactics to prevent women from
22 entering the Planned Parenthood facility. See *id.* at 239.

23 The Second Circuit in *Evergreen* concluded the Status Disclosure regarding
24 licensure status would survive even strict scrutiny, but that the Government Message and Services
25 Disclosures would not withstand even intermediate scrutiny. See *id.* at 237–38, 246–51. The
26 court found the Status Disclosure advanced compelling state interests in public health and
27 combating consumer deception. *Id.* at 246–49. The court found it was narrowly tailored and the
28 least restrictive means of achieving its purpose, because city-sponsored advertisements could not

1 alert consumers whether a particular pregnancy center had a licensed medical provider at the time
2 they interacted with the center. *Id.* at 247.

3 In contrast, the court found the Government Message and Services Disclosures
4 would not survive even intermediate scrutiny, because the Status Disclosure alone may be
5 sufficient to achieve the ordinance’s purpose, and the Government Message and Services
6 Disclosures overly burdened speech. *Id.* at 249–51. Specifically, the court found the
7 Government Message would not withstand scrutiny because it required pregnancy centers to
8 “affirmatively espouse the government’s position on a contested public issue,” though inclusion
9 of the word “encourages” and because the government could communicate the message itself
10 through an advertising campaign. *Id.* at 250. The court concluded the Services Disclosure would
11 not withstand scrutiny because it mandated discussion related to controversial political topics at
12 the beginning of the centers’ contact with potential clients. *Id.* at 249.

13 Here, the State compares the Act’s notice requirement to the Status Disclosure,
14 while plaintiffs argue the notice is more similar to the Government Message or Services
15 Disclosure. The court finds the Act’s notice is distinguishable from all three disclosures in
16 *Evergreen*, because the Act seeks to advance different governmental interests. Although the
17 legislative history of the Act suggests part of the Legislature’s motivation was to combat
18 deceptive practices by some CPCs, the legislative history also suggests a key purpose of the
19 challenged provision was to inform women of the free and low-cost publicly funded health
20 services available to them at the time they are making their time-sensitive reproductive decisions.
21 The Legislature was concerned with women who may not be aware that certain health options are
22 available to them, and wanted to ensure women in California are informed of the full range of
23 free and low-cost services available to them when they make their reproductive decisions. In this
24 way, the Act more closely resembles informed consent cases than deceptive advertising cases.

25 The specific language of the required notice and the means of disseminating the
26 notice further distinguish the Act from the Government Message and Services Disclosure in
27 *Evergreen*. Although the topic of abortion may trigger discussion of controversial political topics,
28 it presents factual information about abortion, as well as the other health services available, in

1 neutral language. Unlike the Government Message in *Evergreen*, which stated the government
2 “encourages” women who may be pregnant to consult with a licensed provider, the required
3 notice here does not express a particular ideological position with respect to reproductive issues.
4 In addition, the statute at issue in *Evergreen* was much more burdensome on speech. It required
5 the CPCs to provide the disclosures at their entrances and waiting rooms, on advertisements, and
6 during telephone conversations. In concluding the Service Disclosure did not withstand scrutiny,
7 the Second Circuit found it significant that the statute required the CPCs to utter the required
8 speech at the very beginning of their contact with potential clients. Here, in contrast, the Act only
9 requires that the notice be posted on the wall of the waiting room or disseminated to clients
10 through a printed or electronic notice. Under the printed notice option, plaintiffs may wait and
11 distribute the printed notice to their clients later on in the appointment, instead of uttering the
12 speech at the beginning of their contact. Although the court considers the analysis in *Evergreen*,
13 that analysis is based on different facts and it ultimately does not affect the court’s conclusions in
14 this action.

15 d) Conclusion

16 For the foregoing reasons, the court at this stage finds the Act survives
17 intermediate scrutiny for professional speech made within a patient-provider relationship, and
18 would likely be upheld even if the court applied strict scrutiny. Accordingly, plaintiffs have not
19 shown a likelihood of success on the merits of their free speech claim.

20 However, plaintiffs have raised “serious questions going to the merits” of their free
21 speech claim under the Ninth Circuit’s approach to preliminary injunctions. *See Cottrell*, 632
22 F.3d at 1135. As discussed above, plaintiffs have raised “serious questions” whether strict
23 scrutiny applies to the Act. In addition, they have raised “serious questions” whether the Act
24 would survive strict scrutiny—in particular, whether less restrictive means would be at least as
25 effective in achieving the Act’s purpose. But before turning to whether plaintiffs have also
26 shown “the balance of hardships tips sharply in [their] favor,” the court considers their second
27 claim.

1 B. Claim Two: Free Exercise of Religion

2 The court considers plaintiffs’ likelihood of success on their Free Exercise claim.
3 As with the free speech claim above, the parties disagree about the appropriate level of scrutiny to
4 apply. Plaintiffs contend the Act unconstitutionally interferes with their right to free exercise of
5 religion. As a result, they argue the Act is subject to strict scrutiny. The State argues the Act is a
6 neutral law of general applicability, and is subject to rational basis review.

7 As discussed below, the court finds in this report the Act is a neutral law of general
8 applicability, subject to rational basis review. The court also concludes the Act would survive
9 rational basis review. Accordingly, plaintiffs are not likely to succeed on the merits of this claim.

10 1. Free Exercise Claim

11 The Free Exercise Clause of the First Amendment provides that “Congress shall
12 make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
13 U.S. Const., Amend. I.¹³ The right to exercise one’s religion freely, however, “does not relieve
14 an individual of the obligation to comply with a valid and neutral law of general applicability on
15 the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or
16 proscribes).” *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990).
17 Indeed, an individual’s religious beliefs do not excuse him from compliance with an otherwise
18 valid law prohibiting conduct that the state is free to regulate. *Smith*, 494 U.S. at 878–79 (1990).

19 A neutral law of general applicability need not be supported by a substantial or
20 compelling government interest, even when “the law has the incidental effect of burdening a
21 particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.
22 520, 531 (1993). Such a law need only survive rational basis review. *Stormans, Inc. v. Wiesman*,
23 794 F.3d 1064, 1075–76 (9th Cir. 2015). For laws that are not neutral and not generally

24 ¹³ Although *Smith* was superseded by the Religious Freedom Restoration Act of 1993
25 (RFRA), the Supreme Court later held that RFRA applies only to the federal government and not
26 the states. See *Holt v. Hobbs*, ___ US ___, 135 S. Ct. 853, 859–60; *City of Boerne v. Flores*, 521
27 U.S. 507, 532–36 (1997). This remains true today for all cases but those governed by the
28 Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). See *Holt*, 135 S. Ct. at
859–60; *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 n.4 (9th Cir. 2015).

1 applicable, strict scrutiny applies. *Id.* at 1076. The tests for “[n]eutrality and general applicability
2 are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has
3 not been satisfied.” *Stormans*, 794 F.3d at 1076 (quoting *Lukumi*, 508 U.S. at 531).

4 Nevertheless, the court must consider each criterion separately so as to evaluate the text of the
5 challenged law as well as the “effect . . . in its real operation.” *Id.* Accordingly, the court
6 assesses below whether the Act is neutral and generally applicable.

7 a) Neutrality

8 “[I]f the object of a law is to infringe upon or restrict practices because of their
9 religious motivation, the law is not neutral” *Id.* A law must be both facially and
10 operationally neutral. *Id.*

11 “A law lacks facial neutrality if it refers to a religious practice without a secular
12 meaning discernable from the language or context.” *Id.* Here, because the Act makes no
13 reference to any religious practice, conduct, belief, or motivation, it is facially neutral.

14 The more challenging question is whether the Act is operationally neutral,
15 particularly at the preliminary injunction stage, where the law has not yet gone into effect. But
16 pre-enforcement challenges are nonetheless susceptible to this test. *See Stormans*, 794 F.3d at
17 1073 (discussing whether state rules not yet in effect were operationally neutral).

18 Two decisions provide guidance. In *Lukumi*, practitioners of the Santeria religion,
19 which prescribes ritual animal sacrifice as a principal form of devotion, challenged city
20 ordinances restricting the slaughter of animals. 508 U.S. at 524–25. One of the challenged
21 ordinances flatly prohibited the sacrifice of animals, but the definition of “sacrifice” excluded
22 “almost all killings of animals except for religious sacrifice” and provided an additional
23 exemption for kosher slaughter. *Id.* at 535–36. The net result of this definition, the Court ruled,
24 was that “few if any killings of animals are prohibited other than Santeria sacrifice.” *Id.* at 536.
25 Because of the way the ordinance operated in practice, it actually prohibited only Santeria
26 sacrifice. *Id.* In this way, the challenged ordinance accomplished a “religious gerrymander,” an
27 impermissible attempt to target religious practices through careful legislative drafting. *Id.*

28

1 In contrast, the appellate court in *Stormans* found the rules at issue to operate
2 neutrally. 794 F.3d 1078. In *Stormans*, pharmacy owners and pharmacists with religious
3 objections to dispensing emergency contraceptives challenged state rules requiring a pharmacy to
4 deliver or dispense such drugs. *Id.* at 1072. For individual pharmacists, the rules contained an
5 exemption for those who had “religious, moral, philosophical, or personal objections to the
6 delivery” of contraceptives. *Id.* The rules did not contain a similar requirement for pharmacies.
7 *Id.*

8 The court nonetheless found the rules operationally neutral. When looking at the
9 exemption as applied to individual pharmacists, the court noted the rule-makers’ conscious
10 decision to avoid unduly burdening pharmacists who objected to dispensing a prescription
11 medication. *See id.* at 1076 (“As an initial matter, we note that as they pertain to pharmacists, the
12 rules specifically protect religiously motivated conduct.”) (emphasis omitted).

13 Regarding the law’s application to pharmacies, the court discussed three main
14 points. First, it reviewed the public policy undergirding the state’s decision not to carve out a
15 religious objections exemption. Specifically, the court noted the state rules provided “practical
16 means to ensure the safe and timely delivery of all lawful and lawfully prescribed medications to
17 the patients who need them.” *Id.* at 1077. This purpose would have been significantly
18 undermined if pharmacies refused to deliver needed prescriptions because of a religious
19 objection, especially in rural areas where pharmacies were sparse. *See id.* at 1078 (“The time
20 taken to travel to another pharmacy . . . may reduce the efficacy of those drugs”). Second, the
21 court noted the rules’ delivery requirement, as related to pharmacies, applied to all objections to
22 deliveries that did not fall into an exemption, regardless of the motivation behind those
23 objections. *Id.* Finally, the court noted the delivery requirement also applied to all prescription
24 products, not just contraceptives, making the requirement broadly applicable to a range of drugs,
25 including those not subject to religious objections. *See id.*

26 Akin to the law in *Stormans*, the Act provides no exemption for religious
27 objections. But this lack of an exemption does not render the Act unconstitutional, because such
28 exemptions are not constitutionally required. *See Smith*, 494 U.S. at 890 (holding states may

1 make nondiscriminatory religious practice exemptions, but that such exemptions are not
2 constitutionally required). Additionally, the notice provision to which plaintiffs object applies to
3 all licensed facilities with limited exceptions unrelated to religion, and regardless of the reason for
4 objections. Finally, the notice provision applies to multiple forms of contraception and
5 reproductive care, not just abortion, requiring that clients be informed of their right of access to
6 “comprehensive family planning services,” including “all forms of FDA-approved methods of
7 contraception” and prenatal care. AB 775 § 1. The Act is operationally neutral.

8 The court reaches this conclusion notwithstanding plaintiffs’ argument that the
9 Legislature “zeroed in on ‘crisis pregnancy clinics’” or CPCs by affiliating CPCs with “pro-life
10 (largely Christian belief-based) organizations.” Mem. P. & A. at 24. Laws targeting religious
11 conduct for distinctive treatment are not shielded merely by facial neutrality. *Id.* (citing *Lukumi*,
12 508 U.S. at 534). And the record before the court shows it was the activities of CPCs, many of
13 them Christian-based, that largely motivated the Act’s notice requirement.¹⁴ As noted by the
14 Act’s authors, reports showed at least some CPCs were giving clients “inaccurate information
15 about reproductive health, including only information “regarding the risks of abortion, . . . that
16 many women commit suicide after having an abortion, and . . . abortions can cause breast
17 cancer.” Pls.’ Ex. 3 at 5.

18 In a limited sense this case resembles *Lukumi*, where the Legislature considered
19 the activities inherent in the petitioner’s Santeria religious practice when deciding whether to ban
20 these activities. But in *Lukumi*, unlike in this case, the Legislature’s target was not the activity of
21 animal killings or sacrifices, but the practice of Santeria itself. Animal killings, to the extent they
22 were not associated with the practice of Santeria, were not prohibited. *See Lukumi*, 508 U.S. at
23

24 ¹⁴ The court recognizes the other motivation behind this act, namely “to ensure that
25 California residents make their personal reproductive health care decisions knowing their rights
26 and the health care services available to them.” AB 775 § 2. But a law that aims to regulate
27 religious conduct for distinctive treatment is not rendered constitutional simply because its stated
28 purpose is benign or neutral. *See Lukumi*, 508 U.S. at 534 (holding laws that target religious
conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of
facial neutrality).

1 543 (“Despite the city’s proffered interest in preventing cruelty to animals, the ordinances are
2 drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of
3 animal deaths or kills for nonreligious reasons are either not prohibited or approved by express
4 provision.”). Here, in contrast, the Legislature’s target in part, dishonest tactics meant to
5 discourage abortions, is burdened by the notice requirement regardless of any religious
6 motivation, if burdened at all.¹⁵ The authors’ suggestion is correct: the Act “regulate[s] all
7 pregnancy centers, not just CPCs, in a uniform manner.” Pls.’ Ex. 5 at 3.

8 b) General Applicability

9 The court next considers whether the Act is generally applicable. *Lukumi*, 508
10 U.S. at 542. If a law promotes the government’s interest “only against conduct motivated by
11 religious belief” but fails to include in its prohibitions substantial, comparable secular conduct
12 that would similarly threaten the government’s interest, then the law is not generally applicable.
13 *Id.* at 543, 545. A law is generally applicable despite exemptions if it does not “afford unfettered
14 discretion [to its enforcers] that could lead to religious discrimination,” because the exemptions
15 are “tied to particularized objective criteria.” *Stormans*, 794 F.3d at 1081–82.

16 Here, the Act requires licensed pregnancy centers to post notices informing
17 women of a range of reproductive options available to them. The Act carves out two exemptions:
18 (1) those clinics “directly conducted, maintained, or operated by the United States or any of its
19 departments, officers, or agencies”; and (2) those licensed primary care clinics enrolled as a
20 Medi-Cal provider and provider in the Family Planning, Access, Care, and Treatment (PACT)
21 Program. Cal. Health & Safety Code § 123471(c).

22 The legislative history provides insights into why these exemptions were made.
23 According to the Assembly Judiciary Committee report, the first exemption was provided to
24 clinics operated by the federal government in order to avoid preemption concerns. Pls.’ Ex. 3 at
25 12. As to the second exemption, the Committee report explained a licensed primary care clinic

26 ¹⁵ Although the legislature discussed CPC tactics used to discourage abortions, AB 775
27 does not inhibit the use of such tactics. Notwithstanding AB 775, CPCs can continue to engage
28 in practices designed to discourage women from obtaining abortions.

1 that is both a Medi-Cal provider and a Family PACT provider already offers the full continuum of
2 health care services as described in the notice to be disseminated under the statute, that is,
3 comprehensive family planning services, contraception, prenatal care, and abortion. *Id.*
4 Accordingly, there was no need to subject such facilities to the notice provisions. *Id.*

5 These justifications are “tied to particularized, objective criteria,” such that the
6 exemptions do not allow for “unfettered discretion that could lead to religious discrimination.”
7 *Stormans*, 794 F.3d at 1082. They are a far cry from those in *Lukumi*, where the exemptions were
8 allowed for killing animals if seen as “important,” “self-evident,” and “obviously justified,” broad
9 terms susceptible to wide-ranging discretion in enforcement. 508 U.S. at 544. The Act here is
10 generally applicable.

11 2. Application of Rational Basis Review

12 Because the Act is neutral and generally applicable, the court applies rational basis
13 review, which requires a rational relation to a legitimate governmental purpose. *Stormans*, 794
14 F.3d at 1084. Plaintiffs have the burden to negate every conceivable basis that might support the
15 law at issue. *Id.*

16 The stated purpose of the notice provision is to ensure that women “quickly obtain
17 the information and services they need to make and implement timely reproductive decisions.”
18 AB 775 § 1. The law’s sponsors identified a need to supplement the State’s existing efforts in
19 advising women of its reproductive health programs, because pregnancy decisions are time-
20 sensitive and competent care early in pregnancy is important. *Id.* As mentioned above, the State
21 has a legitimate interest in ensuring women make an informed decision regarding an abortion.
22 *See Casey*, 505 U.S. at 881–83. The Act’s purpose is legitimate.

23 The means used to effectuate this purpose, mandating a notice informing visitors
24 to licensed facilities of the range of reproductive care resources available, is rationally tailored to
25 the purpose of helping women quickly obtain information necessary to making “personal
26 reproductive health care decisions.” AB 775 § 1. Requiring dissemination of the notice at the
27 time of a clinic visit is more likely to reach the intended recipients at the time they are making
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1 their time-sensitive reproductive decisions. The law is rational and survives the level of
2 constitutional scrutiny due on this claim.

3 Accordingly, plaintiffs have not shown a likelihood of success on their Free
4 Exercise claim, and have not raised serious questions going to the merits of this claim.

5 VII. IRREPARABLE HARM, BALANCE OF HARDSHIPS AND PUBLIC INTEREST

6 A preliminary injunction may issue when the moving party raises serious questions
7 going to the merits and demonstrates the balance of hardships tips sharply in its favor, so long as
8 the court also considers the other two prongs of the *Winter* test, the likelihood of irreparable
9 injury and the public interest. *Cottrell*, 632 F.3d at 1134–35. Having found plaintiffs have raised
10 serious questions going to the merits of their free speech claim, the court considers whether
11 plaintiffs have shown there is a likelihood of irreparable injury, whether the balance of hardships
12 tips sharply in plaintiffs’ favor, and whether an injunction is in the public interest.

13 A. Irreparable Injury

14 Plaintiffs allege injury in the form of interference with their constitutional right to
15 free speech and monetary injuries from the civil penalties of the Act imposes. Plaintiffs argue
16 they will suffer irreparable harm if the Act is not enjoined, because it raises serious First
17 Amendment questions, and the failure to provide notice as required under the Act will result in a
18 civil penalty of \$500 for the first violation and an additional \$1,000 for every subsequent
19 violation. Mem. P. & A. at 21; *see* Cal. Health & Safety Code § 123472(a) (notice requirement);
20 *id.* § 123473(a) (civil penalty provisions). The State argues plaintiffs have submitted no evidence
21 to support an alleged injury. Opp’n at 19.

22 While the Supreme Court has held “[the loss of First Amendment freedoms, for
23 even minimal periods of time, unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427
24 U.S. 347, 373 (1976); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir.
25 2009), a mere “assertion of First Amendment rights does not automatically require a finding of
26 irreparable injury,. . . entitling a plaintiff to a preliminary injunction if he shows a likelihood of
27 success on the merits,” *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989). Rather, it is
28 “purposeful unconstitutional suppression of speech [that] constitutes irreparable harm for

1 preliminary injunction purposes.” *Goldie’s Bookstore Inc. v. Superior Ct.*, 739 F.2d 466, 472
2 (9th Cir. 1984); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) (“[D]irect penalization, as
3 opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury.”).

4 Here, the court has found the Act regulates speech within the confines of a professional
5 relationship, and plaintiffs have raised serious questions that this compelled speech violates their
6 freedom of speech. This is sufficient to constitute irreparable injury.

7 Regarding the civil penalties, monetary injury generally does not constitute
8 irreparable injury. *LA Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202
9 (9th Cir. 1980). However, financial losses that would be unrecoverable due to California’s
10 Eleventh Amendment sovereign immunity do constitute irreparable injury. *Cal. Hos. Ass’n v.*
11 *Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1157 (E.D. Cal. 2011); *see also Kansas Health Care Ass’n*
12 *v. Kansas Dep’t of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (Eleventh
13 Amendment bars retrospective monetary relief against a state thus making a monetary injury
14 irreparable). Plaintiffs’ inability to recover from the State alone is sufficient to constitute possible
15 irreparable injury.

16 Plaintiffs must establish the irreparable harm is likely, not just possible *Alliance*
17 *for the Wild Rockies*, 632 F.3d at 1131 (citing *Winter*, 555 U.S. at 22). The harm must not be
18 speculative, but imminent. *Caribbean Marine Services Co., Inc. v. Baldridge*, 844 F.2d 668, 675
19 (9th Cir. 1988). Given that plaintiffs have raised serious questions on the merits of their free
20 speech claim, plaintiffs have shown a likelihood of irreparable injury to their First Amendment
21 rights. *See Tracy Rifle and Pistol LLC v. Harris*, ___ F. Supp. 3d ___, 2015 WL 4395025, at *9
22 (E.D. Cal. July 16, 2015). In addition, as the Act is scheduled to take effect January 1, 2016,
23 there is an impending threat of civil penalties being imposed if plaintiffs do not comply with the
24 notice requirement. There are no contingencies that need occur before the alleged injuries are
25 experienced, nor are the alleged injuries merely speculative. *Compare City of South Lake Tahoe*
26 *v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (finding the
27 future injury was not sufficiently real and imminent, where city councilmembers alleged they
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1 would be exposed to civil liability by enforcing an ordinance if the constitutionality of the
2 ordinance were challenged in the future).

3 Plaintiffs have shown they are likely to suffer irreparable injury.

4 B. Balance of Hardships

5 The court next examines whether plaintiffs have established that the balance of
6 hardships tips sharply in their favor. *Winter*, 555 U.S. at 20. To assess this prong, the court
7 “balance[s] the interests of all parties and weigh[s] the damage to each.” *Stormans, Inc. v.*
8 *Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citing *L.A. Mem’l Coliseum Comm’n*, 634 F.2d at
9 1203). Here, it is not enough for there to be serious questions as to the merits of a First
10 Amendment claim. *See Paramount Land Co. LP v. Cal. Pistachio Comm’n*, 491 F.3d 1003, 1012
11 (9th Cir. 2007). Rather, the court “must balance the competing claims of injury and must
12 consider the effect on each party of the granting or withholding of the requested relief.” *Amoco*
13 *Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987).

14 Here, the State argues if the Act is enjoined, the injunction will harm women in
15 California who are in need of “publicly funded family planning services, contraception services
16 and education, abortion services, and prenatal care and delivery,” but unaware of the free public
17 programs available providing these services. *Opp’n* at 19. The State points to the legislative
18 history, which reported that “[i]n 2012, more than 2.6 million California women were in need of
19 publicly funded family planning services. More than 700,000 California women become
20 pregnant every year and one-half of these pregnancies are unintended.” AB 775 § 1. Although
21 64.3 percent of unplanned births in California in 2010 were publicly funded, the Legislature
22 found that thousands of women remain unaware of the public programs available to them. *Id.* If
23 the statute is enjoined, during the injunction, the women eligible for the free or low-cost
24 comprehensive publicly funded family planning services and pregnancy-related care will have
25 reduced access to all of the information they need to make a fully informed decision about their
26 pregnancy. *See id.* Though the preliminary injunction plaintiffs seek would only enjoin
27 enforcement of the Act as to the three plaintiffs, *Reply* at 11, their clients are California residents.
28 At hearing, counsel was unable to identify the number of women plaintiffs serve. And, the state

1 argues, “[a]ll California women, regardless of income, should have access to reproductive health
2 services.” *Id.*

3 Hence, on the one hand, if the court denies the injunctive relief, plaintiffs are likely
4 to suffer irreparable injuries with respect to their constitutional rights and incur civil penalties,
5 neither of which can be adequately remedied through damages. *See Selecky*, 586 F.3d at 1138.
6 On the other hand, granting an injunction would interfere with the Legislature’s intention to
7 provide accurate information to all women seeking family planning or pregnancy-related services
8 from plaintiffs. *See AB 775 § 1*. As discussed above, California has a special interest in
9 protecting and regulating trades that closely concern public health. *See Nat’l Ass’n for*
10 *Advancement of Psychoanalysis*, 228 F.3d at 1054–55; *see also Am. Acad. of Pain Mgmt.*, 353
11 F.3d at 1109 (“States have a compelling interest in the practice of professions within their
12 boundaries, and . . . as part of their power to protect the public health, safety, and other valid
13 interests they have broad power to establish standards for licensing practitioners and regulating
14 the practice of professions.” (citation omitted)).

15 Secondly, when a party seeks injunctive relief against a state government,
16 concerns of comity and federalism are raised. *See Clark v. Coye*, 60 F.3d 600, 603–04 (9th Cir.
17 1995). And “any time a state is enjoined by a court from effectuating statutes enacted by
18 representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. of*
19 *Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

20 Plaintiffs argue they will suffer irreparable injury if the injunction is not granted;
21 the court agrees. However, the State has also shown a strong interest in providing public health—
22 the health of the California women who seek services from plaintiffs. And plaintiffs have
23 provided no evidence to challenge the State’s findings. Thus, in weighing the injuries both
24 parties are likely to suffer, the court finds plaintiffs have not established the balance of hardships
25 tips sharply in their favor.

26 C. Public Interest

27 Even if plaintiffs established the balance of hardships tips sharply in their favor,
28 plaintiffs also bear the burden of showing the injunction is in the public interest. *Winter*, 555 U.S.

1 at 20. While the court’s analysis of the balance of hardship is narrowed to the parties affected,
2 the court can consider the hardships to all individuals covered by the Act, not limited to the
3 parties, in assessing the public interest. *Golden Gate Rest. Ass’n v. City & County of S.F.*, 512
4 F.3d 1112, 1126 (9th Cir. 2008). Though “[p]ublic interest favors the exercise of First
5 Amendment rights,” *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014), “where an injunction is
6 asked which will adversely affect a public interest for whose impairment, even temporarily, an
7 injunction bond cannot compensate, the court may [then] in the public interest withhold relief
8 until a final determination of the rights of the parties, though the postponement may be
9 burdensome to the plaintiff.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982). In
10 considering whether the public interest is impaired, the court weighs only the public interest in
11 light of the likely consequences of the injunction and need not reach possibilities that are highly
12 speculative. *See Golden Gate Rest. Ass’n*, 512 F.3d at 1126.

13 Plaintiffs argue there is a “significant interest in upholding First Amendment
14 principles.” Mem. P&A at 22 (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959,
15 974 (9th Cir. 2002), *abrogated on other grounds by Winter*, 555 U.S. 7). Plaintiffs further
16 contend when constitutional grounds are threatened, and where the State has shown no “urgency
17 for the particular enactment” posing the threat, it is in the public interest to make sure the Act is
18 constitutional before effectuating it. Mem. P&A at 22.

19 Here, if the injunction is granted, it will limit the ability of a subset of women who
20 are or may be pregnant from accessing the straightforward information in the required notice
21 when they are making their time sensitive reproductive decisions. And “[t]he general public has
22 an interest in the health of state residents.” *Selecky*, 586 F.3d at 1139 (citing *Golden Gate Rest.*
23 *Ass’n*, 512 F.3d at 1126 (quotation marks omitted)). The Act is intended to provide notice of
24 such healthcare services to women in California and there is a general public interest in ensuring
25 the women of this state know they have access to publicly funded healthcare related to family
26 planning, contraception, abortion, and prenatal care and delivery. Enjoining the Act would
27 interfere with the public interest regarding the health of state residents.
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1 Accordingly, though the public interest favors upholding the First Amendment, the
2 public interest also favors ensuring California women are fully informed as to their reproductive
3 healthcare options. The grant of an injunction would not only affect the parties here, but would
4 also have an effect on non-parties and the greater public. *See Selecky*, 586 F.3d at 1139.
5 Weighing the two effects, the court finds plaintiffs have not carried their burden in showing the
6 injunction is in the public interest.

7 **VIII. CONCLUSION**

8 For the foregoing reasons, plaintiffs' motion for a preliminary injunction enjoining
9 AB 775 from taking effect is DENIED.

10 IT IS SO ORDERED.

11 DATED: December 18, 2015.

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15 UNITED STATES DISTRICT JUDGE
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