

TO INFORM OR NOT TO INFORM: CALIFORNIA REPRODUCTIVE
FREEDOM, ACCOUNTABILITY, COMPREHENSIVE CARE, AND
TRANSPARENCY ACT

Jessica Wolinsky*

In October 2015, the California legislature passed the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the “Reproductive FACT Act” or “Act”), which requires clinics and other facilities that provide family planning or pregnancy-related services to present certain notices to clients.¹ The Act specifically dictates both the notice’s form and content, which must be displayed in a conspicuous location or distributed to all clients via print or digital media.² Should a pregnancy facility fail to comply with the required notice provisions, the Attorney General (the “AG”), city attorney, or county counsel may bring an action to impose civil penalties.³ Post-enactment, between 2015 and 2017,

*Candidate for Juris Doctor, Cumberland School of Law, 2019. Junior Editor, Cumberland Law Review. Bachelor of Science in Political Science, Berry College, 2016.

¹ CAL. HEALTH & SAFETY CODE §§ 123470–1234073 (West 2017); Bill Chappell, *Supreme Court Takes on Case About Free Speech and Abortion*, NPR: THE TWO-WAY (Nov. 13, 2017, 11:27 AM) (summary of the Reproductive FACT Act and the events leading to the Supreme Court’s consideration of the case), <https://www.npr.org/sections/twotwo-way/2017/11/13/563737297/supreme-court-takes-on-case-about-free-speech-and-abortion>.

² HEALTH & SAFETY § 123472. The Reproductive FACT Act added provisions to the California Health and Safety Code. The Code now requires a licensed covered facility to disseminate to clients the following notice: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." HEALTH & SAFETY § 123472(a)(1). Furthermore, the notice must be given “in English and in the primary threshold languages of the Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.” HEALTH & SAFETY § 12347(a). The notice may be combined with other mandated disclosures, but the bill requires the notice be disclosed through one of the following methods:

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

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

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

HEALTH & SAFETY § 123472(a)(2)(A)–(a)(3).

³ HEALTH & SAFETY § 123473(a) (\$500 for a first offense and \$1,000 for each subsequent offense).

various anti-abortion pregnancy clinics filed suit against the State of California, all seeking preliminary injunctions to enjoin enforcement of the Act.

In *A Woman's Friend Pregnancy Resource Clinic v. Harris*, the United States District Court for the Eastern District of California denied Plaintiffs' motion for a preliminary injunction to prevent the State from enforcing the Act.⁴ Plaintiffs, A Woman's Friend Pregnancy Resources Clinic, Crisis Pregnancy Center of Northern California, and Alternatives Women's Center are 501(c)(3) tax-exempt, non-profit religious corporations that provide alternatives to abortion.⁵ Plaintiffs alleged that the Act is unconstitutional on its face and would be unconstitutional as applied, claiming specifically that it would violate their rights to freedom of speech and freedom of religion under the First Amendment by requiring them to provide notice regarding abortion resources.⁶ Plaintiffs filed their petition for certiorari on March 20, 2017.⁷

In *LivingWell Medical Clinic v. Harris*, on appeal from the United States District Court for the Northern District of California, the United States Court of Appeals for the Ninth Circuit affirmed the denial of Plaintiffs' motion for a preliminary injunction to enjoin enforcement of the Act.⁸ Plaintiffs, LivingWell Medical Clinic, Inc., Pregnancy Care Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc. are non-profit faith-based pregnancy centers involved in medical and non-medical activities, including pregnancy tests, ultrasounds, counseling, emotional support, and practical assistance for new and expectant mothers.⁹ In their suit, Plaintiffs asserted that (1) dissemination of the mandated notice of abortion services would be inconsistent with their religious beliefs; and (2) the Act would violate their federal constitutional rights to freedom of

⁴ *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1179 (E.D. Cal. 2015), *aff'd*, 669 F.App'x. 495 (9th Cir. 2016) (mem.), *petition for cert. filed*, No. 16-1146 (U.S. filed March 20, 2017), <https://www.supremecourt.gov/docket/docketfiles/html/public/16-1146.html>.

⁵ *Id.* at 1183–88.

⁶ *Id.* at 1179.

⁷ *See generally Woman's Friend*, No. 16-1146, (U.S. filed March 20, 2017), <https://www.supremecourt.gov/docket/docketfiles/html/public/16-1146.html>.

⁸ *LivingWell Med. Clinic, Inc. v. Harris*, 669 F.App'x. 493 (9th Cir. 2016) (mem.), *petition for cert. filed*, No. 16-1153 (U.S. filed March 20, 2017), <https://www.supremecourt.gov/docket/docketfiles/html/public/16-1153.html>.

⁹ *LivingWell Med. Clinic, Inc. v. Harris*, 2015 U.S. Dist. LEXIS 13187682, *1, *aff'd*, 669 Fed. Appx. 493 (9th Cir. 2016).

speech, freedom of assembly, and the free exercise of religion.¹⁰ These plaintiffs also filed a petition for certiorari on March 20, 2017.¹¹

In *Mountain Right to Life, Inc. v. Becerra*, the most recent case to come before the Ninth Circuit, the United States District Court for the Central District of California held that Plaintiffs were unsuccessful in demonstrating a likelihood of success on the merits of their free speech and free exercise claims under the First Amendment to the Constitution.¹² The Ninth Circuit affirmed that judgment, denying the request for a preliminary injunction to bar the Act's implementation.¹³ The Plaintiffs filed their petition for certiorari on August 4, 2017.¹⁴

Although each of these cases has gone before the Ninth Circuit, the case which led to the Supreme Court's decision to hear the First Amendment issue is *National Institute of Family and Life Advocates v. Harris*.¹⁵ In *National Institute*, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the Southern District of California's judgment to deny Appellants' motion for a preliminary injunction.¹⁶ Appellants', the National Institute of Family and Life Advocates, Pregnancy Care Clinic, and Fallbrook Pregnancy Center, are religious non-profit corporations providing various pregnancy services to clients.¹⁷ Appellants alleged that the Act violated their rights to freedom of speech and free exercise under the First Amendment to the Constitution.¹⁸ On November 13, 2017, the Supreme Court granted certiorari.¹⁹

¹⁰ *Id.* at *1.

¹¹ See generally *LivingWell*, No. 16-1153 (U.S. filed March 20, 2017), <https://www.supremecourt.gov/docket/docketfiles/html/public/16-1153.html>.

¹² *Mountain Right to Life, Inc. v. Becerra*, 692 Fed. Appx. 807, 808 (9th Cir. 2017) (mem.), *aff'g*, 2016 WL 3883923 (C.D. Cal. Jul. 08, 2016), *petition for cert. filed*, No. 17-211 (U.S. filed Aug. 04, 2017), <https://www.supremecourt.gov/docket/docketfiles/html/public/17-211.html>.

¹³ *Id.*

¹⁴ See generally *Mountain Right to Life*, No. 17-211 (U.S. filed Aug. 04, 2017), <https://www.supremecourt.gov/docket/docketfiles/html/public/17-211.html>.

¹⁵ *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), *cert. granted in part*, 138 S. Ct. 464 (2017).

¹⁶ *Id.* at 829.

¹⁷ *Id.* at 831.

¹⁸ *Id.*

¹⁹ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017).

The U.S. Supreme Court is set to consider the Reproductive FACT Act in the upcoming session, limiting consideration “to the issue of whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.”²⁰ Petitioners assert in their brief that the Supreme Court should reverse the Ninth Circuit’s judgment upholding the Act and that the Act deserves strict scrutiny for three reasons: (1) the Act compels speech, (2) the Act is content based, and (3) the Act’s viewpoint would be discriminatory in both its stated purpose and actual effect.²¹ Respondent, Attorney General of California, asserted that States have a “significant role . . . in regulating the medical profession,” arguing the decisions set forth by the court of appeals do not conflict with either the Supreme Court’s or lower courts’ precedence.²²

The Ninth Circuit has consistently upheld denials of preliminary injunctions to pregnancy centers seeking to prevent enforcement of the California Reproductive FACT Act. Taking up the issue in *National Institute of Family and Life Advocates v. Becerra*, it will be interesting to see if the Supreme Court affirms the lower court’s decisions or reverses and remands for further consideration. Be on the lookout for an update on the Supreme Court’s ruling in this case from Cumberland Law Review Online.

²⁰ *Id.* See also Brief for Petitioner at 9, Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 464 (2017) (No. 16-1140), 2018 WL 347510; U.S. CONST. amend. I; (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); U.S. CONST. amend. XIV (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

²¹ Brief for Petitioner, *supra* note 20, at 31–33.

²² Brief for the State Respondents in Opposition at 1, 24, Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 464 (2017) (No. 16-1140), 2017 WL 2333827.