Nos. 16-1146, 16-1140, 16-1153

In the Supreme Court of the United States

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC AND ALTERNATIVE WOMEN'S CENTER,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of the State of California
Respondent.

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,
Respondents.

LIVINGWELL MEDICAL CLINIC, INC., *et al.*,
Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California, in his official capacity, *et al.*,
Respondents.

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

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF EVANGELICALS, CHRISTIAN LEGAL SOCIETY, AND THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit *sustained* legislation compelling anti-abortion pregnancy centers to distribute pro-abortion messages because it allegedly dealt with "professional speech." Another circuit *enjoined* legislation compelling abortion providers to give information that tended to reduce abortions, but for the same reason. *See Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). When dealing with abortion-related speech compelled by the government, some circuits apply strict scrutiny and some other standards of their definition.

The question this and its related petitions present is whether a uniform legal standard is to be applied when dealing with pro- and anti-abortion legislation, or whether pro-abortion legislation compelling speech by pro-life groups is to be given preferential treatment.

INTEREST OF *AMICI CURIAE*[1]

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred because made in the image of God, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of the unborn because they are helpless to protect themselves.

Christian Legal Society ("CLS") is a nonpartisan association of attorneys, law students, and law professors, founded in 1961, with attorney chapters nationwide and law student chapters at nearly 90 law schools. CLS's advocacy arm, the Center for Law and Religious Freedom, works to defend religious liberty and the sanctity of human life in the courts, the legislatures, and the public square. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

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[1] Counsel of Record for the Parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The Parties in these cases have consented to the filing of this brief. Copies of the written consent are being filed with this Brief. No Counsel for any Party authored this Brief in whole or in part, and no Counsel or Party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity other than *Amici,* their members, and their Counsel made a monetary contribution intended to fund the preparation or submission of this Brief.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from California, are vitally concerned with the outcome of this case because of the impact a case such as this one will have on the interactions that religious institutions and other charitable organizations have with local governments when these institutions and organizations speak and assemble. The NLF and its donors also believe that these protections are especially it is important when it comes to a contentious issue such as abortion.

SUMMARY OF THE ARGUMENT

Because uniformity of the rules of decision making are critical, not only to the rule of law but also to the public perception of the evenhandedness of the judiciary in reviewing regulation concerning abortion, one of the most contentious issues of our time, this Court should take this opportunity to set out the applicable standards, consistent with its recent decision in *Reed v. Town of Gilbert*.

ARGUMENT

The petitions for certiorari filed in this case and in the related cases ask for review of the Ninth Circuit's upholding of California's law mandating pro-life pregnancy centers to advertise abortion services by the state (among other things). Those petitions amply identify the conflicts among the circuits and will not be repeated. Instead, *Amici* briefly set out three additional points in support of the petitions.

1. Perhaps to belabor the obvious, abortion remains one of the most contentious issues of our public life, implicating not just religious and ethical issues, but scientific and political ones. When the judiciary appears to be taking sides, with some courts holding what can be perceived as anti-abortion legislation to a more exacting legal standard than other courts hold pro-abortion legislation, it necessarily reflects on the impartiality of our courts, a perception that is critical to be maintained for the Third Branch to be held in proper respect. The petitions should be granted to assure uniform standards are applied on both sides of this issue, preserving the perception of integrity and impartiality by the courts on this contentious topic.

2. Whether abortion should be encouraged or discouraged is not a "closed" issue such that the courts should themselves take sides. The desirability of abortion is still open for legitimate debate among people of intelligence and good faith on any number of levels, including social policy, economics, and biology. Indeed, this Court has repeatedly held that, although abortion may not be fully banned, governments do not have to fund the exercise of the abortion right. *See, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding state law prohibiting use of public facilities and personnel for abortions); *Williams v. Zbarez*, 448 U.S. 358 (1980) (upholding state law prohibiting use of public funds for abortion); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding city's refusal to pay for abortions at its hospital).

3. The Ninth Circuit applied its definition of an intermediate standard of review to the California statute by labeling the compelled advertisement by pro-life facilities of free or reduced-rate abortion services by the state as regulating

"professional" speech. Assuming some content-based regulation is permissible for some types of speech of historical professions, this Court should clarify that admittedly viewpoint-discriminatory speech such as that here cannot be given a standard of review of less than strict scrutiny. As this Court recently observed in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), viewpoint regulation is a particularly "egregious form of content discrimination." *Id.* at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The *Reed* Court noted that, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court "rightly rejected the State's claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment, observing that 'it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.'" *Id.* at 2229 (quoting *Button*, 371 U.S. at 438-39). Similarly here, the California legislature cannot immunize its viewpoint-discriminatory legislation on a matter of central political significance by calling those whose speech it seeks to curtail "professionals." Indeed, *Reed* applied strict scrutiny to the town's content-based regulation of notices about meeting times and places, information that is much less central to major public issues than is abortion.

CONCLUSION

Amici urge this Court to grant the petitions seeking review of the Ninth Circuit's decision that failed to apply strict scrutiny to California's pro-abortion law that compels anti-abortion facilities to advertise the availability of abortion services. The Ninth Circuit's approach is out of step with *Reed* and is in tension with that of other circuits. In this highly contentious area of our national discourse, it is essential

that the public have the perception that our courts are giving evenhanded treatment to all participants. These petitions provide this Court with a prime opportunity to set a uniform standard.

Respectfully submitted,
this 20th day of April 2017

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