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Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive FACT Act

Beth Holtzman*

INTRODUCTION

On October 9, 2015, California Governor Jerry Brown signed Assembly Bill (AB) 775, otherwise known as the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act.¹ The FACT Act imposes mandatory disclosure regulations on all crisis pregnancy centers (CPCs) throughout California,² requiring them to post notices with information about free or low-cost reproductive services in the State, and whether the CPC is a licensed medical facility.³ Within days, the Pacific Justice Institute⁴ and the Alliance Defending Freedom⁵—two prominent conservative legal defense organizations—filed lawsuits on behalf of several CPCs, alleging that the FACT Act violates the CPCs' rights to freedom of speech and the free exercise of religion,⁶ as protected by the First Amendment of the U.S. Constitution.⁷ Federal courts in the Eastern and Southern Districts of California denied the CPCs' motions for preliminary injunctions and the FACT Act took effect on January 1, 2016.⁸ In October 2016, the Ninth Circuit Court of

* J.D., Northwestern University School of Law, 2017; B.A., University of California, Berkeley, 2013. I would like to thank the editors of the *Northwestern Journal of Law and Social Policy*, for their immense support and assistance throughout the publication process, as well as my parents, family, and friends.

¹ See CAL. HEALTH & SAFETY CODE §§ 123470-123473 (2015); see also, e.g., *Governor Jerry Brown Signs the Reproductive FACT Act*, ASSEMBLY MEMBER DAVID CHIU (Oct. 9, 2015), <https://a17.asmdc.org/press-release/governor-jerry-brown-signs-reproductive-fact-act>; *Governor Brown Issues Legislative Update*, OFF. OF GOVERNOR EDMUND G. BROWN JR. (Oct. 9, 2015), <https://www.gov.ca.gov/news.php?id=19160>.

² Erwin Chemerinsky, *In California, Free Speech Meets Abortion*, L.A. TIMES (Oct. 16, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-1016-chemerinsky-reproductive-fact-act-20151016-story.html>.

³ *Infra* Part IV.

⁴ See *About Us*, PAC. JUSTICE INST., <http://www.pacificjustice.org/about-us.html> (last visited Dec. 13, 2015).

⁵ See *Who We Are*, ALL. DEFENDING FREEDOM, <http://www.adflegal.org/about-us/who-we-are> (last visited Dec. 13, 2015).

⁶ See Verified Complaint for Declaratory & Injunctive Relief at 13–14, *A Woman's Friend Pregnancy Res. Clinic v. Harris*, No. 2:15-at-02122 (E.D. Cal. Oct. 10, 2015) [hereinafter PJI Complaint]; Verified Complaint for Declaratory, Injunctive & Other Relief at 22, 26, *Nat'l Inst. of Family & Life Advocates v. Harris*, No. 3:15-cv-2277 (S.D. Cal. Oct. 13, 2015) [hereinafter ADF Complaint].

⁷ See U.S. CONST. amend. I.

⁸ *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 2:15-cv-02122 (E.D. Cal. 2015); *Nat'l Institute of Family and Life Advocates v. Harris*, No. 3:15-cv-02277 (S.D. Cal. 2016).

Appeals affirmed the District Courts' decisions.⁹ Despite these legal setbacks, CPCs are still vehemently challenging the constitutionality of the FACT Act.¹⁰

Since 2009, four cities and one county have passed similar ordinances attempting to regulate CPCs through mandatory disclosure requirements.¹¹ Although most of these laws were struck down for purportedly violating CPCs' freedom of speech and free exercise of religious rights,¹² it is likely that California's Reproductive FACT Act will continue to withstand these constitutional challenges because of features of the FACT Act that distinguish it from the other similar ordinances.¹³ The FACT Act successfully addresses the shortcomings of the previous legislation and was drafted to survive First Amendment challenges.¹⁴

Mandatory disclosure requirements are crucial because CPCs' conduct and practices implicate public health concerns, infringe upon women's reproductive rights and bodily autonomy, and contribute to inequality with regard health care access.¹⁵ Additionally, if California's FACT Act continues to be upheld as constitutional, it has the potential to have far-reaching impacts—setting the precedent for mandatory disclosure ordinances of CPCs on the statewide level and ushering in greater regulations of CPC practices across the United States.¹⁶

Part I will provide background information on CPCs. Part II will explain why CPCs' dissemination of false information and deceptive practices are so troubling. Part III will summarize the legislative history of previous mandatory disclosure ordinances, followed by Part IV, which will discuss the provisions of California's Reproductive FACT Act. In Part V, I will present the main arguments from the recent lawsuits challenging the FACT Act. Part VI is an analysis of the allegation that California's AB 775 violates CPCs' freedom of speech rights. For this section, I will discuss the legal framework the Ninth Circuit utilized for assessing the constitutionality of the mandatory disclosure ordinances, and provide additional arguments based on the legislative histories of prior mandatory disclosure ordinances. Part VII will examine CPCs' claims regarding free exercise of religion. Finally, Part VIII will consider important policy implications and why it is crucial that California's FACT Act survive these constitutional challenges.

I. BACKGROUND ON CPCs

A. *What is a CPC?*

Crisis Pregnancy Centers (CPCs), also known as Limited Service Pregnancy Centers or Pregnancy Resource Centers, are pro-life, non-profit organizations that provide counseling and

⁹ NIFLA v. Harris, No. 16-55249 (9th Cir. Oct. 16, 2016); A Women's Friend Pregnancy Resource Clinic v. Harris, No. 15-17517 (9th Cir. Oct. 16, 2106).

¹⁰ See Appellants Petition for Rehearing and Rehearing en banc, NIFLA v. Harris, No. 16-55249 (9th Cir. Oct. 28, 2016); See Appellants Combined Petition for Rehearing Panel Rehearing and Petition for Rehearing en banc, A Woman's Friend Pregnancy Resource Clinic, No. 15-17517 (9th Cir. Oct. 26, 2016).

¹¹ BALT. MD. HEALTH CODE §§3-501-3-505 (2009); MONTGOMERY CNTY., MD. COUNCIL RES. § 16-1252 (2010); N.Y.C. ADMIN. CODE §§ 20.815-20.816 (2011); AUSTIN, TEX., CITY CODE CH. §10-10 (2012); S.F. ADMIN. CODE. CH.93 §§ 93.1-93.5 (2011).

¹² See *infra* Part III.

¹³ See *infra* Part VI.

¹⁴ See *infra* Part VI.

¹⁵ See *infra* Part VIII.

¹⁶ See *infra* Part VIII.

limited pregnancy services to women, usually free of charge.¹⁷ According to the Waxman Report, a 2006 U.S. House of Representatives report prepared for Rep. Henry Waxman (D-CA), the purpose of CPCs is “to persuade teenagers and women with unplanned pregnancies to choose motherhood or adoption.”¹⁸

Most CPCs have Christian foundations and are affiliated with and often funded by prominent anti-abortion organizations.¹⁹ The three primary pro-life institutions orchestrating CPC networks are Care Net, Heartbeat International, and the National Institute of Family and Life Advocates (NIFLA).²⁰ These umbrella organizations are explicit about their missions. For example, NIFLA’s website proclaims the organization’s vision is to provide CPCs with “legal resources and counsel to develop a network of life-affirming ministries in every community across the nation,” and to “work toward an abortion free America.”²¹ Similarly, Heartbeat International’s official mission statement is to “make abortion unwanted today and unthinkable for future generations.”²²

Unlike their parent organizations, CPCs are misleading about their underlying intentions. CPCs are deceptive about the services they appear to provide (or rather do not provide), mask their pro-life values, and engage in various tactics in order to bring unsuspecting women to their doors.²³ Typically, pregnant women who visit a CPC are only presented with two options: parenting or adoption.²⁴ In other words, leaving them with only one option: continuing the pregnancy. If CPCs do discuss abortion as an option with their clients, those women are inundated with unreliable and egregiously misleading information about abortion procedures and the risks involved.²⁵ Thus, women who visit CPCs will either not be aware of the full spectrum of choices, or will have received biased information about those options—undermining their ability to make informed decisions about their reproductive health.²⁶

¹⁷ CASEY WATTERS ET AL., CTR. FOR STATE & LOCAL GOV’T LAW, U.C. HASTINGS COLLEGE OF THE LAW, PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 4 (2015) [hereinafter U.C. HASTINGS REP.]; see also Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, PERSP. ON SEXUAL & REPRO. HEALTH, 44:3 201, 201 (2012).

¹⁸ COMM. ON GOV’T REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, Prepared for Rep. Henry A. Waxman 1 (July 2006) [hereinafter WAXMAN REP.].

¹⁹ Rosen, *supra* note 17.

²⁰ NARAL PRO-CHOICE CAL. FOUND., UNMASKING FAKE CLINICS: THE TRUTH ABOUT CRISIS PREGNANCY CENTERS IN CALIFORNIA 5 (2010), available at: <http://www.prochoicecalifornia.org/assets/bin/pdfs/cpcreport2010-revisednov2010.pdf> [hereinafter NARAL California CPC Report 2010].

²¹ *Missions and Vision*, NAT’L INST. OF FAMILY & LIFE ADVOCATES, <http://www.nifla.org/about-us-mission-and-vision.asp> (last visited Nov. 20, 2015).

²² *Our Passion*, HEARTBEAT INT’L, <https://www.heartbeatinternational.org/about/our-passion> (last visited Nov. 20, 2015).

²³ *Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom*, NARAL PRO-CHOICE AM. 2–3 (2015), <http://www.prochoiceamerica.org/assets/download-files/cpc-report-2015.pdf> [hereinafter NARAL CPCs Lie, on file with author].

²⁴ NARAL California CPC Report 2010, *supra* note 20, at 12.

²⁵ See NARAL California CPC Report 2010, *supra* note 20, at 4, 12; see also WAXMAN REP., *supra* note 18, at 7–14.

²⁶ See NARAL California CPC Report 2010, *supra* note 20, at 12. CPCs “present[] only the options that are consistent with their anti-choice agenda...to ensure that the women they counsel do not consider ending their pregnancies”.

B. History

The exact origin of CPCs is disputed; however, many credit Robert Pearson as the founder.²⁷ In 1967, Pearson opened a CPC in Hawaii, after the Hawaiian legislature repealed the state's law criminalizing abortion.²⁸ A few years later, Pearson moved to St. Louis and established the Pearson Foundation, an organization that assists people who are interested in starting a CPC.²⁹ The Pearson Foundation provides these groups with training sessions, pamphlets, and a manual entitled *How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center*, which outlines several deceptive practices used by CPCs.³⁰ This manual is still in use today.³¹ The ninety-three-page handbook explains various methods of misleading women and instructions on how to falsely portray CPCs as abortion providers.³² For example, the guide advises that “there is nothing wrong or dishonest if you don't want to answer a question that may reveal your pro-life position.”³³ Pearson publicly admitted to the deceptive nature of CPCs. For instance, in a 1994 speech, Pearson stated “obviously, we're fighting Satan . . . [a] killer, who in this case is the girl who wants to kill her baby, has no right to information that will help kill her baby. Therefore, when she calls and says, ‘Do you do abortions?’ we do not tell her, ‘No we don't do abortions.’”³⁴

Other contingencies consider the organization Birthright International as the founder of CPCs.³⁵ In 1968, Birthright International opened its first center in Canada and shortly thereafter began opening centers in the United States.³⁶ In 1973, the seminal U.S. Supreme Court decision *Roe v. Wade*, which recognized a woman's constitutionally protected right to abortion, ignited anti-abortion sentiment, mobilizing efforts to provide pro-life-oriented pregnancy-related services to women.³⁷ Throughout the 1980s and 1990s, CPCs continued to grow, due in part to financial support from pro-life institutions, including the Christian Action Council (now known as “Care Net”) and NIFLA.³⁸ NIFLA was created to provide legal advice and consultation to pregnancy centers and instigated the movement toward medically licensed centers.³⁹ Another reason for the exponential growth in the 1990s was the involvement of Focus on Family, an Evangelical Christian organization founded by James Dobson, which provided “high-quality, research-supported educational resources” and other materials CPCs were not able to produce on their own.⁴⁰

²⁷ Dawn Stacey, *The Pregnancy Center Movement: History of Crisis Pregnancy Centers*, CRISIS PREGNANCY CTR. WATCH, <http://www.motherjones.com/files/cpchistory2.pdf> (last visited Nov. 21, 2015).

²⁸ Alice X. Chen, *Crisis Pregnancy Centers: Impeding the Right to Informed Decision Making*, 19 CARDOZO J.L. & GENDER 933, 935 (2013); see also *Hawaii: Did you Know?*, NARAL PRO-CHOICE AM. (Dec. 13, 2015), <http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/did-you-know/hawaii.html>.

²⁹ Stacey, *supra* note 27.

³⁰ *Id.*

³¹ *Id.*; Tina Dupuy, *Babies & Bibles*, Pasadena Weekly (Apr. 16, 2009), (<https://www.pasadenaweekly.com/2009/04/16/babies-bibles/>).

³² Stacey, *supra* note 27.

³³ *Id.*

³⁴ *Id.*

³⁵ FAMILY RES. COUNCIL, A PASSION TO SERVE, A VISION FOR LIFE: PREGNANCY RESOURCE CENTER SERVICE REPORT 2009 6 (2009) <http://downloads.frc.org/EF/EF09I51.pdf> [*hereinafter* FAMILY RES. COUNCIL REP.].

³⁶ *Id.* at 6.

³⁷ *Id.* at 7.

³⁸ Stacey, *supra* note 27.

³⁹ FAMILY RES. COUNCIL REP., *supra* note 35, at 7.

⁴⁰ *Id.* at 7–8.

Prior to the year 2000, CPCs received little to no federal funding.⁴¹ Between the years 2001 and 2005, President George W. Bush increased government spending on “abstinence-only” programs, allocating an estimated \$30 to \$60 million for CPCs.⁴² According to a Washington Post review of federal records, by 2006 CPCs had received approximately \$60 million in federal abstinence and marriage-promotion funding.⁴³ Other sources of federal and state funding include direct allocations or tax credits in state budgets and funds from “choose life” license plates sales.⁴⁴

As of November 2016, twenty-seven states have laws supporting CPCs, fourteen states fund CPCs directly, and twenty-one states refer women to CPCs.⁴⁵ In fact, a law in South Dakota actually requires a woman to receive “options counseling” at a CPC *before* visiting an abortion provider.⁴⁶

C. Modern CPCs

There are approximately 2,500 CPCs in the United States today.⁴⁷ The exact number is unknown because many CPCs are often affiliated with more than one pro-life organization.⁴⁸ According to their websites, Care Net has a network of over 1,180 CPCs,⁴⁹ Heartbeat International has over 1,800 CPCs,⁵⁰ and NIFLA oversees at least 1,350 CPCs.⁵¹ In contrast, the Guttmacher Institute⁵² estimates that as of 2011, there were approximately 1,720 abortion providers in the

⁴¹ Kirsten Gallacher, *Protecting Women from Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 WOMEN’S RIGHTS L. REP. 113, 122 (2012).

⁴² WAXMAN REP., *supra* note 18, at 3–4. Between 2001 and 2006, over \$30 million in federal funds went to CPCs. CPCs received \$24 million came from Community-Based Abstinence Education (CBAE) funds, at least \$6 million in abstinence funding under Section 510 of Title V, funding from specific congressional earmarks, including “counseling and pregnancy support services,” and about \$1 million through the “Compassion Capital Fund”.

⁴³ Thomas E. Edsall, *Grants Flow to Bush Allies on Social Issues*, WASH. POST (Mar. 22, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/03/21/AR2006032101723_pf.html (according to the Washington Post’s review of federal records, CPCs received approximately \$60 million in federal abstinence and marriage-promotion funding).

⁴⁴ Stacey, *supra* note 27. *See e.g.*, Laura Bassett, *Jeb Bush to Visit Crisis Pregnancy Center*, HUFFINGTON POST (July 21, 2015), http://www.huffingtonpost.com/entry/jeb-bush-to-visit-crisis-pregnancy-center_us_55ae8335e4b0a9b94852a64c (In 2005, Florida Governor Jeb Bush began a \$2 million per year program, to support over a 100 crisis pregnancy centers that promoted “life affirming choices” for women).

⁴⁵ NARAL PRO-CHOICE AM., WHO DECIDES? THE STATUS OF WOMEN’S REPRODUCTIVE RIGHTS IN THE US 17 (2017), available at: <https://www.prochoiceamerica.org/wp-content/uploads/2017/01/WhoDecides2017-DigitalEdition3.pdf>. (hereinafter NARAL Who Decides?).

⁴⁶ NARAL PRO-CHOICE AM., THE TRUTH ABOUT CRISIS PREGNANCY CENTERS 10 (2015) [hereinafter NARAL The Truth About CPCs]. This law was challenged and never implemented.

⁴⁷ Pam Belluck, *Crisis Pregnancy Centers Gain Influence in Anti-Abortion Arena*, NY TIMES (Jan. 3, 2013), available at: http://www.nytimes.com/2013/01/05/health/pregnancy-centers-gain-influence-in-anti-abortion-fight.html?_r=0&pagewanted=all. *See also* Victoria Lin and Cynthia Dailard, *Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy*, 5 THE GUTTMACHER REP. ON PUB. POLICY 4, 4 (2002) (estimating there are between 2,500 and 4,000 CPCs in the US).

⁴⁸ Chen, *supra* note 28, at 937. Additionally, there are a few CPCs that are not affiliated with any of the three prominent pro-life umbrella organizations.

⁴⁹ *Care Net Impact Report*, CARE NET, <http://cdn2.hubspot.net/hub/367552/file-2184494817-pdf/ImpactReport-12-4-2014.pdf?t=1447705593024> (last updated Dec. 4, 2014).

⁵⁰ *Our Story*, HEARTBEAT INT’L, <https://www.heartbeatinternational.org/about/our-story> (last visited Nov. 20, 2015).

⁵¹ *What we do*, NAT’L INST. OF FAMILY & LIFE ADVOCATES, <http://www.nifla.org/about-us-what-we-do.asp> (last visited Nov. 20, 2015).

⁵² The Guttmacher Institute is a non-profit organization which “advance[s] sexual and reproductive health through an interrelated program of research, policy analysis, and public education.” *About the Guttmacher Institute*, THE GUTTMACHER INST., <https://www.guttmacher.org/about/> (last visited Dec. 11, 2015).

United States.⁵³ CPCs significantly outnumber abortion providers in the United States, by a ratio of at least two to three CPCs to each abortion provider.⁵⁴ However, this number does not reflect the fact that less than half of these providers are clinics, which administer over 90% of abortion procedures.⁵⁵ According to research conducted by NARAL Pro-Choice America,⁵⁶ in May and June of 2014, there were only 438 abortion clinics in the United States.⁵⁷ Thus, the number of abortion clinics in the United States may be more indicative of the jarring disparity between one's ability to access abortions and the number of CPCs: up to 2,500 CPCs compared with only 438 abortion clinics.⁵⁸

D. The "Medicalization of CPCs"

Most CPCs are unlicensed facilities and are staffed by volunteers who are not licensed medical professionals.⁵⁹ Nonetheless, many of these unlicensed facilities will adopt the "appearance" of an unbiased, comprehensive health care clinic.⁶⁰ For instance, many CPCs require clients to fill out paperwork upon arrival, or center volunteers and staff to wear white lab coats or medical scrubs.⁶¹ These unlicensed establishments cannot legally provide medical services and instead focus primarily on counseling, having women take pregnancy tests, and in some cases conducting ultrasounds.⁶²

Recently, a growing number of CPCs have become legally licensed medical centers.⁶³ NARAL Pro-Choice America has published several reports investigating CPCs' practices.⁶⁴ According to a January 2015 NARAL report, at least 800 CPCs had converted to licensed medical centers.⁶⁵ This appearance of legitimacy masks CPCs' pro-life proclivities to an even greater extent than their unlicensed, volunteer-run counterparts. Before discussing the tactics CPCs use to bring women to their centers, it is important to explore why exactly CPCs are so problematic.

⁵³ Rachel K. Jones and Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, 46 PERSP. ON SEXUAL AND REPRO. HEALTH 1, 6 (2011).

⁵⁴ Meaghan Winter, Opinion, *The Stealth Attack on Abortion Access*, N.Y. TIMES (Nov. 12, 2015), http://www.nytimes.com/2015/11/12/opinion/the-stealth-attack-on-abortion-access.html?_r=1.

⁵⁵ Jones, *supra* note 53, at 4.

⁵⁶ See e.g., *About Us*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/about-us/> (last visited Dec. 14, 2015).

⁵⁷ NARAL CPCs Lie, *supra* note 23, at 19 (citing unofficial research conducted by NARAL PRO-CHOICE AM. in May & June 2014).

⁵⁸ See e.g., Molly Redden, *The War on Women is Over—And Women Lost*, MOTHER JONES, (Sept. 9, 2015), <http://www.motherjones.com/politics/2015/07/planned-parenthood-abortion-the-war-is-over> (stating that for the past two years, abortion clinics have been closing at a rate of 1.5 clinics per week).

⁵⁹ NARAL California CPC Report 2010, *supra* note 20, at 5.

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *Crisis Pregnancy Centers*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/what-is-choice/abortion/abortion-crisis-pregnancy-centers.html> (last visited Dec. 14, 2015). Many NARAL State affiliates have conducted investigations on CPCs in their state.

⁶⁵ NARAL The Truth About CPCs, *supra* note 46, at 2.

II. CPCs: DISSEMINATION OF FALSE INFORMATION AND DECEPTIVE PRACTICES

A. Medical Misinformation

Most CPCs provide false and misleading medical information.⁶⁶ For example, the Waxman Report found that 87% of the CPCs contacted during the course of the study provided erroneous medical information.⁶⁷ Common lies include exaggerated dangers of abortions, such as professing how an abortion significantly increases a woman's risk of breast cancer, can cause infertility, and can lead to serious mental health conditions, including "post-abortion syndrome."⁶⁸ Medical research does not support any of these alleged health risks.⁶⁹ In 2010, NARAL Pro-Choice California investigated fourteen CPCs and found that 85% of those CPCs told clients that abortion leads to mental health problems.⁷⁰

A majority of CPCs refuse to provide, or even discuss, contraception.⁷¹ However, the CPCs that do mention contraception or birth control typically do so with utterly inaccurate information about different forms of contraceptives.⁷² According to the American Public Health Association, CPCs disseminate false information about sexually transmitted infections and the effectiveness of contraceptives.⁷³ For instance, NARAL investigators discovered that several CPCs told women how using birth control "can lead to increased risk of breast cancer and infertility" and "condoms will not keep you safe."⁷⁴ Overall, the only form of contraception that most CPCs will endorse is abstinence,⁷⁵ which is particularly troubling because of the significant number of teenagers and young women who visit CPCs, including many who engage in sexual-behavior and are at risk of contracting sexually transmitted infections (STIs) and of becoming pregnant.⁷⁶

B. Attempts to Delay Potential Abortions

CPCs utilize various tactics in order to delay or interfere with a woman's ability to access timely reproductive health services.⁷⁷ This behavior is disconcerting given the time sensitivity of terminating a pregnancy.⁷⁸ Thus, women are often told incorrect information and miss the

⁶⁶ WAXMAN REP., *supra* note 18, at 7.

⁶⁷ *Id.*

⁶⁸ NARAL California CPC Report 2010, *supra* note 20, at 9.

⁶⁹ *Abortion, Miscarriage, and Breast Cancer Risk*, NAT'L CANCER INST. (Jan. 10, 2010), <http://www.cancer.gov/types/breast/abortion-miscarriage-risk> (Over 100 of the world's leading experts who study pregnancy and breast cancer risk concluded that having an abortion or miscarriage does not increase a woman's risk of developing breast cancer); *Mental Health and Abortion*, AM. PSYCHOLOGICAL ASS'N (2008), <http://www.apa.org/pi/women/programs/abortion/index.aspx> (The Task Force on Mental Health and Abortion found that women who had an unplanned pregnancy had no greater risk for mental health problems if they had a first-trimester abortion than if they carried the pregnancy to term).

⁷⁰ NARAL California CPC Report 2010, *supra* note 20, at 2.

⁷¹ Rosen, *supra* note 17, at 202–203.

⁷² Rosen, *supra* note 17, at 202–203.

⁷³ *Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers*, AM. PUB. HEALTH ASS'N (Nov. 1, 2011), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/22/08/33/regulating-disclosure-of-services-and-sponsorship-of-crisis-pregnancy-centers>.

⁷⁴ NARAL California CPC Report 2010, *supra* note 20, at 10.

⁷⁵ NARAL California CPC Report 2015, *supra* note 70, at 2.

⁷⁶ Rosen, *supra* note 17, at 203. (In one study, 33% of teenagers who had negative pregnancy tests at community clinics became pregnant within 18 months).

⁷⁷ NARAL CPCs Lie, *supra* note 23, at 12.

⁷⁸ *Id.*

opportunity to have an abortion during the first-trimester.⁷⁹ For example, the website for Los Angeles Pregnancy Services, a CPC, instructs women not to seek an abortion until they have “confirmed from an ultrasound that the pregnancy is viable.”⁸⁰ However, abortions are far more difficult to access, less safe, and are significantly more expensive after viability and after the first trimester has passed.⁸¹

CPCs also attempt to delay a woman’s ability to obtain a safe legal abortion by both exaggerating the number of pregnancies that end in natural miscarriages and by lying about gestational age.⁸² For instance, during the NARAL investigations, one CPC told women that induced abortion was not necessary because 30% to 50% of all pregnancies end in a miscarriage or a “spontaneous abortion.”⁸³ Other CPCs simply deceive women by telling them they are not far along in their pregnancy, hoping that the women will miss the window of opportunity for obtaining an abortion.⁸⁴

C. Additional Health Risks to Women

Once a woman enters a CPC, it is evident she will be subjected to medically incorrect information, preventing her from making a fully informed decision about whether or not to terminate her pregnancy.⁸⁵ Additionally, many women who choose to carry the pregnancy to term will continue seeking “medical care” at CPCs in lieu of visiting a licensed practitioner, and may be missing important pre-natal care, crucial in the early weeks of pregnancy.⁸⁶ Therefore, even for women who choose to continue their pregnancy, there are serious medical implications and health risks caused by CPCs, such as improper pre-natal care and the inability to address pregnancy complications.⁸⁷ Many CPCs will discourage women from seeking medical care from another clinic or provider, even if a woman reports abnormal symptoms.⁸⁸ For example, an obstetrician and gynecologist (OB-GYN) in San Francisco reported that one of her patients, a pregnant woman with diabetes, had initially sought “care” at a CPC.⁸⁹ While under the CPC’s “care,” the diabetic woman’s blood sugar levels spiked, which put the fetus at risk for “cardiac malformations, brain abnormalities, and spine deformations.”⁹⁰

⁷⁹ *Id.*

⁸⁰ NARAL California CPC Report 2015, *supra* note 70, at 1.

⁸¹ *See* Rosen, *supra* note 17, at 202.

⁸² NARAL The Truth About CPCs, *supra* note 46, at 6–7.

⁸³ Nicole Knight, *Anti-Choice Pastor Refuses to Follow Crisis Pregnancy Center Regulations*, RH REALITY CHECK (Dec. 9, 2015), <http://rhrealitycheck.org/article/2015/12/09/anti-choice-pastor-refuses-follow-crisis-pregnancy-center-regulations/>. According to the National Institute of Health, about 15 to 20% of pregnancies end in a miscarriage; most during the first seven weeks of the pregnancy. *Miscarriage*, U.S. NAT’L LIBRARY OF MED., <https://www.nlm.nih.gov/medlineplus/ency/article/001488.htm> (last updated Dec. 2, 2015).

⁸⁴ NARAL The Truth About CPCs, *supra* note 46, at 6–7.

⁸⁵ *See supra* Part II.A.

⁸⁶ NARAL The Truth About CPCs, *supra* note 46, at 6.

⁸⁷ NARAL California CPC Report 2015, *supra* note 70, at 2.

⁸⁸ *Id.*

⁸⁹ Molly Redden, *One State Finally Cracked Down on Crisis Pregnancy Centers*, MOTHER JONES (Oct. 12, 2015), <http://www.motherjones.com/politics/2015/10/state-just-became-first-crack-down-deceptive-anti-abortion-pregnancy-centers>.

⁹⁰ *Id.*

D. Advertising

Unfortunately, it is not only what occurs within the walls of CPCs that is of deep concern, but also the manipulative tactics CPCs utilize to bring women to their centers in the first place. The primary tools of deception include calculated advertising campaigns, co-location strategies, and mimicking the appearance of actual medical clinics.⁹¹ First, CPCs have adopted a very purposeful and strategic advertising campaign.⁹² Notably, CPCs' print and digital advertisements are typically ambiguous, such as billboards that state "Pregnant? Scared? Need Help?", or clinics with innocuous names, such as "Pregnancy Options" or "Women's Resource Center,"⁹³ which provide no indication of the center's pro-life views, religious affiliation, limited services, or the fact they are not an accredited medical clinic.

E. Online Advertising

One of the most manipulative advertising schemes CPCs use is purchasing "pay-per-click" advertisements on Internet search engines, such as Google and Yahoo.⁹⁴ "Pay-per-click" advertising allows CPCs to place bids on keywords, such as "abortion" or "pregnancy."⁹⁵ When users search those keywords on search engines, the advertisement for the highest bidding organization will appear at the top of the page as the first result.⁹⁶ Care Net and Heartbeat International spend over \$18,000 per month on "pay-per-click" keywords, and have purchased over 100 keywords.⁹⁷ Similarly, CPCs are often listed under "abortion services" in phone books⁹⁸ CPCs' websites do not indicate their pro-life intentions, religious affiliations, or whether or not they provide abortions.

F. Co-Location Strategy

CPCs frequently open clinics in strategic sites, usually near comprehensive health clinics, deceiving women through confusion, especially because many CPCs adopt the appearance of a real medical reproductive health provider.⁹⁹ This method is known as "co-location" and has become more commonplace due to the growth in the number of CPCs in the United States.¹⁰⁰ Currently, CPCs significantly outnumber abortion providers; therefore, nearly every abortion

⁹¹ NARAL CPCs Lie, *supra* note 23, at 4–5; *see supra* Part I.D.

⁹² NARAL CPCs Lie, *supra* note 23, at 4; Lisa Jacobson, *The Abortion-Minded Woman*, CENTER OF TOMORROW, 1, 19, https://www.heartbeatservices.org/pdf/Abortion_Minded_Women.pdf (last visited Nov. 22, 2015) (Stating that "[t]he use of the internet is extremely important . . . the campaign and website are designed with an abstinence message without over pro-life and religious concepts, positioned as informative, non-judgmental, and non-threatening. Young women are an Internet-savvy generation that prefers to turn to the web for information . . . [pregnancy resource center] websites with fresh, culturally appropriate content will lend credibility to centers and draw clients.").

⁹³ NARAL California CPC Report 2010, *supra* note 20, at 6.

⁹⁴ *Id.* at 7.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ NARAL California CPC Report 2010, *supra* note 20, at 7; *see also* NARAL The Truth About CPCs, *supra* note 46, at 3. However, after a campaign by NARAL Pro-Choice America in 2014, Google and Yahoo have worked toward identifying these misleading ads and removing them from search engines in violation of their truth-in-advertising policies).

⁹⁸ NARAL, *The Truth About CPCs*, *supra* note 46, at 2.

⁹⁹ NARAL CPCs Lie, *supra* note 23, at 5–6.

¹⁰⁰ *Id.*

provider has at least one CPC within close proximity.¹⁰¹ In many situations, CPCs are located within a few blocks or are even right across the street from abortion clinics.¹⁰² This can cause quite a bit of confusion for women who are searching for the real medical provider.¹⁰³ For example, in Worcester, Massachusetts, a CPC named “Problem Pregnancy,” was located on the exact same floor and in the same building as a Planned Parenthood clinic.¹⁰⁴ Problem Pregnancy even used the same acronym (PP) as Planned Parenthood, creating greater confusion for women who were looking for Planned Parenthood.¹⁰⁵ This example highlights the manipulation of the co-location strategy and how it further bolsters the false impression that CPCs are medically legitimate enterprises.¹⁰⁶

CPCs have also been using the closure of Planned Parenthoods and other comprehensive care clinics¹⁰⁷ as a means of expanding their “co-location strategies.”¹⁰⁸ Over the past few years, several CPCs have been opening in former Planned Parenthood clinics and facilities. For instance, in Coral Gables, Florida, a city next to Miami, Top-Gyn Ladies Center, which had provided abortions, closed in October 2015.¹⁰⁹ Within one hour of its closure, Heartbeat of Miami, a CPC, had signed the lease to this location.¹¹⁰ This is the second abortion clinic that has been transformed into a CPC in the greater Miami area alone in just the past three years.¹¹¹ When CPCs appropriate locations where there used to be comprehensive health clinics, it bolsters the “CPC’s masquerade as a women’s health clinic.”¹¹²

G. Targeting Vulnerable Women

CPCs specifically target women who are of a lower socio-economic status, women of color, and young women.¹¹³ CPCs consider these groups of women to be the most “abortion-minded” and therefore CPCs disproportionately focus their advertising efforts on attracting these vulnerable populations.¹¹⁴ For example, CPCs will have billboards near high schools and colleges, and advertise in college newspapers as well as on public transportation and bus shelters.¹¹⁵ Care Net has an “Urban Initiative,” which specifically focuses on bringing more African-American and Latina women to their centers.¹¹⁶ Some of these specific techniques include paying for

¹⁰¹ See *supra* Part I.C.

¹⁰² 12TH AND DELAWARE (HBO Films, 2010).

¹⁰³ NARAL investigators asked a CPC worker if the proximity of the clinic (within 100 yards) to Planned Parenthood ever confused women and the counselor replied “all the time.” NARAL California CPC Report 2010, *supra* note 20, at 6.

¹⁰⁴ NARAL CPCs Lie, *supra* note 23, at 5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 5–6.

¹⁰⁷ See *infra* Part VIII.

¹⁰⁸ See *supra* Part II.F.

¹⁰⁹ Nicole Knight Shine, *Abortion Clinic Closures Leave Opening for Crisis Pregnancy Centers to “Prey” on Women*, RH REALITY CHECK (Nov. 30, 2015), <http://rhrealitycheck.org/article/2015/11/30/abortion-clinic-closures-leave-opening-crisis-pregnancy-centers-prey-women/>.

¹¹⁰ Jay Hobbs, *Heartbeat of Miami Converting Second Ex-Abortion Mill into Pro-Life Help Clinic*, NAT’L RIGHT TO LIFE NEWS TODAY (Nov. 19, 2015), <http://www.nationalrighttolifenews.org/news/2015/11/heartbeat-of-miami-converting-second-ex-abortion-mill-into-pro-life-help-clinic/#.V14b6XarTIW>.

¹¹¹ *Id.*

¹¹² Shine, *supra* note 109.

¹¹³ NARAL California CPC Report 2010, *supra* note 20 at 6.

¹¹⁴ NARAL CPCs Lie. *supra* note 23 at 4.; NARAL California CPC Report 2010, *supra* note 20, at 6.

¹¹⁵ *Id.*

¹¹⁶ NARAL California CPC Report 2010, *supra* note 20, at 6.

advertisement on the Black Entertainment Network (BET) and using propaganda that compares abortion to slavery.¹¹⁷

These are only a few of the various and admittedly creative tactics CPCs will use to draw women to their centers. As evident from these examples, CPCs will go to extreme lengths and spend inordinate amounts of resources to reach as many “abortion-minded” women as possible. Without any governmental regulation in place, CPCs essentially have no limits on their advertising campaigns, content on their websites, or even the appearance of their facilities.¹¹⁸ Although the necessity of some form of supervision is apparent, nearly all governmental efforts to date have either been invalidated, lost in the limbo of litigation, or have resulted in watered down versions of what was initially proposed, rendering such regulations as useless.¹¹⁹

III. MANDATORY DISCLOSURE ORDINANCES

Local legislatures have attempted to regulate CPCs through mandatory disclosure ordinances, which require CPCs to disclose certain information, by posting signs near their entrances or in the waiting rooms, printing out notices, or notifying prospective clients in some other way, as dictated by the ordinance. Under these regulations, CPCs are mandated to inform clients that they are not comprehensive reproductive care clinics, they lack medical licenses, or they do not offer certain services, such as abortions or birth-control—all of which often reveal CPCs’ ulterior anti-abortion motives.¹²⁰ These ordinances do not address the issue of CPCs disseminating medical misinformation, but rather target the “preliminary threshold deception that women who accidentally visit CPCs believe they are medical clinics.”¹²¹

The three main categories of disclosure ordinances for CPCs are: “status disclosure,” “government message disclosure,” and “services disclosure.”¹²² A “status disclosure” requires CPCs to disclose whether or not they are licensed medical facilities with a licensed medical provider on staff.¹²³ A “government message disclosure” enforces CPCs to disclose if the government of that municipality has a recommendation for where pregnant women should seek care, such as a licensed medical provider.¹²⁴ Finally, a “services disclosure” mandates CPCs to disclose whether they provide, or give referrals, for certain services, such as abortions or contraceptives.¹²⁵

Four cities and one county have passed legislation enacting mandatory disclosure laws on CPCs: Baltimore, Montgomery County (Maryland), New York City, Austin, and San Francisco.¹²⁶ So far, all of the ordinances have faced substantial legal challenges, and only the San Francisco

¹¹⁷ NARAL California CPC Report 2010, *supra* note 20, at 7.

¹¹⁸ *See supra* Part II.

¹¹⁹ *See infra* Part III.

¹²⁰ Chen, *supra* note 28, at 943.

¹²¹ Molly Duane, *The Disclaimer Dichotomy: A First Amendment Analysis of Compelled Speech in Disclosure Ordinances Governing Crisis Pregnancy Centers and Laws Mandating Biased Physician Counseling*, 35 CARDOZO L. REV. 349, 360 (2013).

¹²² *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 238 (S.D. N.Y. 2011).

¹²³ N.Y.C. ADMIN. CODE §§ 20-816(a)-(e) (2011).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ BALT. MD., HEALTH CODE §§ 3-501-3-506 (2009); MONTGOMERY CNTY., MD. COUNCIL RES. § 16-1252 (2010); N.Y.C. ADMIN. CODE §§ 20-815-20.816 (2011); AUSTIN, TEX., CITY CODE CH. § 10-10 (2012); S.F. ADMIN. CODE. CH.93 §§ 93.1-93.5 (2011).

law and one provision of the New York City ordinance survived the resulting litigation and have been successfully implemented.¹²⁷

These laws were either invalidated or simply never implemented for various reasons; however, the common thread is how the mandatory disclosure statutes allegedly violated CPCs' freedom of speech and free exercise of religion rights.¹²⁸

A. *Freedom of Speech Background*

Before exploring the specific legal challenges to the FACT Act, it is important to discuss the previous disclosure mandates to determine whether the drafters of California's Reproductive FACT Act effectively addressed the weaknesses of the prior legislation, particularly with regard to CPCs' freedom of speech rights. Part VII will explore freedom of speech analysis in greater depth. However, for purposes of understanding the legal challenges previous mandatory disclosure ordinances have faced, the underlying free speech challenge is that government regulations that "compel speech," such as mandatory disclosure ordinances, infringe upon CPCs' freedom of speech rights by forcing them to make statements they would not otherwise say.¹²⁹

In general, courts have held that laws "compelling speech" are subject to strict scrutiny.¹³⁰ Therefore, most mandatory disclosure ordinances have been subject to strict scrutiny, and courts had to determine whether the mandatory disclosure ordinances were narrowly tailored to meet a compelling government interest in the least restrictive way.

B. *Baltimore*

In November 2009, the Baltimore City Council passed Baltimore City Ordinance 09-252, which imposed regulations upon "limited-service pregnancy centers."¹³¹ The Baltimore Ordinance defined "limited-service pregnancy centers" as facilities which provide pregnancy-related services, but do not provide abortions or birth-control—essentially singling out CPCs.¹³² Additionally, in a subsequent implementation regulation, the Baltimore Health Department defined "birth-control services" as types of birth-control "which only a licensed healthcare professional may prescribe or provide," further clarifying how the law was only intended to apply to unlicensed CPCs.¹³³

Section 3-502 of the Baltimore Ordinance required "limited-service pregnancy centers" to post signs in the waiting room stating that the center did not provide or give referrals for abortions or birth control.¹³⁴ Thus, this provision was a "services disclosure" because it mandated all CPCs

¹²⁷ See *infra* Part III.

¹²⁸ See *infra* Part VI and Part VII.

¹²⁹ See *infra* Part VI.A-B.

¹³⁰ ASSEMBLY COMM. ON JUDICIARY (Apr. 28, 2015), at 12, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775 (citing *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988)).

¹³¹ BALT. MD., HEALTH CODE § 3-501 (2009).

¹³² *Id.* "Limited Service Pregnancy Center" is defined as any person "(1) whose primary purpose is to provide pregnancy-related services" and who "(2) does not provide or refer for abortions or nondirective and comprehensive birth-control services."

¹³³ *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 271–72 (4th Cir. 2013).

¹³⁴ BALT. MD., HEALTH CODE §§ 3-502(a)-(b) (2009). "A Limited Service Pregnancy Center must provide clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services" Additionally, the disclosure must be "written in English and Spanish," "easily readable," and "conspicuously posted in the center's waiting room or other area where individuals await service." (§ 3-502(b)).

to reveal the fact that they did not provide certain reproductive health services.¹³⁵ In March 2010, the Archbishop of Baltimore, Edwin F. O'Brien, and the Greater Baltimore Center for Pregnancy Centers, Inc., a CPC, filed a lawsuit challenging the constitutionality of the Baltimore law.¹³⁶

In the 2011 case, *O'Brien v. Mayor of Baltimore*, the Maryland District Court concluded that the Baltimore Ordinance's "services disclosure" effectively singled out CPCs because it "limit[ed] the application of the Ordinance primarily (if not exclusively) to those with strict moral or religious qualms regarding abortion and birth-control."¹³⁷ Thus, the ordinance was based on "disagreement with plaintiffs' viewpoints on abortion and birth control"¹³⁸ and was therefore subject to strict scrutiny.¹³⁹

To survive strict scrutiny, the regulation must be narrowly tailored to meet a compelling government interest—a high burden.¹⁴⁰ The District Court did not identify a specific compelling interest, but rather "assumed" the Ordinance had been enacted for some compelling purpose.¹⁴¹ Furthermore, the District Court held the ordinance failed to meet the "narrowly tailored" standard because it did not provide a "carve-out" provision for limited-service pregnancy centers that do not engage in deceptive practices.¹⁴² Additionally, the District Court reasoned that the City of Baltimore could have adopted other, less restrictive alternatives to achieve the compelling interest.¹⁴³ For instance, the City could have used or amended existing regulations regarding fraudulent advertising to combat CPCs' deceptive advertising campaigns, or adopt a content-neutral advertising ordinance that applied to noncommercial entities.¹⁴⁴ Ultimately, the Maryland District Court fully and permanently enjoined the city's mandatory disclosure ordinance for violating the free speech clause of the First Amendment.¹⁴⁵

In 2013, the Fourth Circuit remanded the Maryland District Court's *O'Brien* decision because it "denied the defendants essential discovery" and "disregarded basic rules of civil procedure."¹⁴⁶ However, the Fourth Circuit did not evaluate the ultimate merits of the CPCs claims.¹⁴⁷ No further decisions have been made since the Fourth Circuit's decision and the law was never implemented.¹⁴⁸

¹³⁵ *Id.* § 3-502(b).

¹³⁶ *O'Brien v. Mayor of Balt.*, 768 F. Supp 2d 804 (D. Md. 2011); *see also* Chen, *supra* note 28, at 945 n. 99 (stating that the Court held that Archbishop O'Brien lacked standing to be a plaintiff in the lawsuit).

¹³⁷ *O'Brien*, 768 F. Supp at 815.

¹³⁸ *Id.* at 816.

¹³⁹ *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 279 (4th Cir. 2013) (citing *O'Brien*, 768 F. Supp at 816).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* However, the Fourth Circuit does mention an affidavit on behalf of the City that stated that the Ordinance served important public health goals (*Id.* at 276 (citing "Blum Affidavit" of June 17, 2010 at 45)).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *O'Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 817 (D. Md. 2011).

¹⁴⁶ *Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 721 F.3d at 271.

¹⁴⁷ *Id.* at 280.

¹⁴⁸ *Greater Balt. Ctr. for Pregnancy Concerns, Inc., v. Mayor & City Council of Balt.*, 2015 U.S. Dist. LEXIS 107042 (D. Md. Aug. 13, 2015); *Greater Balt. Ctr. for Pregnancy Concerns, Inc., v. Mayor v. City Council of Balt.*, 2014 U.S. LEXIS 176718 (D. Md. Dec. 23, 2014).

C. Montgomery County

In February 2010, Montgomery County, Maryland, enacted an ordinance imposing mandatory disclosure regulations on “limited service pregnancy resource centers.”¹⁴⁹ The Montgomery County Council adopted Resolution 16-1252 to address concerns that clients are being misled into believing a “limited service pregnancy resource center” provides medical services, which it does not.¹⁵⁰

Based on the Montgomery County Ordinance’s definition of a “limited service pregnancy resource center,” the ordinance only applied to unlicensed CPCs.¹⁵¹ According to Resolution 16-1252, “limited service pregnancy resource centers” are required to post at least one sign on their premises stating that “(1) the Center does not have a licensed medical professional on staff,” and “(2) Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.”¹⁵² Provision (1) is a “status disclosure” because it mandates CPCs to publicize whether or not they had licensed medical staff. Provision (2) is a “government message disclosure” because it promulgates the suggestion of Montgomery County state officials. Centro Tepeyac, a CPC in Montgomery County, filed a lawsuit, challenging the legality of the Montgomery County Ordinance.¹⁵³

In 2011, the Maryland District Court ultimately only granted a preliminary injunction on provision (2) the “government message disclosure.”¹⁵⁴ The Maryland District Court recognized that “ensuring patients obtain appropriate care” falls within the State’s broader compelling public health interests.¹⁵⁵ However, the County failed to demonstrate that the “government message disclosure” provision was narrowly tailored enough to serve that compelling interest.¹⁵⁶ Thus, provision (2), the “government message disclosure,” might compel unnecessary speech, and therefore was not the least restrictive means of achieving the proposed compelling governmental interest.¹⁵⁷

On the other hand, the District Court declined to grant an injunction for provision (1), the “status disclosure.”¹⁵⁸ The District Court’s reasoning was that unlike the “government message disclosure,” the “status disclosure” was narrowly tailored to meet the government’s interest in public health because it did “not require any other specific message and in neutral language states the truth.”¹⁵⁹

¹⁴⁹ MONTGOMERY CNTY., MD. COUNCIL RES. § 16-1252 (2010).

¹⁵⁰ *Id.* Specifically, the Council was concerned that these mistaken clients could then neglect to take action, such as seeing a doctor or medical provider, which would protect their health and prevent adverse consequences to the client or the pregnancy.

¹⁵¹ *Id.* § 16-1252(3). “Limited service pregnancy resource centers = as an organization, center, or individual that “(A) has a primary purpose to provide pregnancy-related services,” “(B) does not have a licensed medical professional on staff,” and “(C) provides information about pregnancy-related services, for a fee or as a free service.”

¹⁵² *Id.* § 16-1252(b)(1). Also, signs must be “written in English and Spanish,” “easily readable,” and “conspicuously posted in the Center’s waiting room or other area where individuals await service” (*Id.* § 16-1252(b)(2)).

¹⁵³ Centro Tepeyac v. Montgomery Cnty., 779 F. Supp 2d 456 (D. Md. 2011).

¹⁵⁴ *Id.* at 472.

¹⁵⁵ *Id.* at 468.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 471.

¹⁵⁹ Centro Tepeyac v. Montgomery Cnty., 779 F. Supp 2d 456, 471 (D. Md. 2011).

In 2013, the Fourth Circuit Court affirmed the Maryland District Court's decision to grant a preliminary injunction for provision (2) ("government message disclosure"),¹⁶⁰ and to reject the preliminary injunction for provision (2) ("status disclosure").¹⁶¹

Shortly after the Fourth Circuit's ruling, the plaintiff CPC renewed its motion for summary judgment, bringing the lawsuit before the Maryland District Court once again.¹⁶² However, this time the Maryland District Court came to a very different outcome, and considered the Resolution's two statements as a "single entity, to rise or fall together."¹⁶³ Subsequently, the Maryland District Court held that the Montgomery County ordinance, when evaluated as a whole, was unconstitutional.¹⁶⁴

D. Austin

The Austin City Council enacted City Code Ch. 10-10 (2012) in 2012, which only applied to unlicensed CPCs.¹⁶⁵ The Austin Ordinance required CPCs to post signs disclosing whether or not they provided "medical services," and if so, whether those "medical services" were conducted under the direct supervision of a licensed health care provider and whether the CPC was licensed to provide those "medical services."¹⁶⁶ However, the Austin Ordinance did not adequately define what constituted a "medical service," but simply stated that it includes "without limitation, diagnosing pregnancy or performing a sonogram."¹⁶⁷

The Austin Ordinance was a "status disclosure" because it mandated unlicensed CPCs to inform clients they are not licensed medical facilities. Thus, although the statute used the term "medical services" several times, it is not a "services disclosure" because Chapter 10-10 did not require CPCs to list which specific services they do or do not provide at their center, such as abortions or providing birth control. Instead, the sign only had to reveal whether those "services" are performed under medical supervision while stating the center is licensed to provide those services.¹⁶⁸

A Texas District Court declared Chapter 10-10 to be unconstitutional.¹⁶⁹ It is important to note that the justification for invalidating the mandatory disclosure ordinance was due to the vagueness of the statutory language, particularly the phrase "medical services."¹⁷⁰ Thus, the merits of the CPCs' contention that the Austin Ordinance unlawfully violated their freedom of speech

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; see also *id.* at 193 (Wilkinson, J., concurring) (stating that the first provision "fell within the bounds of the state's authority to safeguard its citizens' welfare...[a]nd it relies on the common-sense notion that pregnant women should at least be aware of the qualification of those who wish to counsel them regarding what is, among other things, a medical condition.").

¹⁶² *Centro Tepeyac v. Montgomery Cnty.*, 5 F. Supp 3d 745, 753 (D. Md. 2014).

¹⁶³ *Id.* at 754.

¹⁶⁴ *Id.* at 769.

¹⁶⁵ AUSTIN, TEX., CITY CODE CH. § 10-10 (2012). Chapter 10-10 defines an "unlicensed pregnancy service center" as an organization or facility that "(a) as its primary purpose, provides pregnancy related services, including pregnancy testing and options counseling" and "(b) does not have a health care provider that is licensed by a state or federal regulatory entity maintaining a full-time practice on site."

¹⁶⁶ *Id.* § 10-10-2. The Austin City ordinance mandates unlicensed CPCs to "prominently display" a sign in "English and Spanish" that is "affixed to the entrance of the center so that the sign is conspicuously visible to a person entering the center."

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* § 10-10.

¹⁶⁹ *Austin LifeCare, Inc., v. City of Austin*, No. A-11-CA-875-LY, 1, 15 (W.D. Tex. 2014).

¹⁷⁰ *Id.*; see also Mary Tuma, *Judge on Pregnancy 'Clinics': Signage Ordinance 'Vague'*, AUSTIN CHRON. (July 11, 2014), <http://www.austinchronicle.com/news/2014-07-11/judge-on-pregnancy-clinics-signage-ordinance-vague/>.

and freedom of religion, were never discussed by the court.¹⁷¹ Therefore, it is unclear whether or not the Austin Ordinance's "status disclosure" would have otherwise been held constitutional.

E. New York City

In March 2011, the New York City Council passed Local Law 17,¹⁷² which mandated that pregnancy services centers must disclose: (1) whether or not they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center" (the "status disclosure"), (2) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider" (the "government message disclosure"), and (3) whether or not they provide referrals for abortion, emergency contraception, or prenatal care (the "services disclosure").¹⁷³ These required disclosures must be posted near entrances, in waiting rooms, on advertisements, and stated during telephone conversations.¹⁷⁴

Local Law 17's definition of "pregnancy services centers" encompassed unlicensed CPCs that either provide obstetric ultrasounds, sonograms, or prenatal care, or that have the "appearance of a licensed medical facility,"¹⁷⁵ which is determined by a series of factors provided by the statute.¹⁷⁶

In 2011, several CPCs filed a motion for a preliminary injunction to prevent Local Law 17 from being implemented.¹⁷⁷ The New York Southern District Court held that Local Law 17's disclosure requirements violated the plaintiff CPCs' First Amendment rights, thereby enjoining the law in its entirety.¹⁷⁸

In 2014, the Second Circuit Court of Appeals reinstated provision (1), the "status disclosure," which required CPCs to indicate that they do not have licensed medical staff and was not a licensed medical facility.¹⁷⁹ The Court held the "status disclosure" was narrowly tailored to promote the City's interest in public health by "promoting unobstructed access to reproductive health facilities," and was the least restrictive means of accomplishing this compelling interest.¹⁸⁰

In contrast, the Second Circuit affirmed the New York District Court's decision that both the "government message disclosure" (provision 2) and the "services disclosure" (provision 3) were unconstitutional.¹⁸¹ The Second Circuit held that the "government message disclosure" was insufficiently tailored to meet the compelling government interest because there were alternative

¹⁷¹ *Austin LifeCare*, No. A-11-CA-875-LY, at 15.

¹⁷² N.Y.C. ADMIN. CODE §§ 20-815-20-816 (2011).

¹⁷³ *Id.* §§ 20-816(a)-(e).

¹⁷⁴ *Id.* § 20-816(f).

¹⁷⁵ *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 239 (2d Cir. 2014) (citing N.Y.C. ADMIN. CODE § 20-816(g) (2011)).

¹⁷⁶ N.Y.C. ADMIN. CODE § 20-816(g) (2011). Factors include that the pregnancy services center "(a) offers pregnancy testing and/or pregnancy diagnosis; (b) has staff or volunteers who wear medical attire or uniforms; (c) contains one or more examination tables; (d) contains a private or semi-private room or area containing medical supplies and/or medical instruments; (e) has staff or volunteers collect health insurance information from clients; and (f) is located on the same premises as a licensed medical facility or provide or shares facility space with a licensed medical provider." A pregnancy services center meets the requirement of "hav[ing] the appearance of a licensed medical facility" if it has two or more of these factors (N.Y.C. ADMIN. CODE § 20-816(g) (2011)).

¹⁷⁷ *Evergreen Ass'n v. City of N.Y.*, 801 F. Supp 197, 200 (S.D.N.Y. 2011).

¹⁷⁸ *Id.* at 211.

¹⁷⁹ *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 239 (2d Cir. 2014).

¹⁸⁰ *Id.* at 246.

¹⁸¹ *Id.*

less restrictive options available, such as, if the City of New York communicated that message through an advertising campaign.¹⁸² Furthermore, the “government message disclosure” infringed upon CPCs’ free speech rights because it directly “mandate[d] that Plaintiffs affirmatively espouse the government’s position on a contested public issue.”¹⁸³

Similarly, the Second Circuit invalidated Local Law 17’s “services disclosure” because the City could have utilized less restrictive means to achieve the compelling government interest.¹⁸⁴ For instance, the “status disclosure” arguably satisfies the compelling interest because it provides notice of whether the services provided at the center are “medical” or “non-medical.”¹⁸⁵ The Court also concluded that the “services disclosure” may overly burden CPCs’ freedom of speech rights by fundamentally altering the way CPCs discuss the topics of abortion or birth-control.¹⁸⁶

In November 2014, the U.S. Supreme Court denied a petition for writ of certiorari regarding the constitutionality of the reinstated “status disclosure” provision.¹⁸⁷

F. *San Francisco*

The Pregnancy Information Disclosure and Protection Ordinance (San Francisco Admin. Code. Sec. 93.1-93.5) was passed in 2011.¹⁸⁸ The San Francisco Ordinance applies to both licensed and unlicensed “limited pregnancy service centers”¹⁸⁹ which offer ultrasounds, sonograms, or prenatal care, or, have the “appearance of a medical facility.”¹⁹⁰ Like New York City’s Local Law 17, the San Francisco Act lists a series of factors to determine whether a pregnancy service center fulfills the “appearance of a medical facility” standard.¹⁹¹

Unlike the previous mandatory disclosure laws, the San Francisco law primarily focuses on CPCs’ deceptive advertising practices.¹⁹² The San Francisco Act prohibits CPCs from making or disseminating:

any statement, concerning [pregnancy-related] services (professional or otherwise)...before the public anywhere, in any newspaper or other publication, or

¹⁸² *Evergreen*, 740 F.3d at 250.

¹⁸³ *Id.* at 251.

¹⁸⁴ *Id.* at 249.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 249–50. Currently, CPCs have the freedom to discuss these political issues in any manner they wish.

However, the Court believed that mandating a “services disclosure” would infringe upon the CPCs’ choice of when and how to bring up these topics with their clients because women visiting the clinic will be put on notice of the fact that the center does not provide those services when they walk through the entrance of the center.

¹⁸⁷ *Id.*, *cert. denied*, 135 S.Ct. 435 (2014).

¹⁸⁸ S.F. ADMIN. CODE §§ 93.1-93.5 (2011).

¹⁸⁹ S.F. ADMIN. CODE § 93.3(f) (2011). (“Limited services pregnancy center’ shall mean a pregnancy services center, as defined in subsection (g), that does not directly provide or provide referrals to clients for the following services: (1) abortions; or (2) emergency contraception.”).

¹⁹⁰ S.F. ADMIN. CODE § 93.3(g) (2011) (“Pregnancy service center’ shall mean a facility, licensed or otherwise, and including mobile facilities, the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility”).

¹⁹¹ *Id.* These factors include that the facility: offers pregnancy testing and/or pregnancy diagnoses, has staff or volunteers who wear medical attire or uniforms, contains one or more examination tables, contains a private or semi-private room or area containing medical supplies and/or medical information, has staff or volunteers who collect health information from clients, or is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

¹⁹² S.F. ADMIN. CODE § 93.4 (2011).

any advertising device...including the Internet...which is untrue or misleading, whether by statement or omission, that the limited services pregnancy services center knows or which by the exercise of reasonable care should know to be untrue or misleading.¹⁹³

The San Francisco Ordinance is also distinctive because it only requires CPCs to post disclaimers if a CPC violates the advertising regulation.¹⁹⁴ CPCs who defy this provision have ten days to “cure” the false, misleading, or deceptive advertising.¹⁹⁵ If the CPC still has not remedied the situation after ten days, the City Attorney may require the CPC to post a notice in their waiting area or examination area,¹⁹⁶ which discloses whether the center has a “licensed medical doctor, registered nurse, or other licensed medical practitioner,”¹⁹⁷ which is a “status disclosure,” and if the center provides “abortion, emergency contraception, or referrals for abortion or emergency contraception,”¹⁹⁸ which is a services disclosure.

In 2012, First Resort, Inc., a CPC, filed a lawsuit challenging the legality of the San Francisco Ordinance.¹⁹⁹ In February 2015, the San Francisco Act was deemed constitutional in the case *First Resort, Inc. v. Herrera*.²⁰⁰ The Federal Court rejected First Resort’s contention that strict scrutiny should be applied because the ordinance regulates speech based on viewpoint and content.²⁰¹ Instead, the Court held that since the San Francisco Ordinance only focused on commercial speech, which was false and misleading, the proper standard was not strict scrutiny.²⁰² Furthermore, the CPCs failed to demonstrate the Ordinance violated the First Amendment in “every conceivable application.”²⁰³

IV. CALIFORNIA AB 775 (THE REPRODUCTIVE FACT ACT)

A. Background

Currently, there are over 228 CPCs in the State of California,²⁰⁴ and only 44 abortion clinics.²⁰⁵ According to a 2010 study conducted by NARAL Pro-Choice California Foundation, 41% of California counties do not have an abortion provider, while over 91% of the counties have at least one CPC.²⁰⁶

The purpose of the Reproductive FACT Act is to ensure all women in California are fully informed of their options, aware of the services available to them, and able to make their own healthcare and pregnancy-related decisions.²⁰⁷ According to the bill’s authors, it is in the best

¹⁹³ S.F. ADMIN. CODE § 93.4(a) (2011).

¹⁹⁴ S.F. ADMIN. CODE § 93.5(b)(2) (2011).

¹⁹⁵ S.F. ADMIN. CODE § 93.5(a) (2011).

¹⁹⁶ S.F. ADMIN. CODE § 93.5(b)(2) (2011).

¹⁹⁷ S.F. ADMIN. CODE § 93.5(b)(2)(A) (2011).

¹⁹⁸ S.F. ADMIN. CODE § 93.5(b)(2)(B) (2011).

¹⁹⁹ *First Resort, Inc. v. Herrera*, 80 F. Supp. 3d 1043 (N.D. Cal. 2015).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1049.

²⁰² *Id.* at 1053.

²⁰³ *Id.* at 1053–54.

²⁰⁴ S. COMM. ON HEALTH, Bill Analysis, AB-775 Reproductive FACT Act, 2015-2016 Sess., at 4 (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775.

²⁰⁵ NARAL CPCs Lie, *supra* note 23, at 19.

²⁰⁶ NARAL California CPC Report 2010, *supra* note 20, at 1.

²⁰⁷ CAL. HEALTH & SAFETY CODE §§ 123470-123473 (2015).

interest of the state, patients, and providers, for women to be cognizant of all available assistance for preventing, continuing, or terminating a pregnancy.²⁰⁸

The Act has two main provisions: one regarding “licensed covered facilities,” (“Licensed Notice” provision) and the other focusing on “unlicensed covered facilities” (“Unlicensed Notice” provision).²⁰⁹ Therefore, unlike the Baltimore, Montgomery County, Austin, and New York City mandatory disclosure ordinances, California’s FACT Act applies to both licensed and unlicensed CPCs.²¹⁰ Facilities that fail to comply with these provisions will be put on notice and must correct the violation within 30 days.²¹¹ If the violation is not corrected within 30 days, the facility will be liable for a civil penalty of \$500 for the first offense, and \$1000 for each subsequent offense.²¹²

B. Provision 1: “Licensed covered facility” (“Licensed Notice”)

The FACT Act defines a “licensed covered facility” as a licensed clinic “whose primary purpose is providing family planning or pregnancy related services”²¹³ and has two or more of the following characteristics: it offers obstetric ultrasounds, sonograms, or prenatal care; provides or offers counseling about contraception; offers pregnancy testing; advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; offers abortion services; or has staff or volunteers who collect health information from clients.²¹⁴ It is important to note, unlike the “factors” listed in the New York City and San Francisco ordinances,²¹⁵ the FACT Act includes “provides or offers counseling about contraception,” and “offers abortion services.”²¹⁶

The first provision of the FACT Act requires “licensed covered facilities” to post or distribute a notice that states:

California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert telephone number].²¹⁷

The notice must be posted in a conspicuous place where individuals may easily read it, printed out and distributed to all clients, or distributed to all clients electronically to be read at the time they check-in or arrive at the clinic.²¹⁸

²⁰⁸ S. COMM. ON HEALTH, Bill Analysis, AB-775 Reproductive FACT Act, 2015-2016 Sess., at 4 (Cal. 2015), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775.

²⁰⁹ CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

²¹⁰ *Infra* Part IV.B-C; *supra* Part III.B-E.

²¹¹ CAL. HEALTH & SAFETY CODE § 123473 (a)(1).

²¹² CAL. HEALTH & SAFETY CODE § 123473 (a).

²¹³ CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

²¹⁴ *Id.*

²¹⁵ *Supra* Part III.E-F.

²¹⁶ CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

²¹⁷ *Id.*; Chemerinsky, *supra* note 2.

²¹⁸ CAL. HEALTH & SAFETY CODE § 123472(2) (2015). The Act includes further regulations regarding the dimensions of the notice, font size, and placement of the sign (123472(2)(A-B)).

C. Provision 2: “Unlicensed Notice”

The FACT Act defines an “unlicensed covered facility” as an unlicensed facility that “does not have a licensed medical provider on staff” and “whose primary purpose is providing pregnancy-related services.”²¹⁹ Additionally, an “unlicensed covered facility” must have two or more of the following features: it offers obstetric ultrasounds, sonograms, or prenatal care; offers pregnancy testing; advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; or has staff or volunteers who collect health information from clients.²²⁰

The second provision of the FACT Act requires unlicensed facilities to post signs near the entrance and in the waiting area, giving notice to all clients that “[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”²²¹ Furthermore, this message must be circulated to clients on site and in any print or digital advertising.²²²

D. The Reproductive FACT Act Applies to More than CPCs

The FACT Act’s qualifying factors for identifying a “licensed covered facility” include “provid[es] contraception,”²²³ and “offers abortion services.”²²⁴ As previously discussed, CPCs typically refuse to give referrals, let alone provide contraceptives or abortion services.²²⁵ Thus, the drafters of the FACT Act clearly intended for the Act to encompass more than just CPCs.²²⁶ In fact, earlier drafts of the Act did not include “[t]he facility offers abortion services” as a factor for classifying “licensed covered facilities.”²²⁷ Ultimately, the language was adopted during the State Assembly’s third reading of the bill, on May 4, 2015.²²⁸ The Assembly’s decision was influenced in part by a 2011 report conducted by the Public Law Research Institute at UC Hastings College of the Law, entitled “Pregnancy Resource Centers: Ensuring Access and Accuracy of Information.”²²⁹ According to the UC Hastings report, the primary weakness of the previous mandatory disclosure ordinances was how they only applied to CPCs.²³⁰ Since most CPCs are affiliated with a religious ideology,²³¹ any regulation which targets CPCs is automatically

²¹⁹ CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

²²⁰ CAL. HEALTH & SAFETY CODE § 123471(b)(1-4).

²²¹ CAL. HEALTH & SAFETY CODE § 123472(b)(1).

²²² CAL. HEALTH & SAFETY CODE § 123472(b).

²²³ CAL. HEALTH & SAFETY CODE § 123471(a)(2).

²²⁴ CAL. HEALTH & SAFETY CODE § 123471(a)(5).

²²⁵ *Supra*, Part II.A.

²²⁶ Chemerinsky, *supra* note 2.

²²⁷ AB-775 Reproductive FACT Act, Compare Versions, 02/25/15-Introduced . California Legislative Information, https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201520160AB775&cversion=20150AB77599INT.

²²⁸ ASSEMBLY THIRD READING ANALYSIS, A.B. 775, at 2 (Cal. 2015),

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775. The Senate Health Committee approved of the addition on June 24, 2015 (S. HEALTH COMM. ANALYSIS, A.B. 775, at 4 (Cal. 2015)).

²²⁹ See ASSEMBLY THIRD READING ANALYSIS, A.B. 775, at 2 (Cal. 2015); see also S. COMM. ON HEALTH, Bill Analysis, AB-775 Reproductive FACT Act, 2015-2016 Sess., at 4 (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775; U.C. HASTINGS REP., *supra* note 17, at 1. The report was first published in 2011 and then updated in June 2015.

²³⁰ U.C. HASTINGS REP., *supra* note 17, at 13.

²³¹ See *supra* Part I.A.

susceptible to potential free exercise clause violations.²³² Thus, the Assembly adopted a bill that “regulate[s] all pregnancy centers, not just CPCs, in a uniform manner.”²³³

The statutory language of the FACT Act suggests the all pregnancy service facilities, including abortion clinics, fall within the FACT Act’s regulatory powers. It is important to note that the FACT Act exempts all government operated clinics as well as primary care clinics that are enrolled as providers for both Medi-Cal²³⁴ and the Family Planning, Access, Care, and Treatment Program (Family PACT).²³⁵ Clinics that are enrolled as both Medi-Cal and Family PACT providers, by definition, already offer the entire “continuum of health care services” listed on the notice requirement.²³⁶ Therefore, these exemptions do not undermine the FACT Act’s general applicability.²³⁷

V. LEGAL CHALLENGES TO THE REPRODUCTIVE FACT ACT (AB 775)

Since Governor Brown signed the California Reproductive FACT Act into law on October 9, 2015, opponents have filed several lawsuits against the FACT Act.²³⁸ A Ninth Circuit panel heard arguments for three of those cases and affirmed the District Courts’ decision to deny the plaintiff CPC’s requests for preliminary injunctions.²³⁹

²³² U.C. HASTINGS REP., *supra* note 17, at 13.

²³³ ASSEMBLY THIRD READING ANALYSIS, A.B. 775 (Cal. 2015) at 2

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775 (“[b]ecause approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the [UC Hastings] report concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.”).

²³⁴ *Abortions*, MEDI-CAL (Sept. 2015), https://files.medi-cal.ca.gov/pubsdoco/publications/.../abort_m00o03.doc. Medi-Cal covers abortions regardless of the gestational age of the fetus and does not require medical justification or authorization for the abortion.

²³⁵ ASSEMBLY COMM. ON JUDICIARY (Apr. 28, 2015), at 19,

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775; *see also Family PACT Program Overview*, MEDI-CAL (Aug. 2014), https://files.medi-cal.ca.gov/pubsdoco/publications/.../fpact/fam_f00.doc. Family PACT is a publicly funded program, focused on providing low-income men and women access to comprehensive planning services. Family PACT provides coverage for contraceptives, but not abortions.

²³⁶ ASSEMBLY JUDICIARY COMM. (Apr. 28, 2015), at 19–20,

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775. Under Medi-Cal, patients are covered for “pregnancy-related services, maternity and new born care, prenatal care, and emergency abortion services.” Under Family PACT, a patient receives coverage for “comprehensive clinical family planning services, including...contraceptives, natural family planning, abstinence methods, limited fertility management, preconception counseling, maternal and fetal health counseling, general reproductive health care...medical family planning treatment, and family planning procedures.”

²³⁷ Defendant Attorney General Kamala D. Harris’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 17, *A Woman’s Friend Pregnancy Resource Clinic v. Harris*, 2:15-cv-02122 (E.D. Cal. Dec. 4, 2015). [Hereinafter *Opposition to Motion for Preliminary Injunction*].

²³⁸ On November 25, 2015, a third lawsuit was filed against AB 775. Associate pastor Scott Scharpen, who operates a licensed mobile crisis pregnancy center, called “Go Mobile for Life,” claims that the new law violates his constitutional right to free exercise of religion and freedom of speech. Nicole Knight Shine, *Anti-Choice Pastor Refuses to Follow Crisis Pregnancy Center Regulations*, RH REALITY CHECK (Dec. 9, 2015), <https://rewire.news/article/2015/12/09/anti-choice-pastor-refuses-follow-crisis-pregnancy-center-regulations/>.

²³⁹ *Order, A Woman’s Friend Pregnancy Resource Center v. Harris*, No. 15-17517 (9th Cir. Jan 11, 2016).

A. Pacific Justice Institute Lawsuit—Eastern District Court of California

The Pacific Justice Institute (PJI) filed a complaint on October 10, 2015 in the U.S. District Court for the Eastern District of California, on behalf of three licensed CPCs: A Woman’s Friend Pregnancy Resource Clinic, Crisis Pregnancy Center of Northern California, and Alternatives Women’s Center.²⁴⁰ None of the plaintiff CPCs offer abortion or abortion referrals, based on their moral and religious convictions.²⁴¹ PJI brought a Civil Rights suit pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the FACT Act, and demanding a preliminary injunction.²⁴²

First, PJI argued that the FACT Act violates the plaintiff CPCs’ freedom of speech by unconstitutionally compelling the CPCs to “speak messages that they have not chosen, with which they do not agree, and that distract, and detract from the messages they have chosen to speak.”²⁴³ Second, PJI claimed the FACT Act infringes upon plaintiff CPCs’ right to the free exercise of their religious beliefs because it forces them to disseminate the mandated, pro-abortion, State message, which is inconsistent with the CPCs’ religious convictions, thus burdening these CPCs’ free exercise of religion secured under the First Amendment.²⁴⁴

B. Alliance Defending Freedom Lawsuit—Southern District Court of California

A subsequent lawsuit was filed on October 13, 2015 in the U.S. District Court for the Southern District of California, by the Alliance Defending Freedom (ADF) on behalf of the National Institute of Family and Life Advocates (NIFLA), and two CPCs: Pregnancy Care Center, and the Fallbrook Pregnancy Resource Center.²⁴⁵ As previously stated, NIFLA is a pro-life organization with an expansive network of affiliated CPCs, including 111 CPCs in California.²⁴⁶ Pregnancy Care Center is a “licensed” facility, and Fallbrook is an “unlicensed” facility.²⁴⁷ The case is a federal civil rights suit brought pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the FACT Act, and requesting a preliminary injunction.²⁴⁸

ADF’s primary contentions were how the FACT Act violates plaintiff CPCs’ First Amendment right to free speech, as well as plaintiffs’ right to the free exercise of religion.²⁴⁹

VI. LEGAL CHALLENGES TO THE REPRODUCTIVE FACT ACT (AB 775)—PART 1: FREEDOM OF SPEECH

The First Amendment of the U.S. Constitution protects the right to freedom of speech.²⁵⁰ The government infringes upon this right either by silencing speech or by forcing someone to

²⁴⁰ Amended Verified Complaint for Declaratory and Injunctive Relief at 3–5, *A Woman’s Friend Pregnancy Resource Clinic v. Harris*, 2:15-cv-02122 (E.D. Cal. Oct. 19, 2015) [hereinafter PJI Amended Complaint]. All three CPCs identify as religious, non-profit corporations, licensed under California Health and Safety Codes 1204.

²⁴¹ *Id.* at 3–5.

²⁴² *Id.* at 2.

²⁴³ *Id.* at 13–14.

²⁴⁴ *Id.* at 14.

²⁴⁵ ADF Complaint, *supra* note 6, at 2–3.

²⁴⁶ *Id.* at 2–3; see *infra* Part I.

²⁴⁷ ADF complaint, *supra* note 6, at 7–8.

²⁴⁸ *Id.* at 2.

²⁴⁹ Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Preliminary Injunction at 2, *NIFLA v. Harris*, No. 3:15-cv-02277 (S.D. Cal. Oct. 21, 2015) [hereinafter ADF Motion for Preliminary Injunction].

²⁵⁰ U.S. CONST. amend. I.

speak against his or her will,²⁵¹ otherwise known as “compelled speech.”²⁵² In general, the First Amendment prohibits the government from compelling speech.²⁵³ However, that right is not absolute²⁵⁴ and a court will uphold a law that compels speech so long as it “survives the applicable level of scrutiny.”²⁵⁵ The level of scrutiny a court will apply depends on how the speech is classified.²⁵⁶

A. Content-Based Regulation: Compelled Speech and Viewpoint Discrimination

The first consideration for determining the appropriate level of scrutiny is whether the government’s regulation on speech is “content-based” or “content-neutral.”²⁵⁷ The Supreme Court has held that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”²⁵⁸ As a result, “compelled speech” is generally considered a “content-based” speech regulation and therefore is subject to the highest level of scrutiny: strict scrutiny.²⁵⁹ Additionally, regulations that discriminate on the basis of viewpoint also warrant a higher level of scrutiny.²⁶⁰ For instance, a law forbidding someone from speaking out against abortion would constitute “viewpoint discrimination.”²⁶¹ Alternatively, a lower level of scrutiny may apply if a court determines that the speech regulation is “compelling” commercial speech or professional speech.²⁶²

The Ninth Circuit concluded that the FACT Act is a “content-based” regulation because the Act “[m]andate[s] speech that a speaker would not otherwise make which necessarily alter[s] the content of the speech.”²⁶³ The Ninth Circuit also held that the Act did not discriminate based on viewpoint because the FACT Act “applies to all [licensed and unlicensed] clinics, regardless of their stance on abortion or contraception.”²⁶⁴ Neither the “Licensed Notice” nor the “Unlicensed Notice” provisions indicate any preference for particular family-planning services, but merely required disclosure of publicly-funded family-planning services (“Licensed Notice”) and whether a clinic is licensed (“Unlicensed Notice”).²⁶⁵

²⁵¹ Caroline M. Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1282 (2014); see e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (stating how the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all”).

²⁵² *Id.* at 1279.

²⁵³ ASSEMBLY COMM. ON JUDICIARY (Apr. 28, 2015), at 11, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775.

²⁵⁴ *Id.* (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919), “The most stringent protection of free speech would not protect a man [from] falsely shouting fire in a theater and causing panic.”).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 12.

²⁵⁸ *Id.* at 12 (citing *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796 (1988)).

²⁵⁹ Corbin, *supra* note 251, at 1283.

²⁶⁰ ASSEMBLY COMM. ON JUDICIARY (Apr. 28, 2015), at 12, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *NIFLA v. Harris*, 839 F.3d 823, 835 (9th Cir. 2016) (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

²⁶⁴ *Id.* at 836. The Court holds that the FACT Act’s two exceptions are unrelated to viewpoint.

²⁶⁵ *Id.* at 836.

B. “Professional Speech”

The next classification of the government’s speech regulation depends on whether the plaintiff CPCs’ speech is considered “commercial speech”²⁶⁶ or “professional speech.”²⁶⁷ Courts have held that regulations affecting otherwise protected speech of certain professions, including doctors, should be subject to a lower level of scrutiny because of the government’s legitimate interest in regulating that profession.²⁶⁸

The Ninth Circuit defines “professional speech” as “speech that occurs between professionals and their clients in the context of their professional relationship.”²⁶⁹ The appropriate level of scrutiny for regulations of “professional speech” depends on where it falls on a continuum. At one end of the continuum is a professional’s right to engage in “public dialogue,” which is afforded the greatest First Amendment protection²⁷⁰ and therefore regulations infringing on this right are subject to strict scrutiny. At the other end of the spectrum, speech that regulates professional conduct, such as a form of treatment like therapy, is granted a lesser level of protection and is subject to rational basis review.²⁷¹ In the middle of the continuum is professional speech within the professional-client relationship.²⁷² The proper level of scrutiny for professional speech that occurs at this midpoint is intermediate scrutiny.²⁷³

The Ninth Circuit held that the speech at issue under the “Licensed Notice” was “professional speech,” and therefore intermediate scrutiny should apply.²⁷⁴ The Court did not determine whether the second provision, the “Unlicensed Notice” regulation, was professional speech because it would survive strict scrutiny.²⁷⁵

C. Provision 1 (“Licensed Notice”) Professional Speech Analysis

The Ninth Circuit held that the speech at issue under the “Licensed Notice” was “professional speech,” and therefore intermediate scrutiny should apply.²⁷⁶ Licensed CPCs engage in speech that falls “squarely within the confines of their professional practice.”²⁷⁷ The speech that occurs between clients and licensed CPCs is part of CPCs’ “professional practice of offering family-planning services.”²⁷⁸ Since the speech at issue here is not the clinics’ “engaging in public dialogue,” strict scrutiny is inappropriate.²⁷⁹ Alternatively, the Licensed Notice is not regulating speech that constitutes conduct, such as therapy or treatment, and therefore rational basis review is improper as well.²⁸⁰ Rather, the CPC speech that is subject to regulation under the FACT Act

²⁶⁶ ASSEMBLY COMM. ON JUDICIARY (Apr. 28, 2015), at 12,

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775.

²⁶⁷ *Id.*, at 15.

²⁶⁸ Meagan Burrows, *The Cubbyhole Conundrum: First Amendment Doctrine in the Face of Deceptive Crisis Pregnancy Center Speech*, 45 COLUM. HUMAN RIGHTS L. REV. 896, 912–13 (Spring 2014).

²⁶⁹ *NIFLA v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016).

²⁷⁰ *Id.* (citing *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013)).

²⁷¹ *Id.* (citing *Pickup* at 1229 (“the state’s power is great, even though such regulation may have an incidental effect on speech”)).

²⁷² *Id.* at 839 (citing *Pickup* at 1228).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *NIFLA v. Harris*, 839 F.3d at 843.

²⁷⁶ *Id.* at 839.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 840.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

falls within the midpoint of the professional speech continuum.²⁸¹ Thus, intermediate scrutiny is proper.²⁸²

To survive intermediate scrutiny, the regulation must “directly advance[] a substantial governmental interest” and that regulation must be “drawn to achieve that interest.”²⁸³ The Ninth Circuit held that the Licensed Notice meets the intermediate scrutiny requirement because California has a “substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion.”²⁸⁴ Furthermore, the Licensed Notice was narrowly drawn to achieve the State’s substantial interest because the Notice requirement “informs the reader only of the existence of publicly-funded family-planning services,” and does not “encourage, suggest, or imply that women should use those state-funded services.”²⁸⁵ Additionally, based on the time-sensitive nature of decisions regarding pregnancy, the Court recognized that the Notice is an “effective means of informing women about publicly-funded pregnancy services” because it disseminated information directly to women upon entering a clinic.²⁸⁶

Even if the FACT Act was not considered “professional speech” and was required to meet strict scrutiny, it would still be considered constitutional. The legislative histories and court decisions further support that the FACT Act’s mandatory disclosure provisions for “licensed covered facilities” and “unlicensed covered facilities” were narrowly tailored to a compelling governmental interest.²⁸⁷ Note that in the prior cases, the Courts held that the mandatory disclosure notice requirements were subject to a higher level of scrutiny, and therefore needed to be narrowly tailored to a compelling governmental interest. None of these court decisions are binding on California courts.

D. Provision 1 (“Licensed Covered Facilities” is Not a “services disclosure”)

The first provision of the FACT Act requires “licensed covered facilities” to have signs and printed and digital notices, stating there are free services available in California for family planning, prenatal care, and abortions. The signs must further provide a phone number for the county social services.²⁸⁸

This provision could arguably be characterized as a “services disclosure” because it requires plaintiff CPCs to post a notice about certain family planning services. However, that classification would be inherently flawed because unlike the unlawful “services disclosure” of New York City’s Local Law 17, which dictated that CPCs must indicate whether or not they provide or give referrals for abortions or emergency contraception,²⁸⁹ and the Baltimore Ordinance’s illegitimate “services disclosure,” which required CPCs to state that their facility “does not provide or make referrals for abortion or birth-control services,”²⁹⁰ the FACT Act

²⁸¹ *NIFLA v. Harris*, 839 F.3d at 840.

²⁸² *Id.*

²⁸³ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2001).

²⁸⁴ *NIFLA v. Harris*, 839 F.3d at 841.

²⁸⁵ *Id.* at 842.

²⁸⁶ *Id.*

²⁸⁷ *See supra* Part III.

²⁸⁸ CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

²⁸⁹ N.Y.C. ADMIN. CODE § 20.816(C) (2011).

²⁹⁰ *Greater Balt. Ctr. For Pregnancy Concerns, Inc., v. Mayor & City Council Balt.*, 721 F.3d 264, 276 (4th Cir. 2013).

stipulation merely requires the sign or notice to include a list of services available in California,²⁹¹ stating nothing about the particular services offered or not offered by that individual CPC.

E. Provision 1 (“Licensed Covered Facility”) is Not a “Government Message Disclosure”

Additionally, the FACT Act’s mandate on “licensed covered facilities” may resemble a “government message disclosure” because it references the State’s free, or low-cost, publicly funded family planning services.²⁹² In fact, the plaintiff CPCs maintain the FACT Act is imposing “government speech”²⁹³ and improperly forcing plaintiff CPCs to promote the state of California’s message.

New York City’s Local Law 17’s “government message disclosure,” which required CPCs to state, “the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider,”²⁹⁴ was invalidated because it compelled CPCs to “espouse the government’s position on a contested public issue.”²⁹⁵

Unlike New York City Local Law 17, the FACT Act mandate is neutral and does not identify whether the State has an inclination or preference for a certain type of medical care.²⁹⁶ Rather, the FACT Act only requires CPCs to post a sign with a generic, neutral statement listing the low-cost services offered in the state, without any indication of the government endorsing one pregnancy service or family planning option over another.²⁹⁷ Thus, in no way does the California FACT Act force CPCs to promote the government’s preference.

Therefore, allegations that the FACT Act unlawfully mandates CPCs to promote government speech are unfounded. Although California is a pro-choice state, that does not necessarily mean the FACT Act is espousing California’s pro-choice views by forcing CPCs to endorse abortion. On the contrary, the notice merely states that abortion, as well as other forms of FDA-approved contraceptives and family planning services, are available in the state of California. Thus, CPCs are not forced to sanction a practice that they are morally opposed to or that conflicts with the centers’ ideology.

F. Provision 1 is Narrowly Tailored

In addition to the Ninth Circuit’s reasoning, the FACT Act is also narrowly tailored because the time-sensitive nature of pregnancy makes other policy options, such as a statewide advertising campaign, unavailable to the legislature.²⁹⁸ Furthermore, “the most effective way to make sure pregnant women obtain the information and services they need during pregnancy in a timely way is to require a licensed health facility to provide the required notice, especially if the facility does not provide the full spectrum of health care services.”²⁹⁹

Additionally, the FACT Act’s mandatory disclosure ordinance for “licensed facilities” is the least restrictive means because, unlike the previous ordinances, the FACT Act does not impose additional burdens or requirements on CPCs, such as mandating that staff or volunteers remind women of that notice orally or requiring the notice to be displayed in multiple places throughout

²⁹¹ Opposition to Motion for Preliminary Injunction, *supra* note 237, at 16.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ N.Y.C. ADMIN. CODE § 20-816(A) (2011).

²⁹⁵ *Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233, 251 (2d. Cir. 2014) (citations omitted).

²⁹⁶ N.Y.C. ADMIN. CODE § 20-816(A) (2011); CA A.B. 775 (2015).

²⁹⁷ CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

²⁹⁸ Opposition to Motion for Preliminary Injunction, *supra* note 237, at 16.

²⁹⁹ *Id.*

the CPC. First, the FACT Act only requires licensed CPCs to post one sign with the mandatory disclosure message.³⁰⁰ This is in contrast to the other ordinances that instructed CPCs to post signs in multiple locations, such as near the entrance as well as in the waiting area.³⁰¹

Furthermore, CPC volunteers and staff are not forced to make any oral statements regarding abortion, birth control, or any other content mentioned on the signs. This is distinct from New York City's Local Law 17 which requires that disclosure regarding the CPCs' status as a licensed medical facility not only be displayed on a sign, but be disclosed orally by the CPC staff.³⁰² Whereas Local Law 17 is more stringent than California's FACT Act, it is likely that the FACT Act will be held as constitutional.

Finally, the FACT Act does not prohibit CPCs from "expressing their views to patients about abortion, or any other topic, or prevent them from recommending against abortion."³⁰³ In fact, CPCs are even permitted to "communicat[e] disagreement with the Act or the notice itself."³⁰⁴ Overall, this provision is narrowly tailored to meet the State of California's compelling interest.

G. Provision 2 (Unlicensed Notice)

The second provision of the FACT Act applies to unlicensed clinics. The Ninth Circuit did not evaluate whether this provision regulated professional speech because the Unlicensed Notice would survive any level of scrutiny, including strict scrutiny.³⁰⁵ To survive strict scrutiny, a regulation must be "narrowly tailored to serve a compelling interest."³⁰⁶ The Ninth Circuit held that "informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state" is indeed a compelling state interest.³⁰⁷ This is due in part to the Legislature's determinations on the prevalence of CPCs throughout the state and the misleading information disseminated by CPCs.³⁰⁸ Additionally, the Ninth Circuit determined that the Unlicensed Notice of the FACT Act was narrowly tailored to achieve that compelling interest because the notice clearly informs women that a CPC is not a licensed clinic.³⁰⁹ The Unlicensed Notice does not require CPCs to make any statements regarding the quality of the services offered at the clinic or comments indicating if California has a preference for licensed clinics.³¹⁰ Rather, the Unlicensed Notice disclosure is only one sentence, requiring clinics to state whether or not they are licensed by the state.³¹¹

H. Provision 2 ("Unlicensed Covered Facilities" is a "status disclosure")

The second part of the Reproductive FACT Act applies to "unlicensed facilities."³¹² This provision could be considered a "status disclosure" because it requires CPCs to provide notice revealing if they are not a licensed medical facility. The plaintiff CPCs contend the FACT Act

³⁰⁰ CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

³⁰¹ See BALT. MD., HEALTH CODE §3-502(b) (2009); MONTGOMERY CNTY., MD. COUNCIL RES. § 16-1252(b)(1) (2010); N.Y.C. ADMIN. CODE § 20-816(f) (2011); S.F. ADMIN. CODE § 93.5(b)(2) (2011).

³⁰² N.Y.C. ADMIN. CODE § 20-816(a) (2011).

³⁰³ Opposition to Motion for Preliminary Injunction, *supra* note 237, at 9.

³⁰⁴ *Id.*

³⁰⁵ NIFLA v. Harris, 839 F.3d 823, 835 (9th Cir. 2016).

³⁰⁶ *Id.* at 843 (citing Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665 (2015)).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 842.

³¹⁰ *Id.* at 843.

³¹¹ *Id.*

³¹² CAL. HEALTH & SAFETY CODE § 123470-123473 (2015).

wrongfully compels unlicensed centers to disclose the fact that they lack a medical license.³¹³ ADF criticizes the notion that unlicensed centers must disclose this detail, arguing that these CPCs do not need a “medical license since they are not offering medical services (and don’t pretend to be).”³¹⁴ However, as discussed earlier, this contention is one of the primary concerns with CPCs: that unlicensed medical centers *are* pretending to be legitimate medical providers and take extreme measures to have the “appearance” of a licensed medical facility.³¹⁵

The only portion of New York City’s Local Law 17 to be reinstated and implemented was the “status disclosure” mandate, which required unlicensed pregnancy resource centers to inform clients that the CPC did not have a licensed medical provider on staff.³¹⁶ This provision is similar to the message the FACT Act directs unlicensed CPCs to disclose. Therefore, since the Second Circuit held that New York City’s Local Law 17’s “status disclosure” survived strict scrutiny,³¹⁷ it is likely that a Court would conclude the FACT Act’s “status disclosure” provision for “unlicensed facilities” also meets the requirements for strict scrutiny because of the analogous language of the New York City and California notice requirements.

Additionally, the California Act is not unduly burdensome upon CPCs. For example, the FACT Act does not require CPCs to actually provide accurate information; rather the Act is merely requiring them to disclose whether or not they are a licensed medical facility.³¹⁸

1. Freedom of Speech Summary

Both provisions of California’s FACT Act will survive CPCs’ allegations of violations of freedom of speech, regardless of what level of scrutiny is applied. If courts follow the Ninth Circuit’s holding and continue to classify the speech in question as “professional speech,” then courts should find the FACT Act Licensed Notice provision meets intermediate scrutiny requirements and is therefore constitutional. Even if the law is subject to strict scrutiny, it will still be constitutional because the FACT Act is narrowly tailored to meet a compelling governmental interest and does so in the least restrictive way. This conclusion is supported by comparing and contrasting the FACT Act to the prior mandatory disclosure ordinances and considering the Act’s statutory language and legislative history.

The FACT Act’s provision for “unlicensed facilities” will also be held constitutional, because it can survive any level of scrutiny, including strict scrutiny.

³¹³ ADF Motion for Preliminary Injunction, *supra* note 249, at 9.

³¹⁴ *Id.*

³¹⁵ *See supra* Part I.D.

³¹⁶ N.Y.C. ADMIN. CODE § 20-816(a)-(e) (2011). *See also* Austin LifeCare, Inc. v. City of Austin, Civil No. A-11-CA-875-LY (W.D. Tex. 2014) (stating that the Austin Ordinance which mandated that unlicensed facilities have signs notifying whether the medical services at the CPC were not conducted under the supervision of a licensed health provider, was unconstitutional because the language of the statute was too vague). Therefore, the Texas Federal District Court did not evaluate the alleged First Amendment violations and the invalidation of the Austin Ordinance’s “status disclosure” should not be dispositive with regards to the FACT Act’s “status disclosure.”

³¹⁷ Evergreen Ass’n v. City of N.Y., 740 F.3d 233, 247 (2d Cir. 2014) (New York City’s Local Law 17 was held to be narrowly tailored and the least restrictive means of achieving the compelling government interest. Without the “status disclosure,” the City would be deprived “its ability to protect the health of its citizens and combat consumer deception in even the most minimal way).

³¹⁸ Duane, *supra* note 121, at 382.

VII. LEGAL CHALLENGES TO THE REPRODUCTIVE FACT ACT (AB 775)—PART 2: FREE EXERCISE CLAUSE

The First Amendment of the U.S Constitution protects the free exercise of religion.³¹⁹ However, in *Employment Division v. Smith*, the Supreme Court held that a rationally based, neutral law of general applicability does not violate the right to the free exercise of religion, even when a law incidentally burdens a religious belief or practice.³²⁰

The Pacific Justice Institute and the Alliance Defending Freedom accuse the FACT Act of violating plaintiff CPCs' right to free exercise of religion because the Act only applies to certain facilities: pro-life, Christian CPCs.³²¹ Therefore, plaintiffs allege the FACT Act unlawfully infringes upon CPCs' free exercise rights because it is not neutral or generally applicable, as evident by the fact that it explicitly singles out religious clinics.³²²

The Ninth Circuit held that the FACT Act is both facially and operationally neutral.³²³ The FACT Act is facially neutral because it does not reference any religious practice.³²⁴ The Act is operationally neutral because it applies to all licensed and unlicensed facilities.³²⁵ As the District Court noted, the legislature did not engage in "religious gerrymander[ing]" by "target[ing] religious practices through careful legislative drafting."³²⁶ Additionally, based on the plain language of the FACT Act, the statute does not apply exclusively to CPCs, but rather applies to all medical care providers whose primary purpose is family planning or pregnancy-related services, including those that are secular.³²⁷ Therefore, the FACT Act satisfies the general applicability requirement.³²⁸ The FACT Act is still "generally applicable" regardless of the two exemptions because those exemptions are "tied directly to limited, particularized, business-related, objective criteria."³²⁹ Thus, the FACT Act is subject to rational basis review. Since both provisions survived at least immediate scrutiny, the FACT Act clearly will survive rational basis review.³³⁰

PJI and ADF's claims regarding their right to the free exercise of religion will likely continue to fail because of the erroneous belief that the FACT Act unlawfully singles out CPCs because of their religious beliefs. Therefore, the CPCs' allegations of how the FACT Act violates CPCs' free exercise of religion is without merit.

VIII. POLICY

As discussed earlier, there are several health risks and implications associated with CPCs.³³¹ Therefore, CPCs should not have the right to use deception and manipulation to attract

³¹⁹ U.S. CONST. amend. I.

³²⁰ Opposition to Motion for Preliminary Injunction, *supra* note 237, at 17 (citing *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990)).

³²¹ ADF Complaint, *supra* note 6, at 13.

³²² ADF Complaint, *supra* note 6.

³²³ *NIFLA v. Harris*, 839 F.3d at 844.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1211 (E.D. Cal. 2015).

³²⁷ *Supra* Part IV.D.; Opposition to Plaintiff's Motion for Preliminary Injunction, *supra* note 237, at 17; *see also* Chemerinsky, *supra* note 2.

³²⁸ Opposition to Plaintiff's Motion for Preliminary Injunction, *supra* note 237, at 17.

³²⁹ *NIFLA v. Harris*, 839 F.3d at 844–45 (citing *Stormans*, 794 F.3d at 1082).

³³⁰ *Id.* at 845.

³³¹ *Supra* Part II.

unknowing women to their doors. While CPCs have discretion over most of what goes on within their walls, there are still mechanisms that local, state, and hopefully federal governments can utilize to regulate these centers.

An important policy consideration is the balance between protecting a pregnant woman's right to be fully aware of all her reproductive health options—including her constitutionally protected right to terminate a pregnancy—and CPCs' freedom to disseminate and share their pro-life dogma and adhere to their strong moral and religious convictions about abortion and contraceptives. However, there are several additional compelling state interests that justify this imposition on the CPCs' conduct and freedom of speech rights.

A. Public Health

First, CPCs pose serious public health threats. This risk is true both for women who are seeking to terminate their pregnancies as well as women who choose to carry a pregnancy to term, but are not receiving adequate prenatal care.³³² Overall, CPCs' deceptive practices “jeopardize the health of women and their children, and a public health response is warranted.”³³³

As CPCs continue to grow and gain momentum, due to greater federal and state support, the number of abortion providers has diminished at an alarming rate as a result of increasingly restrictive abortion regulations, such as Targeted Regulation of Abortion Provider (TRAP) laws.³³⁴ This trend has created several public health issues.

For instance, women who initially visit a CPC and decide to terminate their pregnancy may find themselves unable to access or afford an abortion due to CPCs' delay tactics and practices.³³⁵ Thus, many of these women are turning to self-induced abortions. A recent study conducted by the Texas Policy Evaluation Project estimates that approximately 100,000 to 240,000 women of reproductive age in Texas have attempted a self-induced abortion at some point in their life.³³⁶ Common methods included using herbal remedies or being punched in the abdomen in order to induce an abortion.³³⁷

Overall, the current practices of CPCs pose a true threat to women's health and safety by preventing access to legitimate healthcare services.³³⁸ These public health concerns are “even more insidious when these fake clinics receive the sheen of authenticity from governments.”³³⁹ Although

³³² *Supra* Part II A-C.

³³³ Rosen, *supra* note 17, at 203.

³³⁴ “TRAP” laws “single out the medical practices of doctors who provide abortions and impose on them requirements that are different and more burdensome than those imposed on other medical practices.” *Targeted Regulation of Abortion Providers (TRAP)*, CENTER FOR REPRODUCTIVE RIGHTS, <http://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap> (last updated Aug. 28, 2015). See also *Last Week Tonight with John Oliver* (HBO television broadcast Feb. 21, 2016) (discussing TRAP laws, specifically Texas' HB 2).

³³⁵ *Supra* Part II.

³³⁶ Ashley Welch, *Study: 100,000 Texas Women Have Tried to Self-Induce Abortion*, CBS NEWS (Nov. 19, 2015), <http://www.cbsnews.com/news/100000-texas-women-have-tried-to-self-induce-abortion/>.

³³⁷ *Id.* According to the World Health Organization, approximately 47,000 women die from complications from unsafe abortions each year. *Preventing Unsafe Abortion*, WORLD HEALTH ORG., http://www.who.int/reproductivehealth/topics/unsafe_abortion/magnitude/en/ (last visited Dec. 13, 2015).

³³⁸ NARAL The Truth About CPCs, *supra* note 46, at 1.

³³⁹ NARAL CPCs Lie, *supra* note 23, at 17.

CPCs in California do not receive federal funding,³⁴⁰ approximately \$60 million in federal abstinence and marriage-promotion funds have been directed to CPCs.³⁴¹

B. Autonomy and Reproductive Rights

If the FACT Act survives affronts to its constitutionality, it will reiterate to women the empowering message of how the State of California supports women's rights to making decisions about their health. This is in sharp contrast to recent legislation and Supreme Court decisions which undermine women's bodily autonomy or that are based on the patronizing premise that women are not competent to make decisions about their own reproductive health.³⁴² Overall, "[a]ll women deserve medically accurate and unbiased information when facing an unintended pregnancy, in order to ensure autonomy in decision-making and personal integrity,"³⁴³ because "[w]hen a woman is coerced to continue an unwanted pregnancy through misinformation or lack of access, she loses control of her body, education, finances—her future."³⁴⁴

C. Targeting Vulnerable Women

Young women, women of color, and women who are of a lower socioeconomic status have the highest rate of unintended pregnancies in the United States,³⁴⁵ and as a result, have become the primary targets of CPCs.³⁴⁶ CPCs have exploited the fact that they can use the promise of providing free services to attract these vulnerable communities. For example, some CPC staff members said centers are most appealing to "young women without anywhere else to turn."³⁴⁷ Although medically accurate and unbiased comprehensive clinics for women do exist, it is predominantly women who come from privileged backgrounds who are either aware of these clinics or are able to afford these medical services.³⁴⁸ Thus, CPCs exacerbate this inequality. Overall, there is a serious injustice in this country if only certain groups of women, namely privileged women, are receiving proper medical care. All women, regardless of race, age, or socioeconomic level, deserve medically accurate and unbiased information and have the right to be fully informed of all of their options. Because "the struggle for reproductive rights is inextricable from other movements for racial and economic justice," there will not be "equal opportunity until a poor woman has the same sovereignty over her body and her future as a wealthy man."³⁴⁹ If CPCs continue their deceptive practices unhindered, it is not only a public health concern, but a matter of inequality.

³⁴⁰ NARAL California CPC Report 2010, *supra* note 20, at 6.

³⁴¹ Thomas E. Edsall, *Grants Flow to Bush Allies on Social Issues*, WASH. POST, Mar. 22, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/21/AR2006032101723_pf.html.

³⁴² See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

³⁴³ *Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers*, AM. PUB. HEALTH ASS'N, Nov. 1, 2011, <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/22/08/33/regulating-disclosure-of-services-and-sponsorship-of-crisis-pregnancy-centers>.

³⁴⁴ Winter, *supra* note 54.

³⁴⁵ *Fact Sheet: Unintended Pregnancy in the United States*, GUTTMACHER INST., (Mar. 2016), <https://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>.

³⁴⁶ *Supra* Part II.G

³⁴⁷ Winter, *supra* note 54.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

D. *Message to CPCs and Impact beyond California*

If the FACT Act can survive these constitutional onslaughts, the victory will be both symbolic and impactful. If the FACT Act is upheld as constitutional, it will send a strong signal to CPCs that they will no longer be able continue their unregulated, disingenuous practices and that asserting “freedom of speech” rights will no longer provide immunity. Although the FACT Act does not remedy most of the deceptive methods used by CPCs, its implementation draws more attention to the practices of CPCs and is likely to subject them to greater scrutiny. Enhanced regulation and inspection of CPCs should encourage them to alter their conduct in order to avoid paying the fines imposed by the statute.

Already, California has been making headlines across the country since Governor Brown signed this bill into law.³⁵⁰ If California’s FACT Act survives these constitutional challenges, perhaps it will influence other , municipalities, states, and even the federal government to follow suit.³⁵¹ Thus, the potential impact of California’s FACT Act extends beyond the confines of California’s borders. While the provisions in the FACT Act may not resolve all of the concerns regarding CPCs, the Act is certainly a step in the right direction. It will hopefully lead the way for further regulations, ensuring that all women have proper access to unbiased medical care and are aware of all their options. Only then will women be able to make truly informed decisions about their own reproductive health.

E. *Importance of the FACT Act Right Now*

The myriad of policy implications and legitimate concerns regarding CPCs clearly justifies the necessity of a statewide mandatory disclosure ordinance for CPCs. Additionally, the timing of this legislation is critical.

In recent years, CPCs have grown exponentially, due in part to greater federal and state government support, such as funding.³⁵² This is in stark contrast to the recent efforts by state legislators and members of the U.S. Congress to defund abortion providers across the country, especially Planned Parenthood centers.³⁵³ Since July 2015, eleven states have proposed legislation that would restrict Planned Parenthood’s ability to provide health care to low-income women.³⁵⁴ More recently, on December 3, 2015, the U.S. Congress approved a bill that would repeal parts of Obamacare and defund Planned Parenthood.³⁵⁵ The new Trump administration and Republican Congress have continued in this direction. In April 2017, the President signed a bill allowing states to independently decide if they will withhold federal funding from organizations that provide abortions, including Planned Parenthood.³⁵⁶ The future of the Affordable Care Act is currently unknown. Therefore, coming changes in funding of Planned Parenthood and other pregnancy care

³⁵⁰ *See id.* (“Last month, California enacted a law that requires unlicensed centers to disclose that they are not licensed medical providers and requires licensed centers to tell women that the state has programs for affordable family planning, abortion services and prenatal care”).

³⁵¹ In 2006, a proposed statute would have allowed the Federal Trade Commission to regulate crisis pregnancy centers; however the bill was never passed. *See e.g.*, U.C. HASTINGS REP., *supra* note 17, at 11.

³⁵² *Supra*, Part I.B.

³⁵³ Winter, *supra* note 54.

³⁵⁴ *Id.*

³⁵⁵ Kelsey Snell, *Senate Passes Obamacare Repeal, Planned Parenthood Defunding Bill, Putting Republicans on Record*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/12/03/senate-passes-obamacare-repeal-planned-parenthood-defunding-bill-putting-republicans-on-record/>.

³⁵⁶ Dan Merica, *Trump Privately Signs Anti-Planned Parenthood Law*, CNN (Apr. 14, 2017), <http://www.cnn.com/2017/04/13/politics/donald-trump-planned-parenthood-money/>.

providers remain to be seen³⁵⁷. Overall, there has been an alarming assault on comprehensive health care providers across the country and it is likely we will only see increased political attempts to cut funding from these medical clinics and divert these funds to subsidize CPCs.³⁵⁸ This trend will leave many impoverished women with few alternatives for proper reproductive and preventative care, especially since CPCs will not fill that void.³⁵⁹

VII. CONCLUSION

The California FACT Act must defeat freedom of speech and free exercise of religion claims raised by the Pacific Justice Institute and the Alliance Defending Freedom. Based on the similarities and differences between those acts and the recent legislation in California, it is evident that the California law will be held constitutional because it sufficiently overcomes the shortcomings of those invalidated or unimplemented ordinances due to its close resemblance to the ordinances which maintained some constitutional muster.

The FACT Act is significant not because it will expose and eliminate CPCs, but rather because it will be the first step in regulating CPCs, laying the groundwork for other states to follow suit. This law was strategically crafted in a way to best counter the inevitable constitutional challenges and allegations of free speech violations. Although the provisions of the FACT Act do not change the practices within CPCs, such as false information about the dangers of abortion or the use of scare tactics, the FACT Act is still a vital piece of legislation and is only the gateway toward ensuring that all women, regardless of age, race, or socioeconomic status, are able to make truly informed and autonomous decisions about their reproductive health.

³⁵⁷ Paige Winfield Cunningham, *Planned Parenthood Would be Defunded for One Year Under GOP Health Bill*, CHI. TRIB. (May 4, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-planned-parenthood-defunded-gop-health-bill-20170504-story.html> (noting that measures to defund Planned Parenthood “took a backseat to larger negotiations of the American Health Care Act”).

³⁵⁸ Winter, *supra* note 54. For example, the state of Ohio recently passed legislation that restricts funding for Planned Parenthood affiliates and another piece of legislation that allocates \$1 million over the next two years for CPCs.

³⁵⁹ *Id.*