No. 16-1140

In The Supreme Court of the United States

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

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CITY AND COUNTY OF SAN FRANCISCO; THE CITIES OF OAKLAND, BALTIMORE, LOS ANGELES, AND NEW YORK; AND THE COUNTY OF SANTA CLARA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amici are cities and counties that regulate pregnancy centers. Through legislation, litigation, investigations, and enforcement efforts, *amici* have developed substantial records about the harms caused by many pregnancy centers. These harms often arise when pregnancy centers mislead women about the services they provide, leading women to delay accessing abortion services or comprehensive prenatal care. Some *amici* have enacted legislation to address deceptive practices by pregnancy centers. For instance, Baltimore and New York City have enacted ordinances requiring pregnancy centers to disclose certain information about their services. *See* Balt., Md., City Health Code §§ 3-501 to 3-506; N.Y.C., N.Y., Admin. Code § 20-816(a)-(e). San Francisco and Oakland prohibit pregnancy centers that provide limited medical services from falsely advertising services they do not offer. *See* S.F., Cal., Admin. Code § 93.4; Oakland, Cal., Mun. Code § 5.06.110. Other *amici*, like the City of Los Angeles and the County of Santa Clara have encountered pregnancy centers' deceptive practices in the course of investigation or enforcement efforts.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for Petitioners' letter consenting to the submission of *amicus* briefs has been filed with the Clerk's Office. Counsel for Respondents have consented to the filing of this *amicus* brief.

Collectively, *amici* are leaders among local governments in advocating and acting to protect consumers.

Amici submit this brief to provide the Court with factual information from municipal records, as well as to urge the Court to adopt a consistent standard for reviewing reproductive health disclosure laws. This evidence demonstrates that there is ample reason to regulate pregnancy centers – not to discriminate against their viewpoints, but because pregnant women have a critical need for accurate and timely information. That would be reason enough for *amici* to require pregnancy centers to disclose truthful information to the pregnant women they serve. The need for disclosure mandates is only strengthened by overwhelming evidence that the deceptive conduct of some pregnancy centers hinders the ability of pregnant women to obtain accurate information and appropriate services, causing significant harms. Recognizing that there is not a one-size-fits-all approach, *amici* have selected different policy tools to respond to this problem. Some *amici* have enacted compelled disclosure laws similar to California's Reproductive FACT Act,[2] while others have taken different approaches tailored to specific problems in their jurisdictions. All *amici* share an interest in maintaining a broad range of policy tools so that jurisdictions around the country can select an approach that best fits the problems they have identified. *Amici* urge the Court to uphold the FACT Act.

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[2] Cal. Health & Safety Code §§ 123470-123473 (FACT Act).

SUMMARY OF ARGUMENT

California is not alone in regulating pregnancy centers.[3] At least ten other jurisdictions, including four *amici*, have enacted regulations that impose disclosure requirements or advertising restrictions on pregnancy centers.[4] These regulations respond to the particular harms that result when pregnancy centers use false information and deceptive practices to prevent pregnant women from accessing desired health care, including abortion, in a timely fashion. While some pregnancy centers are honest brokers that provide valuable services to pregnant women, *amici*'s legislative records – as well as records developed through their

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[3] State and local laws define pregnancy centers differently, with some focused on limited-service pregnancy centers and others including pregnancy centers that provide comprehensive reproductive health care. As used in this brief, the term "pregnancy centers" refers to facilities that offer pregnant women limited services such as pregnancy tests or ultrasounds, but do not offer or provide referrals for abortion.

[4] *See* Austin, Tex., City Code §§ 10-10-1 to 10-10-3; Balt., Md., City Health Code §§ 3-501 to 3-506; Court of Common Council of the City of Hartford, Ct., Ordinance Amending Chapter 17 of the Hartford Municipal Code To Add Article VI-Pregnancy Information Disclosure and Protection (Dec. 11, 2017) (enacted); S.B. No. 501, S.D. 1, 29th Leg., Reg. Sess. (Haw. 2017); 745 Ill. Comp. Stat. §§ 70/2, 70/3, 70/6, 70/9; King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017); Montgomery County, Md., Board of Health, Res. No. 16-1252 (Feb. 2, 2010); N.Y.C., N.Y., Admin. Code § 20-816(a)-(e); Oakland, Cal., Mun. Code § 5.06.110; S.F., Cal., Admin. Code §§ 93.1-93.5.

litigation and enforcement actions – show recurring patterns of deception at many pregnancy centers.[5]

This deception frequently begins when pregnancy centers use intentionally misleading advertising to attract women seeking abortions, even though the centers do not provide or refer for abortions. Sometimes, pregnancy center staff members pretend that they work for clinics that provide abortions, and dupe pregnant women into going to the pregnancy center instead of their intended destination. At unlicensed pregnancy centers, the deception often continues when staff request medical histories, wear scrubs, and purport to give clients "full examinations," falsely leading them to believe they have been treated by a medical professional. Pregnancy centers also frequently give clients medically or legally inaccurate information about abortion, and fail to provide them with information about the availability of medical assistance for family planning and abortion services. The trickery culminates with lies and delay tactics designed to prevent a pregnant woman from seeing an abortion provider until it is too late for her lawfully to choose an abortion – with the consequence that comprehensive prenatal care is also delayed.

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[5] Many of *amici*'s legislative records have been included in court records in cases challenging *amici*'s laws. For the convenience of the Court, references are provided to court filings where possible. Where evidence has not been included in court filings, citations are provided to legislative records. All cited records are on file with counsel.

California's FACT Act responds to these harms by ensuring that pregnant women at unlicensed facilities are notified that the person treating them is not a licensed medical provider, and that pregnant women at licensed facilities are informed about the option to access comprehensive reproductive health care at little or no cost. In requiring pregnancy centers to provide factual information about care and services, the FACT Act is similar to dozens of laws that compel disclosures by physicians before providing abortions. Like these other disclosure laws, the FACT Act regulates some speakers treating pregnant women but not others, responding to the particular harms the legislature was trying to solve. This does not constitute viewpoint discrimination. "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist" by enacting an overly broad statute to counter a particular issue. *McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014) (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion)). So long as disclosure laws simply require a commercial speaker to provide "purely factual and uncontroversial information," they need only be "reasonably related to the State's interest." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). The FACT Act easily satisfies this standard.

Amici urge the Court to maintain a consistent standard for evaluating reproductive health disclosure laws. If the Constitution allows a state to require abortion providers to give a pregnant woman factual

information about available resources, it must also allow similar disclosures to be imposed on providers who do not offer abortions.

ARGUMENT

I. Many Pregnancy Centers Deceive Women About The Services They Offer And The Qualifications Of Their Personnel, And Also Provide Inaccurate Information About Pregnancy And Abortion.

Some pregnancy centers are straightforward about their objectives, honestly advertising the services they offer, and supporting women who choose to carry their pregnancies to term. But other pregnancy centers take a different approach, as demonstrated in *amici*'s legislative records.

A. Deceptive Advertising

Many pregnancy centers use advertising campaigns that lead pregnant women to believe that they offer abortions, and intentionally dupe women seeking abortions into making appointments at the centers. For instance, a San Francisco pregnancy center that does not perform abortions or refer women to abortion providers pays to advertise on Google searches for "abortion San Francisco" and on yellowpages.com

under "abortion services."[6] These advertisements include links to a website that features a testimonial from a "client who chose to terminate her pregnancy," without disclosing that the pregnancy center did not help that client obtain an abortion. *Id.* at 39. Other pregnancy centers advertise that they provide "Abortion and Morning After Pill information, including procedures and risks," omitting that the advertised "procedures" do not include abortion and contraceptive care.[7]

One pregnancy center's executive director admitted that its "ads are purposely vague, of course." *Id.* at 708. After running these "purposely vague" ads, this pregnancy center reported an increase in the number of calls from women who "wanted to schedule an abortion" and who "were under the [false] impression from the bus advertisements that [the center] assisted in paying for abortions." *Id.* at 705.

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[6] Appellees' Supplemental Excerpts of Record at 151, 153-54, 157-58, *First Resort, Inc. v. Herrera et al.*, 860 F.3d 1263 (9th Cir. 2017) (No. 15-15434), ECF No. 12; *see also* Amy Everitt, Remarks at the Oakland City Council Life Enrichment Committee Meeting (June 28, 2016), http://oakland.granicus.com/MediaPlayer.php?view_id=2&clip_id=2026&meta_id=139607, at 8:35 [hereinafter Oakland City Council LEC] (noting that a Google search for "abortion Oakland" listed crisis pregnancy centers as two of the top three results).

[7] Joint Appendix to Appellants' Brief at 702-03, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. 16-2325 (4th Cir. Jan. 30, 2017), ECF No. 26 [hereinafter Balt. J.A.].

Phone calls to pregnancy centers are unlikely to yield further clarity. A nationwide pregnancy center hotline trains staff to be intentionally "vague" when fielding calls about abortion services. Oakland City Council LEC at 10:10. And in a survey of pregnancy centers, "not one of the [pregnancy centers] admitted that they don't offer complete pregnancy counseling including abortion and contraception options, unless explicitly asked."[8]

Some pregnancy centers adopt a different strategy to attract clients – namely, diverting pregnant women who are going to other clinics and tricking them about where they are and what services are offered there. Pregnancy centers "often have misleading names and signage and set up shop near legitimate reproductive health care providers." *Id.* at 311. They use "large and vague signs and advertis[e]ments" to divert patients from their intended destinations. *Id.* at 951. Many women "accidentally enter[] into a 'limited service' pregnancy center," "thinking it is a medical facility that offers a full range of reproductive health services." *Id.*

Other pregnancy centers go further, actively deceiving women who intend to go to clinics that provide more comprehensive care, including contraception and abortion services. In Brooklyn, for example, a pregnancy center operates in the same building as a clinic

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[8] Joint Appendix to Appellants' Brief at 308, *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) (No. 11-2735-cv), ECF Nos. 78-81 [hereinafter N.Y.C. J.A.].

that provides contraceptive and abortion care, but on a different floor. Someone posing as a clinic employee intercepted a patient outside of the clinic and took her to the pregnancy center instead. *Id.* at 315. Another pregnancy center parks a bus advertising free ultrasounds outside of a clinic that provides abortions. *Id.* at 442-43. Workers on the bus have falsely stated that "the counselors work for [the] clinic, [and] that the clinic is closed," in an apparent effort to lure women to the pregnancy center instead of the clinic. *Id.* at 443.

B. Unlicensed Facilities Purporting To Be Licensed

Some pregnancy centers falsely claim that they are licensed medical facilities. For instance, a California pregnancy center advertises that its unlicensed mobile unit provides "the same services" as its licensed facility, even though the mobile unit cannot legally provide medical services that are provided by the licensed facility.[9]

Other pregnancy centers "go to great lengths to foster an impression of medical authority, even though most are not licensed medical facilities, and the women coming in are unlikely to see a licensed medical provider." N.Y.C. J.A. at 308. These pregnancy centers "look like a doctor's office," *id.* at 312, or "like a medical

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[9] *See* Informed Choices, *Location & Hours*, http://www.informed-choices.org/map-office-hours (last visited Feb. 15, 2018); Cal. Bus. & Prof. Code § 2052 (prohibiting the unlicensed practice of medicine).

facility," *id.* at 321. Clients are often asked for a full medical history, and then given a "full examination" by staff in scrubs. *Id.* at 400.[10] As one woman testified:

> On October 18th at 23 weeks pregnant, I went to EMC Pregnancy Center in downtown Brooklyn. Though this crisis pregnancy center did not appear to have any licensed medical personnel on staff, it looked and felt like a doctor's office. I was given paperwork to fill out that asked for a medical history as well as all of my contact information and all of my partner's contact information. A woman in scrubs was seeing patients in an exam room that looked just like every OB/GYN office I've ever been in.
>
> I took a pregnancy test . . . and sat waiting for the results with scared 16, 17 and 18-year-old women. Women half my age who had come seeking help at a desperate moment. Though I knew I was pregnant and had been testing positive on pregnancy tests since I was four weeks along, I was told my pregnancy test was inconclusive. The only way to know for sure was a sonogram.

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[10] *See also* King County Board of Health Staff Report, Briefing No. 17-B14, at 5 (June 15, 2017), https://kingcounty.legistar.com/View.ashx?M=F&ID=5269982&GUID=C4A67A50-9E92-4A42-BA4F-2217DFE71C1C [hereinafter King Cnty. Staff Report] (describing a pregnancy center waiting room that "looked like a professional office" and had a framed "test site provider" certificate from the Washington State Department of Public Health, even though it was not a licensed medical facility).

> I was taken into the examination room where the woman in scrubs pulled a wand over my belly and played the sound of the heartbeat for me. She oohed and aahed and with a few more quick swipes, she gave the baby a full examination. She pronounced my baby healthy and perfect. The whole procedure took less than five minutes. I was never seen by a doctor or nurse and my fetus had not received a full medical examination. Though if I didn't know it beforehand, I would have assumed, as many women do, that they had had a full checkup."

Id. at 399-401.

C. Breaches Of Patient Confidentiality

Pregnancy centers often ask clients "to fill out forms soliciting personal information, including health history, relationship status and work information with no assurance of confidentiality," N.Y.C. J.A. at 308, or with assurances of confidentiality that the centers later violate.[11] This raises particular concerns in unlicensed facilities. "[I]n a room set up to look like a doctor's office, many women do not know that there isn't a licensed medical professional giving them this information or that private health and contact information may not be treated confidentially." *Id.* at 312.

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[11] *See, e.g.*, Complaint Ex. D-2 at 8, *Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d 745 (D. Md. 2014) (No. 8:10-cv-01259-DKC), ECF No. 1-5 [hereinafter Complaint Ex. D-2] (testimony of Laura Berger).

Pregnancy centers have used women's personal information to show up at their workplaces, *id.* at 337-39, send them harassing texts, *id.* at 338, and sign them up for pregnancy tracking and notifications without their consent.[12] They have shared a woman's personal information with other pregnancy centers, *see* Complaint Ex. D-2, at 8; and even attempted to read the medical records of a former patient into the record at a public hearing.[13]

D. Medically And Legally Inaccurate Information

While some pregnancy centers seek to enhance decision-making by providing information about abortion alternatives, others undermine informed decision-making by giving women inaccurate information about abortion and contraception.

Some pregnancy centers provide women with medical information about the risks of abortion and contraceptives that is inconsistent with the medical standard of care. For example, pregnancy centers often tell clients that abortion causes breast cancer, *see*

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[12] *Relating to Health: Hearing on S.B. 501 Before the S. Comm. on Ways & Means*, 29th Leg. at 117 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/SB501_SD1_TESTIMONY_WAM_02-23-17_.PDF [hereinafter S. Comm. WAM Hearing on S.B. 501] (testimony of Morgen Trube).

[13] *Relating to Health: Hearing on H. Comm. on Health*, 29th Leg. at 253-54 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/SB501_SD1_TESTIMONY_HLT_03-16-17_.PDF (testimony of Ghazaleh Moayedi, DO).

N.Y.C. J.A. at 946, 950; King Cnty. Staff Report at 5, even though the American Cancer Society has concluded that "the scientific evidence does not support the notion that abortion of any kind raises the risk of breast cancer or any other type of cancer."[14] In another common example, pregnancy centers often greatly exaggerate the risks of abortion, telling women that it "is a dangerous procedure" and that they "will become sterilized from the abortion and never able to have children again." N.Y.C. J.A. at 950; *see also id.* at 650 ("[C]ountless women" report "that they were told specifically from the staff at Crisis Pregnancy Centers that they will never have another child again."). Some pregnancy centers also discourage contraceptive use by telling clients that contraceptives cause sterility or sexually transmitted diseases. Complaint Ex. D-2 at 6 (testimony of Eleanor Dayhoff-Brannigan) (describing a pregnancy center giving misinformation about contraception, including that "birth control pills would lead to sterility"); N.Y.C. J.A. at 315-16 ("According to this [pregnancy center], Depo-Prevara [sic], a form of contraception, causes HPV, a sexually transmitted infection.").

The provision of medically inaccurate information by pregnancy centers – many of which present themselves to the public as medical facilities – is widespread. In a 2010 investigation of pregnancy centers throughout California, 40 percent advised that

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[14] Am. Cancer Soc'y, *Abortion and Breast Cancer Risk* (last revised June 19, 2014), https://www.cancer.org/cancer/cancer-causes/medical-treatments/abortion-and-breast-cancer-risk.html.

hormonal birth control increases the risk of infertility, 60 percent advised that condoms were ineffective in reducing pregnancy and sexually transmitted diseases, 70 percent advised that abortion increases the risk of breast cancer, and 85 percent advised that abortion increases the risk of infertility. Oakland City Council LEC at 22:45.

Additionally, pregnancy centers sometimes lie to women about whether and when abortion is legal. Some pregnancy centers falsely "tell the Hispanic women that abortion is illegal" and "[t]hat if they do have abortions that they will be deported back to their country." N.Y.C. J.A. at 450. Others encourage women to wait to decide about abortion by claiming that "[a]bortion is legal through all nine months of pregnancy," even when the procedure is not legal or not available at later gestational ages. Balt. J.A. at 179. A pregnancy center patient in New York was "shocked" to learn that she had delayed her abortion decision until it was too late for the procedure, because the pregnancy center "had assured her she could have an abortion in the third trimester." N.Y.C. J.A. at 941. And a California pregnancy center falsely advises that a woman must undergo multiple steps – including an ultrasound – before obtaining an abortion, even though California law does not require this.[15]

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[15] The center's website tells women that they must first "Verify" a pregnancy via a "laboratory quality pregnancy test," second "Confirm" via a "limited obstetric ultrasound," and third "Decide" by speaking "with a trained pregnancy options consultant." Informed Choices, *Home*, http://www.informed-choices.org/ (last

E. False Information About Pregnancies And Other Delay Tactics

At pregnancy centers that trade in deception, the duplicity often culminates in delay tactics designed to prevent women considering abortions from seeing a provider until it is too late to terminate the pregnancy. "When a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy. Under these circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all." S.F., Cal., Admin. Code § 93.2(9). Such delays may also lead to increased safety risks and medical costs. Although abortion is a safe medical procedure, the risks of abortion – and its costs – increase as a woman advances through her pregnancy. Balt. J.A. at 712. As a result, the longer a woman is delayed in having an abortion, the riskier and costlier the procedure becomes. *Id.*[16] Similarly,

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visited Feb. 22, 2018). It specifically states that "No matter what you decide to do if your pregnancy test is positive, you will need an ultrasound to confirm if you have a viable pregnancy and to accurately date your pregnancy." Informed Choices, *About our Services*, http://www.informed-choices.org/our-services (last visited Feb. 22, 2018). However, California does not require that a woman undergo an ultrasound before an abortion. *See* Kaiser Family Foundation, *State Ultrasound Requirements in Abortion Procedure: As of April 1, 2017*, https://www.kff.org/womens-health-policy/state-indicator/ultrasound-requirements/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Feb. 22, 2018).

[16] *See also* Appellant's Excerpts of Record at 65, ¶ 29, *First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017) (No. 15-15434), ECF 7-3.

delays in access to the birth control method of a woman's choice can leave the woman and her partner vulnerable to unintended pregnancy and sexually transmitted disease. *Id.*; *see also* N.Y.C. J.A. at 640.

Care providers across the country testified about encountering patients who sought abortions but could not obtain them because of pregnancy center delay tactics. In one example, a woman went to a pregnancy center in the mistaken belief that they offered abortions. N.Y.C. J.A. at 941. The center told her "she needed an ultrasound before the procedure." *Id.* "Then another ultrasound." *Id.* The center strung her along by telling her they were "uncertain[] about how advanced her pregnancy was." *Id.* The woman's pregnancy advanced to the third trimester. When she finally sought an abortion at a hospital-based clinic, her doctor "had to tell her it was no longer possible: she was well beyond the legal limit for abortion in New York." *Id.* The woman was "shocked"; her pregnancy center counselor had assured her that she could have an abortion in her third trimester of pregnancy. *Id.* After examining the woman, her doctor found that there was no medical reason why she should have had to wait for an abortion; her case was straightforward and her pregnancy could have been dated with a single ultrasound. *Id.* The doctor reported that this pattern of deception was "not uncommon" in her experience. *Id.* at 942.

In another example, a pregnant 16-year-old girl sought care at a pregnancy center, and they "delayed doing an ultrasound several times," and then told the girl and her parents that "the pregnancy was not as far

along as it actually was." *S. Comm. WAM Hearing on S.B. 501* at 107. When the girl and her parents finally sought care at a full-service practice, her pregnancy was too advanced for her to obtain an abortion. *Id.* Her doctor reported that upon hearing the news, "this 16 year-old girl was beyond grief and her parents were understandably very upset. For two months this center had deceived this family, and essentially forced this girl into continuing her pregnancy." *Id.*

These delay tactics are often deliberate. "[S]ome girls are set up for procedures with appointments, only to have these appointments canceled and rescheduled time and time again, in an attempt to prolong the process past a point when a woman can have access to a real and safe abortion procedure by a licensed provider." N.Y.C. J.A. at 649; *see also* Balt. J.A. at 180 (describing similar practices). Some pregnancy centers wait to transfer patients out of their care until the pregnancy is at "20-24 weeks, because the center knows that the patient can no longer terminate the pregnancy."[17] A pregnancy center told a 15-year-old who was 21 weeks pregnant that "she was too far along" for an abortion, a false statement. N.Y.C. J.A. at 656, 660. A different pregnancy center told a patient that she had "weeks" to make her decision, even

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[17] Letter from Muntu Davis, Cnty. Health Officer, and Kiko Malin, Dir., Family Health Servs. Div., Alameda Cnty., Cal., to Oakland City Council Members (June 26, 2016), https://oakland.legistar.com/View.ashx?M=F&ID=4568298&GUID=949F4B1B-3B0E-46B9-9451-77E4D44ADD98 [heareinafter Alameda Cnty. Health Services Letter] (describing pregnancy center advertising in low-income neighborhoods).

though she "only had 10 days in which she was legally able to seek termination."[18]

These deceits also delay access to prenatal care. In one instance, a pregnancy center delayed a patient's care, "asking her to return for subsequent visits until she was well into her second trimester." *S. Comm. WAM Hearing on S.B. 501* at 46-47. "Unfortunately the patient had a serious medical condition and this delay of care resulted in additional risks to her and the pregnancy. These risks could have been decreased had she actually received prenatal care in the first trimester." *Id.*[19]

F. Pregnancy Center Clients Are Often Vulnerable To Deception

Women who go to pregnancy centers are sometimes experiencing emotional and physical stress that makes them especially susceptible to deception. S.F., Cal., Admin. Code § 93.2(8). Domestic violence

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[18] *Relating to Health: Hearing on H.B. 663 Before the H. Comm. on Health*, 29th Leg. 55-56 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/HB663_TESTIMONY_HLT_02-02-17_.PDF (Testimony of Katelyn Stevens, PA-C).

[19] *See also Comments and Documents Relating to Disclosure of Information by Limited Service Pregnancy Centers: Hearing on BOH-17-04 Before the Bd. of Health*, King Cnty. Bd. of Health at 81 (King Cnty., Wa. 2017), https://mkcclegisearch.kingcounty.gov/View.ashx?M=F&ID=5452607&GUID=F536D4AF-3F70-468D-B9CB-39FBE35565D2 (noting that inaccurate dating led a patient to "delay[ ] her prenatal care for months because she was devastated because she thought the father of her baby was her ex.").

increases in frequency and severity when women are pregnant, and between four and nine percent of pregnant women are abused by their spouses or partners. N.Y.C. J.A. at 320. Many pregnancy center clients are vulnerable for additional reasons, including their age, economic status, and lack of literacy. Balt. J.A. at 712. These women "have even less general knowledge and access to accurate reproductive health information than other consumers." *Id*. One New York City care provider testified:

> I work in the south Bronx and many of the patients that we serve are low income. Some of them may have Medicaid, but in general I would say it's a population that experiences a lot of barriers to accessing medical care. So in that way, I think that these centers are particularly coercive because they prey on someone's lack of health literacy, lack of access to care. So these people are very desperate, especially if it's a young woman experiencing an unwanted pregnancy. Maybe she's in an abusive relationship. These women are in crisis and they're desperate for help.

N.Y.C. J.A. at 342-43.[20]

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[20] *See also* Alameda Cnty. Health Services Letter; *Relating to Health: Hearing on S.B. 501 Before the S. Comms. on Commerce*, Consumer Protection & Health and on Judiciary and Labor, 29th Leg. 1-2 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/SB501_TESTIMONY_CPH-JDL_02-03-17_LATE.PDF (stating that pregnancy centers "disproportionately target teenagers, young women and women without easy access to actual medical services").

II. Pregnancy Center Disclosure Laws Should Be Evaluated Under The Same Standard As Other Reproductive Health Disclosure Laws

With the FACT Act, California has made the legislative judgment that the need for accurate information about care and services during pregnancy is particularly acute, and has tailored disclosure requirements to address that need. Its legislative response is analogous to the judgments that many other states have made that women should be advised of the risks of abortion, and this Court should apply the same standard to the FACT Act as it has applied to other reproductive health disclosure laws.

In *Planned Parenthood v. Casey*, this Court upheld a Pennsylvania statute requiring abortion providers to give verbal disclosures about the risks of abortion and the gestational age of the fetus, as well to offer state handouts listing agencies that offer pregnancy assistance and abortion alternatives. 505 U.S. 833 (1992). In the 25 years since *Casey*, over 30 states have enacted laws requiring doctors or medical facilities to make pre-abortion disclosures to patients.[21] Many of these

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[21] *See* Ala. Code § 26-23A-4; Alaska Stat. §§ 18.16.060, 18.05.032; Ariz. Rev. Stat. Ann. § 36-2153; Ark. Code Ann. §§ 20-16-1703 to 20-16-1705; Conn. Gen. Stat. § 19a-601; Fla. Stat. §§ 390.0111(3), 390.025; Ga. Code Ann. §§ 31-9A-3 to 31-9A-4; Idaho Code Ann. § 18-609; Ind. Code § 16-34-2-1.1 (§ 16-34-2-1.1(a)(1)(K), *invalidated by Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017), *appeal filed*, No. 17-3163 (7th Cir. Oct. 19, 2017)); Kan. Stat. Ann. §§ 65-6709 to 65-6710; Ky. Rev. Stat. Ann. §§ 311.725, 311.727, *invalidated by EMW Women's Surgical Ctr., P.S.C. v. Beshar*, ___ F. Supp. 3d ___, 2017 WL 4288906 (W.D. Ky. Sept. 27,

laws neatly mirror the FACT Act, requiring abortion-performing physicians to disclose state resources for maternity care and social services.[22] Arkansas, for example, requires distributing handouts that include "[g]eographically indexed materials that inform a pregnant woman seeking an abortion of public and

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2017), *appeal filed EMW Women's Surgical Ctr., P.S.C. v. Beshar*, No. 17-6183 (6th Cir. Oct. 12, 2017); La. Rev. Stat. Ann. §§ 40:1061.15 to 40:1061.17; Me. Rev. Stat. tit. 22, §§ 1597-A, 1599-A; Mich. Comp. Laws § 333.17015; Minn. Stat. §§ 145.4242-145.4243; Miss. Code Ann. §§ 41-41-33, 41-41-35; Mo. Rev. Stat. §§ 188.027, 188.039; Neb. Rev. Stat. §§ 28-327 to 28-327.01 (provisions requiring disclosure of risk factors of abortion procedures held likely to violate First Amendment and enjoined in *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010)); Nev. Rev. Stat. § 442.253; N.C. Gen. Stat. §§ 90-21.82, 90-21.83, 90-21.85; N.D. Cent. Code §§ 14-02.1-02 to 14-02.1-02.1; Ohio Rev. Code Ann. §§ 2317.56, 2919.192; Okla. Stat. tit. 63, §§ 1-738.2, 1-738.3, 1-746.2, 1-746.3; R.I. Gen. Laws § 23-4.7-3; S.C. Code Ann. §§ 44-41-330, 44-41-340; S.D. Codified Laws §§ 34-23A-10.1, 34-23A-10.3 (upheld on First Amendment challenge in *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (*en banc*); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (*en banc*)); Tex. Health & Safety Code Ann. §§ 171.012, 171.0123, 171.013, 171.015 (upheld on First Amendment challenge in *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012)); Utah Code Ann. §§ 76-7-305, 76-7-305.5, 76-7-305.6; Va. Code Ann. § 18.2-76; W. Va. Code §§ 16-2I-2–16-2I-3; Wis. Stat. § 253.10.

[22] The State of Texas unsuccessfully tries to distinguish these as informed consent laws "giving a patient information to assess the risks and consequences of a procedure a doctor in a certain medical facility is about to perform." *See* Br. of Amicus Curiae State of Texas, *et al.* Supporting Petitioner, at 3. But at least eighteen of these laws have provisions that mirror the FACT Act by providing women with information about state-funded abortion alternatives, not medical information about abortion procedures. *See infra* n.25.

private agencies and services available to assist her through pregnancy, upon childbirth, and while her child is dependent, including without limitation adoption agencies."[23] Ark. Code Ann. § 20-16-1704. Alaska requires abortion providers to give patients "information concerning the eligibility for medical assistance benefits for prenatal care, childbirth, neonatal care, abortion services, women's health care, and contraception" and "geographically indexed material designed to inform a person of public and private agencies, services, clinics, and facilities that are available to assist a woman with the woman's reproductive choices," including entities providing or assisting with adoption services, counseling, and contraceptive options. Alaska Stat. §§ 18.05.032(a)(1)-(3), 18.16.060(b). In South Dakota, at least 24 hours prior to the abortion procedure, doctors must verbally inform patients "that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care" and "the name, address, and telephone number of a pregnancy help center in reasonable proximity of the abortion

[23] The Arkansas disclosure also mandates the following statement: "There are many public and private agencies willing and able to help you to carry your child to term and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The State of Arkansas strongly urges you to contact one or more of these agencies before making a final decision about abortion. The law requires that your physician or his or her agent give you the opportunity to call agencies like these before you undergo an abortion." *See also* Ohio Rev. Code Ann. §§ 2317.56(B)(2)(b), 2317.56(C)(1) (similar).

facility where the abortion will be performed."[24] S.D. Codified Laws § 34-23A-10.1(2)(a), (c). In total, at least 18 states require abortion providers to give patients seeking abortions information or written materials about agencies that are available to assist women during pregnancy, childbirth, and beyond.[25] Depending on the state, these materials may include contact information for agencies that offer ultrasounds, adoption services, family planning and natural family planning, and limited-service pregnancy centers.

Some states require disclosures about other reproductive health matters. California and Arizona, for example, require factual disclosures before egg donation. *See* Cal. Health & Safety Code § 125335; Ariz. Rev. Stat. Ann. § 36-1702. At least seven states require doctors to provide specific disclosures to mammogram

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[24] Texas's requirements are quite similar. *See* Tex. Health & Safety Code Ann. §§ 171.012(a)(2)-(3), 171.014(a)(2), 171.015(1)(a); *see also* 18 Pa. Cons. Stat. §§ 3205(2)-(3), 3208(a)(1).

[25] *See* Alaska Stat. §§ 18.05.032(a)(1)-(3), 18.16.060(b); Ark. Code Ann. § 20-16-1704; Ga. Code Ann. §§ 31-9A-3(2)(C)-(D), 31-9A-4(a)(1)-(1.1); Idaho Code Ann. § 18-609(2), (4); Kan. Stat. Ann. §§ 65-6709(b)(2), 65-6710(a)(1); Ky. Rev. Stat. Ann. § 311.725(1)(b)(1), (2)(a); Minn. Stat. §§ 145.4242(a)(2)(iii), 145.4243(a)(1); Miss. Code Ann. §§ 41-41-33(1)(b)(iv), 41-43-35(1)(a); Neb. Rev. Stat. § 28-327(1)(a), (2)(d); N.D. Cent. Code §§ 14-02.1-02(11)(b)(1)-(2), 14-02.1-02.1(1)(a); Okla. Stat. tit. 63, §§ 1.738.2(B)(1)(a)(5), 1.738.3(A)(1)(a); 18 Pa. Cons. Stat. §§ 3205(2)-(3), 3208(a)(1); S.C. Code Ann. §§ 44-41-330(A)(2), 44-41-340(A)(1); S.D. Codified Laws § 34-23A-10.1(2)(a), (c); Utah Code Ann. §§ 76-7-305(2)(a), 76-7-305.5(2)(g)-(k); Va. Code Ann. § 18.2-76(D)(5), (F)(1); W. Va. Code §§ 16-2I-2(b)(3)-(4), 16-2I-3(a)(1); Wis. Stat. § 253.10(c)(1)(L)(d), (d)(1).

patients about breast tissue density,[26] at least five states require that patients be informed about alternative treatments for breast cancer,[27] and Texas requires midwives to provide written disclosures in Spanish and English related to the limitations of midwifery practice. *See* Tex. Occ. Code § 203.351. While many of these disclosures are linked to specific medical procedures, some are not. Missouri, for example, requires health facilities to disclose in the event of a miscarriage that the patient has a right to determine the disposition of the fetus. *See* Mo. Rev. Stat. § 194.387.

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[26] California, Connecticut, Illinois, New York, Texas, Utah, and Virginia require specific notice be given post-mammogram regarding breast density; each state specifies in a script the particular language to be given. *See* American College of Obstetricians and Gynecologists (ACOG), *State Legislative Mandates: Mammography & Breast Density* (2012), http://www.leg.state.nv.us/Session/77th2013/Exhibits/Senate/HHS/SHHS1054W.pdf (detailing state legislative efforts to require disclosure to women with dense breast tissue).

[27] *See, e.g.*, Cal. Health & Safety Code § 109275(b), (c)(1) (failure to inform patients in writing of alternative treatments for breast cancer is unprofessional conduct; state officials must develop standard disclosure form); Cal. Health & Safety Code § 109280 (requiring state officials to develop written disclosure form for alternative treatments for prostate cancer and urging physicians to disclose that information to patients); Fla. Stat. Ann. § 458.324; La. Rev. Stat. Ann. § 40:1103.4 (requiring discussion of alternative methods of treating breast cancer); Me. Rev. Stat. tit. 24, § 2905-A (requiring information be provided, orally and in writing, about alternative efficacious methods of treatment of breast cancer); Mich. Comp. Laws § 333.17513 (requiring doctor to inform breast cancer patients, orally and in writing, about alternative methods of treatment of the cancer).

These reproductive health disclosure laws do not violate the First Amendment by regulating some speakers but not others. The same is true of the FACT Act. Contrary to Petitioners' argument, Pet'rs' Br. 31-39, regulations that apply to pregnancy centers are not *ipso facto* viewpoint discrimination. Even assuming that all pregnancy centers oppose abortion, "[t]hat petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the [regulations]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994). As the Court recognized in *McCullen*, 134 S. Ct. at 2532, a legislature faced with a limited problem may reasonably enact a limited solution. "When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *Id.* Thus, *McCullen* held that a buffer zone law did not discriminate by viewpoint, even though it applied only to abortion clinics, and not to other healthcare facilities. *Id.* In other contexts as well, the Court recognizes that "policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). The Court has "accordingly upheld laws – even under strict scrutiny – that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.*

Further, so long as disclosure laws simply require a commercial speaker to provide "purely factual and uncontroversial information," they are subject to less

exacting scrutiny. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *accord Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010). By their nature, these laws compel regulated entities to convey messages they likely would not otherwise speak, and that are often contrary to the success of the entity.[28] Yet because disclosure regulations normally have only a "minimal" effect on First Amendment interests, they need only be "reasonably related to the State's interest." *Zauderer*, 471 U.S. at 651.

The straightforward *Zauderer* analysis should apply to this case, and under that test the California FACT Act easily survives review. Pregnancy centers are commercial speakers,[29] and the FACT Act

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[28] *See, e.g.*, 15 U.S.C. § 1333 (labeling requirements for cigarettes, including "Smoking can kill you"); La. Rev. Stat. Ann. § 27.249 (requiring casinos to post notices about resources for compulsive gamblers); S.C. Code Ann. § 40-83-30 (requiring non-lawyers who provide immigration services to post notices that they are not lawyers).

[29] *Amici* agree with the United States that *Zauderer* should apply regardless of whether the regulated entity charges for services. *See* Br. Amicus Curiae of United States Supporting Neither Party at 20 [hereinafter SG Brief]. There is no dispute that pregnancy centers provide commercially valuable services to their clients, and the First Amendment inquiry should not turn on whether a medical clinic charges directly for its services, offers them subject to insurance or government reimbursement, or funds them through corporate or individual third party donations. Such a rule would threaten to insulate pro bono service providers from regulation, and thus jeopardize the ability of governments to protect the most vulnerable of their residents from unsavory or unsafe practices.

disclosures are purely factual statements that relate to their actual or perceived practice of medicine.[30] The disclosure for licensed facilities states that public programs offer free or low-cost reproductive health care services – an undisputed fact – and provides a county telephone number for accessing those services. This notice directly advances the State's "strong interest in protecting a woman's freedom to seek medical and counseling services in connection with her pregnancy." *Madsen*, 512 U.S. at 767. The disclosure for unlicensed clinics is even simpler, merely informing clients that the clinic is not a licensed medical facility. This kind of requirement to disclose professional status survives any level of scrutiny. *See Riley v. Nat'l Federation of the Blind of N. C., Inc.*, 487 U.S. 781, 799 n.11 (1988); *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249 (2d Cir.), *cert. denied*, 135 S. Ct. 435 (2014); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189-90 (4th Cir. 2013).

Finally, there is no merit to the United States' suggestion that a different standard should apply here because abortion is "controversial."[31] As used in *Zauderer*, the word "uncontroversial" modifies "information" and refers to the facts required by the disclosure. It is these *facts* that must be uncontroversial – or

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[30] This provides an independent basis for upholding the disclosures, which are "reasonable . . . regulation by the State" of "the practice of medicine," *Casey*, 505 U.S. 884, both with respect to licensed practitioners and to unlicensed ones who are deceiving patients about their qualifications.

[31] *See* SG Br. at 24 (describing federal statutes requiring written or posted disclosures).

objectively accurate – not the broader subject of the law. *See Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) ("[W]hether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information . . . not on whether the disclosure emotionally affects its audience or incites controversy."). The logic of *Zauderer* does not depend on whether the subject of the law is controversial; a pregnancy center has the same "minimal" interest in withholding information about the scope of services it provides, or whether the state offers free services elsewhere, as any other speaker who is offering commercially valuable goods or services to the public. *See Zauderer*, 471 U.S. at 651. Accordingly, this Court should not adopt a more stringent standard for factual disclosures merely because they may occur in a broader context that carries political sensitivities.

Amici urge the Court to maintain a consistent standard for evaluating mandatory disclosures by facilities that serve pregnant patients. The same standard should apply, regardless of whether it is imposed on providers who offer abortions or those who do not. And the standard should not change based on the perceived political sensitivity of the disclosure. Such a test is not only unwarranted for commercial speech but would put courts in the untenable position of deciding which topics are too politically sensitive for regulation. The United States' proposed rule is unworkable at best, and creates more constitutional problems than it solves.

Further, the FACT Act survives constitutional review, regardless of the level of scrutiny applied. As *amici*'s records demonstrate, pregnancy centers frequently deceive pregnant women and impede their ability to see other service providers. Pregnant women have a short period of time to make life-altering decisions, "[a]nd the more [they] know, the better decisions can be made." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011). The FACT Act disclosures advance California's compelling interests in combating consumer deception, protecting public health, and promoting informed decision-making, and they should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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