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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

THE SCHARPEN FOUNDATION, INC. dba ICU MOBILE RIVERSIDE COUNTY, Plaintiffs, v. KAMALA HARRIS, Attorney General of the State of California, in her official capacity; KAREN SMITH, M.D., Director of California Department of Public Health, in her official capacity; PETER THORSON, City Attorney of the City of Temecula, California, in his official capacity; and DOES 1 through 10, inclusive; Defendants.	Case No. RIC 1414022 **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SCOTT SCHARPEN; AND [PROPOSED] ORDER IN SUPPORT THEREOF** Hearing: Date: December 23, 2015 Time: 8:30 a.m. Dept: 07 RES51337

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 23, 2015 at 8:30 a.m., or as soon thereafter as counsel may be heard, in Department 07 of the above entitled court located at 4050 Main Street, Riverside, California 92501, Plaintiff The Scharpen Foundation, Inc., dba ICU Mobile Riverside County, Image Clear Ultrasound Temecula, and Go Mobile For Life (hereinafter collectively referred

to "ICU Mobile") will and hereby does move this Court for a preliminary injunction against Defendants Kamala Harris, Karen Smith, M.D., and Peter Thorson (hereinafter collectively referred to as "Defendants") and their officers, employees, and representatives from enforcing or causing to be enforced Assembly Bill 775, the Reproductive FACT Act (the "Act") during the pendency of this case.

This motion is made pursuant to the provisions of Code of Civil Procedure section 527 on the following grounds:

1. Passage of the Act into law represents an imminent, concrete and reliable threat that Defendants will enforce the Act against Plaintiff's Facilities;
2. Enforcement of the Act by Defendants will irreparably harm ICU Mobile by infringing upon its free speech rights under the California Constitution;
3. ICU Mobile has a high likelihood of prevailing on the merits of its claims for violations of its free speech rights under the California Constitution; and
4. The balance of harm weighs strongly in favor of granting an injunction.

This Motion is based on this Notice of Motion and Motion for Preliminary Injunction, the accompanying Memorandum of Points and Authorities in support thereof, the Declaration of Scott Scharpen in Support of the Motion for Preliminary Injunction, and upon such other matters as may be presented to the Court at or before the time of the hearing.

TYLER & BURSCH, LLP

Dated: December 2, 2015

By: _____
Robert H. Tyler, Esq.
Counsel for Plaintiff, **THE SCHARPEN FOUNDATION**

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff, The Scharpen Foundation, Inc., doing business as ICU Mobile Riverside County, Image Clear Ultrasound Temecula, and Go Mobile For Life (hereinafter collectively referred to as "ICU Mobile") seeks a preliminary injunction that will prohibit Defendants and their officers, employees, and representatives, from enforcing or causing to be enforced Assembly Bill 775, the Reproductive FACT Act (the "Act") in order to prevent imminent and irreparable injury to ICU Mobile. The Act violates, *inter alia*, Article I, § 2 of the California Constitution.

Specifically, the Act mandates that "licensed covered facilities," such as ICU Mobile, advertise the availability of free or low cost abortion services. As a result, the Act not only compels ICU Mobile to speak in a way that may stigmatize its pro-life services, but it goes so far as to force the clinic to expressly advance the availability of free abortions, which is contrary to its religious and moral beliefs. Failure to abide by the Act comes with penalties: $500 for a first offense, and $1,000 for each subsequent offense. Preliminary relief is needed to afford this Court an opportunity to address the constitutional issues raised by the Act, with which ICU Mobile must comply on January 1, 2016.

FACTUAL BACKGROUND

I. ICU Mobile

ICU Mobile is a non-profit, faith-based pregnancy care center that provides services to women and their unborn children to advance its religious belief that life is a gift from God. (Declaration of Scott Scharpen in Support of Plaintiff's Motion for Preliminary Injunction ("Scharpen Decl.") ¶¶ 11, 12.) ICU Mobile engages in a number of medical and non-medical activities to carry out its religious mission, including pregnancy testing, limited obstetrical ultrasounds, medical referrals, pregnancy options, emotional support, information on STDs/STIs, information on birth control, and resources for additional pregnancy and post-pregnancy needs beyond the clinic. (Scharpen Decl. ¶¶ 8, 9.)

It provides these services and information to women with the goal of holistically serving their medical, emotional, spiritual, and material needs. (Scharpen Decl. ¶ 7.) ICU Mobile's mission is to equip women to make informed decisions to choose parenting or adoption, rather than abortion. (Scharpen Decl. ¶ 11.) Consistent with its religious and non-profit nature, ICU Mobile provides these services completely free of charge and never asks clients for donations. (Scharpen Decl. ¶ 11.) Also

consistent with its religious commitments, ICU Mobile believes that abortion is wrong and has never referred, nor would they ever refer, a client to have an abortion. (Scharpen Decl. ¶ 12.)

II. The Reproductive FACT Act

On October 9, 2015, Governor Edmund G. Brown, Jr. signed into law the Reproductive FACT Act. (Assem. Bill No. 775 (2014-2015 Reg. Sess.)(attached hereto as Exhibit "A".) The Act, co-sponsored by the abortion rights advocacy group, NARAL Pro-Choice California ("NARAL"), imposes specific obligations on two different types of entities, each defined in the Act as: (1) licensed covered facilities, and (2) unlicensed covered entities. A "licensed covered facility" is defined as a:

> [F]acility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purposes is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy test, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

(Exhibit "A," § 123471(a).)

ICU Mobile is a "licensed covered facility" as defined by the Act because it offers two or more of the pregnancy-related services set forth in the Act. The Act further states that each "licensed covered facility" shall "disseminate to clients on site the following notice" which 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 the telephone number].

The licensed covered facilities must post the required disclosure in one of the following ways:

> (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.

(Exhibit "A," § 123472(a).)

Two entities are specifically exempt from having to comply with the Act's mandated disclosures:

> (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
> (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

(Exhibit "A," § 123471(c).)

A licensed covered facility that fails to comply with the Act's disclosure requirements is "liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense." (Exhibit "A," § 123473(a).) The Attorney General, city attorney, or county counsel may bring an action to enforce the Act. (Exhibit "A," § 123473(a).)

ARGUMENT

This Court is authorized to issue an injunction pursuant to *Code of Civil Procedure* Sections 526 and 527. The California Supreme Court articulated a trial court's task in evaluating a request for preliminary injunction as follows: "[W]hether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff (or moving party) will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 527, 554.)

Here, Defendants should be enjoined from enforcing the Act during the pendency of this case because ICU Mobile has a sufficiently strong likelihood of prevailing on the merits of its claims under the California Constitutional claims. The balance of harms also tips heavily in favor of ICU Mobile because the Act not only compels ICU Mobile to speak in a way that may stigmatize its pro-life services, but it goes so far as to force the clinic to expressly advance the availability of free abortions, which is contrary to its religious and moral beliefs.

I. It is Highly Likely That ICU Mobile Will Prevail on the Merits of its Free Speech Claim

ICU Mobile's free speech claim is entirely based on Article I, § 2 of the California Constitution. In all instances, "Article I's free speech clause is at least as broad as the First Amendment's, and its right to freedom of speech is at least as great." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468,

490) ("*Gerawan*") (holding that Article I affords greater commercial speech rights and protections than the First Amendment.)[1] As a "general rule," however, "[A]rticle I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even broader and greater." (*Id.* (internal quotations omitted).) It is considered an exception to the general rule when Article I's protections are merely equivalent to protections under the First Amendment's. (*Id.*)

Because Article I encompasses all the protections afforded by the First Amendment, California courts that have addressed government-compelled speech under the California Constitution have used the abundant First Amendment jurisprudence as an analytical framework, in addition to considering the additional to protections afforded by Article 1. (*see e.g. ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1314; *Jerry Beeman and Pharmacy Services, Inc. v. Anthem Prescription Management, LLC* (9th Cir. 2011) 652 F.3d 1085, 1095). This brief follows suit, considering the First Amendment framework while also looking to the California Constitution for its greater protection of speech.

As discussed below, the Act is unconstitutional and ICU Mobile has a high likelihood of success on the merits for several reasons. First, the Act amounts to an impermissible viewpoint regulation of speech. Next, as conceded in the bill's analysis,[2] the Act is expressly content-based because it compels disclosure of specific content. Under First Amendment doctrine, the Act, as a viewpoint and content-based restriction, must satisfy strict scrutiny, which it cannot do. Finally, similar government regulations targeting pro-life pregnancy resource clinics have been found unconstitutional.

A. The Act is a Viewpoint-Based Regulation of Speech

The Act is viewpoint-based because the compelled speech implicitly advertises abortion and targets pro-life pregnancy centers. Although content and viewpoint discrimination are both presumed

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[1] In *Gerawin*, the California Supreme Court also noted the following three aspects of Article 1 demonstrate its greater breadth than the First Amendment: "Article 1, and not the First Amendment, affirmatively declares a 'right' that '[e]very person may freely speak, write and publish his or her sentiments on all subjects;" second, Article 1, unlike the First Amendment, "runs against the world, including private parties as well as governmental actors;" and third, Article 1 explicitly protects all subjects, while the First Amendment does not. (*Gerawan,* 24 Cal.4th at 491-493 (internal quotations omitted).)

[2] (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 775 (2015-2016 Reg. Sess.) April 28, 2015, p. 18.)

unconstitutional and subject to the highest scrutiny, viewpoint discrimination is an especially "egregious form of content discrimination" and a "blatant" First Amendment violation. (*Rosenberger v. Rectors and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 829.) Such viewpoint-based speech restrictions, i.e., those "based on hostility—or favoritism—towards the underlying message expressed," are impermissible under the First Amendment. (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 386; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983) 460 U.S. 37, 46 (holding that the government cannot "suppress expression merely because public officials oppose the speaker's view").

In *Conant v. Walters*, the Ninth Circuit affirmed a lower court's decision to enjoin the federal government from revoking a physician's Drug Enforcement Agency registration or initiating an investigation if the doctor recommended medical marijuana. (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629 ("Conant").) At issue in *Conant* was a federal policy declaring that a doctor's "recommendation" of marijuana would lead to revocation of his or her license. (*Id.*) Noting that "[b]eing a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights," the Ninth Circuit held that the policy was not just content-based, but also viewpoint-based because it "condemn[ed] expression of a particular viewpoint, *i.e.*, that medical marijuana would likely help a specific patient." (*Id.*)

Here, the Act *mandates* expression of a particular viewpoint, *i.e.*, that abortion is an appropriate alternative to carrying a child to term—a message directly antithetical to pro-life pregnancy clinics like ICU Mobile that have a profound religious objection to referring clients for an abortion.

The Act is also viewpoint-based because it exempts facilities that offer certain family planning and Medi-Cal services. (Exhibit "A," § 123471(c)(2).) Those services inherently favor the abortion rights side of the debate. Medi-Cal covers abortion and considers it part and parcel with family planning. For this reason, ICU Mobile, as a pro-life organization, is not part of these programs, but abortion facilities are. The Act steps into the highly politically charged abortion debate, and then exempts centers that provide abortions from its regulation of prolife centers. This is impermissible viewpoint discrimination. "In its practical operation," therefore, the Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." (*See Sorrell v. IMS Health Inc.* (2011) 131 S. Ct. 2653, 2663 (quoting *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 391).)

It is axiomatic that the government may not "attempt to give one side of a debatable public question an advantage in expressing its views to the people." (*City of Ladue v. Gilleo* (1994) 512 U.S. 43, 51 (internal quotations omitted.) That is precisely what the Act does. By means of the Act, California has radically skewed the public debate over abortion in favor of abortion providers by forcing pro-life pregnancy centers to recommend or refer clients to facilities that provide the very services to which these pro-life centers religiously object. Thus, the Act is an unconstitutional viewpoint discrimination.

B. The Act Compels ICU Mobile to Speak a Government Mandated Message and is Content-Based

The Act compels ICU Mobile to advertise the availability of free or low cost abortion services, which violates ICU Mobile's free speech rights. The United States Supreme Court has observed that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (*Wooley v. Maynard* (1977) 430 U.S. 705, 714 (quoting *West Va. Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 637 ("*Barnette*").) "It is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" (*AID v. AOSI, Inc.* (2013) 133 S. Ct. 2321, 2327 (citation omitted).) Indeed, the Supreme Court has repeatedly emphasized that government attempts to dictate what private individuals or groups must say are highly suspect. (*See, e.g.*, *Knox v. SEIU, Local 1000* (2012) 132 S. Ct. 2277, 2287 ("The government may not . . . compel the endorsement of ideas that it approves").)

Due to the First Amendment's robust protection of freedom of speech, laws requiring groups or individuals to convey a message dictated by the government are "subject to exacting First Amendment scrutiny"; the government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." (*Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* (1988) 487 U.S. 781 798, 800 ("*Riley*").) Many cases demonstrate that the Act fails this standard.

In *Barnette*, the Supreme Court held that a public school could not compel students to recite the Pledge of Allegiance over their religious objections. (*Barnette*, *supra,* 319 U.S. 624.) Similarly, in *Wooley v. Maynard*, the Court held that New Hampshire could not penalize citizens who covered the motto "Live Free or Die" on their license plates because the motto conflicted with their religious and

moral beliefs. (*Wooley v. Maynard*, *supra*, 430 U.S. 705.) The Court based its decision on the fact that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." (*Id.* at 714 (citing *Barnette*, *supra*, 319 U.S. at 633-34).

In *Riley*, the Supreme Court held that a law requiring professional fundraisers for charitable organizations to tell solicited persons what percentage of contributions actually went to such organizations violated the First Amendment. (*Riley*, *supra*, 487 U.S. at 781.) The Court explained,

> [t]he First Amendment mandates that we presume that *speakers, not the government, know best both what they want to say and how to say it*. . . . "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." To this end, the government, even with the purest of motives, *may not substitute its judgment as to how best to speak for that of speakers and listeners*; free and robust debate cannot thrive if directed by the government.

(*Id.* at 790-91 (emphasis added) (citations omitted).)

In the instant action, as previously described, the Act compels licensed covered facilities, such as ICU Mobile, to disseminate a message, in a manner dictated by the government, stating, "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]." (Exhibit "A," § 123472(a)(1).)

In light of the foregoing cases, the Act is a quintessential compelled and content-based speech regulation because, *on its face*, it requires ICU Mobile to speak a specific government-mandated message. (*See Reed v. Town of Gilbert* (2015) 135 S. Ct. 2218, 2227 (the "commonsense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys").) Indeed, even according to the bill analysis by the Assembly on Judiciary, the "licensed facility notice is content-based. . ."[3] Thus, the Act is both viewpoint and content-based discrimination under the First Amendment.

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[3] (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 775 (2015-2016 Reg. Sess.) April 28, 2015, p. 18.)

C. Strict Scrutiny Applies and the Act Fails that Standard

Compelled speech, including content and viewpoint-based regulations of speech, are extraordinarily disfavored under the First Amendment. (*Turner Broad. Sys. v. FCC* (1994) 512 U.S. 622, 642 ("[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the [most exacting] rigorous scrutiny") (citations omitted).) No lesser doctrines of scrutiny apply to save the Act's regulation of speech from heightened scrutiny. The Assembly Committee on Judiciary's bill analysis erroneously concluded that "it seems likely that the speech required under this bill would be construed as commercial speech, and a reviewing court would likely apply rational basis scrutiny." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 775 (2015-2016 Reg. Sess.) April 28, 2015, p. 26.) However, this statement is flawed for several reasons.

First, ICU Mobile's speech is not commercial. Commercial speech is defined as speech which does no more than "propose a commercial transaction," or that "relates solely to the economic interests of the speaker and its audience." (*Bd. of Trustees of the State Univ. of New York v. Fox* (1989) 492 U.S. 469.) "By contrast, political speech is speech that deals with governmental affairs, and ideological speech is speech that apparently concerns itself with philosophical, social, artistic, economic, literary, ethical, and similar matters. (*Gerawan,* 24 Cal.4th at 483) (internal quotations omitted.) Here, ICU Mobile is a non-profit organization that offer its services entirely free of charge and has a religious rather than economic interests in its speech. ICU Mobile's mission is to promote their pro-life, religious beliefs that life is a gift from God and that abortion is morally wrong. (Scharpen Decl. ¶ 11.)

Moreover, Article I of the California Constitution protects nonmisleading[4] commercial and noncommercial speech equally, and unlike the First Amendment, Article I does not apply a more lenient standard to commercial speech. (*Gerawan,* 24 Cal.4th at 483 (finding that Article 1 did not incorporate a distinction between commercial and noncommercial speech, and rights guaranteed by the California Constitution are not dependent on those guaranteed by the United States Constitution).) Thus, under the California Constitution, content and viewpoint-based discrimination, even of commercial speech, is subject to strict scrutiny. (*Id.*)

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[4] As discussed below, the Act does not attempt to prohibit ICU Mobile from engaging in false or misleading speech, nor is there any evidence that ICU Mobile is engaged misleading speech.

To survive the rigorous strict scrutiny standard applicable in this case, the government must demonstrate that the challenged law is "the least restrictive means of achieving a compelling state interest." (*McCullen v. Coakley* (2014) 134 S. Ct. 2518, 2530.) The Act does not pass this exacting test.

1. *The Act Serves No Compelling Interest*

Defendants bear the difficult burden of demonstrating that the law at issue is one of the "rare" instances in which a law mandating or directly regulating speech meets the "demanding standard" of strict scrutiny. (*Brown v. Entm't Merchs. Ass'n* (2011) 131 S. Ct. 2729, 2738.) Even when the government has cited very important interests, like national security and the protection of children, the Supreme Court has invalidated laws that were not narrowly tailored to eliminate a concrete threat to those interests, or that were not the least restrictive means of doing so. (*Id.* at 2741 ("Even where the protection of children is the object, the constitutional limits on governmental action apply."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 119-20 ("The distinction drawn by [the statute] has nothing to do with [the asserted] interest."); *United States v. Robel* (1967) 389 U.S. 258, 263-64 (national security "cannot be invoked as a talismanic incantation to support any [law]").)

The Supreme Court has described a compelling state interest as a "high degree of necessity," noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." (*Brown, supra*, 131 S. Ct. at 2738, 2741) (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." (*Consol. Edison Co. of N.Y. v. Public Serv. Comm'n* (1980) 447 U.S. 530, 543.) As such, the government's mere invocation of the promotion of public health as a compelling interest, without more, is insufficient to meet the demands of strict scrutiny.

Neither the Act nor the Defendants can identify any compelling interest that would support the law. There is no specific evidence, much less compelling proof, that ICU Mobile is engaged in a wrongdoing. Indeed, the Act's disclosures contain no requirement that a center has engaged in wrongdoing before they are subject to the disclosures. The Act is a quintessential prophylactic measure. Furthermore, the government has no evidence of actual harm resulting from pro-life pregnancy centers as a result of failing to recite the Act's disclosures.

Not even the findings contained in the Act allege any harm to women justifying restrictions on providers of pregnancy related services. The findings merely state that "at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." (Exhibit "A," § 1 (b).) The same could presumably be said of a host of other government services. The Act does not say, however, how this alleged fact demonstrates a *harm* to the public health, much less a harm so significant as to generate a *compelling* interest. For the government to meet its high burden of proof under strict scrutiny, it "must present more than anecdote and supposition." (*United States v. Playboy Entm't Grp.* (2000) 529 U.S. 803, 822.)

In addition, any claim that the Act serves the compelling interest of informing pregnant women that they might be eligible for free or low cost pregnancy-related services is undermined by the Act's *total* exemption for licensed facilities who are enrolled as Medi-Cal and FPACT providers. The under-inclusiveness of the Act in this regard "undermines the likelihood of a genuine [governmental] interest." (*F.C.C. v. League of Women Voters of California* (1984) 468 U.S. 364, 396; *See also*, *Ysursa v. Pocatello Educ. Ass'n* (2009) 129 S. Ct. 1093, 1105 ("The statute's discriminatory purpose is further evidenced by its substantial . . . underinclusiveness with respect to the State's asserted interest in passing the legislation").

The legislative history of the Act mentions that its author believes (presumably at NARAL's tendentious prompting) that pregnancy resource centers engage in "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care."[5] As support, the report cites a publication of NARAL, a longtime abortion advocacy and partisan group, and a report by the University of California, Hastings College. [6] The legislative history is wholly lacking in any scientific methodology and fails to substantiate its alleged findings with any details of its alleged investigations that can be evaluated objectively. The Assembly Committee on Health's report itself does not mention,

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[5] (Assem. Com. on Health, Rep. on Assem. Bill No. 775 (2015-2016 Reg. Sess.) April 14, 2015, p. 6.)

[6] (*Id.* at 7.) (The NARAL report to which the legislative history refers is presumably this one: http://www.prochoiceamerica.org/ca-cpcs/full-report-un.html (last visited, Nov. 12, 2015).)

let alone substantiate, any harm pregnancy centers allegedly cause; it only "discusses several options for regulation [*sic*] CPCs, ranging from creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute."[7] Thus, there is a complete absence of any evidence of a compelling interest. "[B]ecause [the government] bears the risk of uncertainty, ambiguous proof will not suffice." (*Brown*, *supra*, 131 S. Ct. at 2739 (citation omitted).)

Moreover, the command of the Act is not to prohibit pregnancy centers from engaging in false or misleading speech, but to make them speak a government message promoting, *inter alia*, state funded abortion services. Thus, even if the alleged deceptive practices helped motivate enactment of the Act, the Act itself does not pinpoint this problem as something to be remedied. Non-exempt licensed covered facilities must comply with the Act whether or not they engage in deceptive practices or have engaged in such practices in the past.

While the government might like to have a broad, prophylactic measure designed to prevent various potential harms from possibly happening in the future, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (*NAACP v. Button* (1963) 371 U.S. 415, 438 (citations omitted). When the government imposes requirements to speak a government-mandated message in order to address a perceived problem, the First Amendment requires a scalpel, not a sledge hammer. (*See FEC v. Wis. Right to Life, Inc.* (2007) 551 U.S. 449, 477-78.) The government must do more than simply "posit the existence of the disease sought to be cured." (*Turner*, *supra*, 512 U.S. at 664 (citation omitted).) "It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." (*Id.* (citation omitted).)

2. Compelling ICU Mobile to Speak the Government's Message is Not the Least Restrictive Means of Advancing the Act's Asserted Interests

It is not enough under strict scrutiny for the government to identify a compelling interest. The government must also show it has adopted the *least restrictive means* of advancing its alleged interests. This is no easy task for the government. (*See Burwell v. Hobby Lobby Stores, Inc.* (2014) 134 S. Ct.

[7] Assembly Committee on Health, April 11, 2015, *available at*: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB775 (last visited, Nov. 20, 2015).

2751, 2780 ("The least-restrictive-means standard is exceptionally demanding") (citation omitted).) Indeed, there can be little doubt that the government has not chosen the least restrictive means to further its goal of advising women across the State of California of pregnancy options available to women under Medi-Cal and FPACT.

One obvious way the State could choose to advance its goals, without having to compel ICU Mobile to speak a viewpoint-based and ideological message contrary to its mission, values, and purpose, is for the State to disseminate the message *itself.* (*See Evergreen Ass'n v. City of New York* (2d Cir. 2014) 740 F.3d 233, 250 ("*Evergreen*") (noting that New York City could "communicate [the Government] message through an advertising campaign"); *Riley*, *supra*, 487 U.S. at 800 (requirement that professional fundraisers disclose information about percentage of funds actually turned over to charity in the prior year was not narrowly tailored where "the State [could] itself publish the detailed financial disclosure forms it requires professional fundraisers to file").)

The State can communicate its message through a variety of media including radio and television spots, social media and government internet sites, billboards, notices placed in printed publications, brochures in state and local governmental offices, and so forth. In today's media saturated culture, the list is all but endless. In sum, the government has at its disposal a plethora of means to communicate its own message without infringing on the constitutional rights of others.

D. Other Governmental Attempts to Compel Speech by Non-Profit Pregnancy Centers Have Failed.

California's attempt to compel speech through the Act is not the first time a government has tried to coerce non-profit, pro-life pregnancy centers like ICU Mobile to act as a ventriloquist's dummy for a government-mandated message. In *Evergreen*, New York City required pregnancy services centers to make three types of disclosures: (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" ("Government Message"); and (3) "whether or not they 'provide or provide referrals for abortion,' "emergency contraception," or "prenatal care" (the "Services Disclosure"). (*Evergreen,*

supra, 740 F.3d 238

Though it declined to enjoin the ordinance's Status Disclosure, the Second Circuit held that the Government Message and the Services Disclosure in *Evergreen* was likely unconstitutional. (*Id.*) Evaluating the context in which the compelled speech is made under *Riley*, *supra*, the Court held that the Services Disclosure "overly burdens Plaintiffs' speech." (*Id.* at 249). According to the Second Circuit, "the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the ordinance] provide alternatives." (*Id.)* Noting that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." (*Id.* (quoting *Riley*, 487 U.S. at 795).) The Court correctly observed that "[a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins." (*Id.*)

The Act challenged here is even worse. It does not just compel ICU Mobile to speak in a way that may stigmatize its services, but it goes so far as to force ICU Mobile expressly to advance the availability of free abortions, procedures which are contrary to ICU Mobile's religious and moral beliefs. The Act thus "change[s] the way in which a pregnancy services center, if it so chooses, discusses the issues of prenatal care, emergency contraception, and abortion . . . [which] must be free to formulate their own address." *Id.* at 249-50. Whereas New York City's Services Disclosure required pregnancy centers to indicate whether they provide abortions or referrals for abortions, the present Act positively and affirmatively requires pregnancy centers to point clients elsewhere for abortion services. In "mandat[ing] the discussion of controversial political topics," this provision of New York City's ordinance failed to satisfy either strict or intermediate scrutiny. (*Id.* at 250.) The same holds true here.

The Second Circuit also found that the Government Message failed judicial scrutiny. The Court held that "'mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue, deprives Plaintiffs of their right to communicate freely on matters of public concern." (*Id.* (quotations omitted).) The court ruled that "[w]hile the government may incidentally encourage certain speech through its power to '[choose] to fund one activity to the exclusion of the other,' it may not directly 'mandat[e] that Plaintiffs affirmatively espouse the government's position on a contested

public issue' through regulations, like [New York City's ordinance], that threaten not only to fine or de-fund but also to forcibly shut down non-compliant entities." (*Id.* at 250-251 (quotations omitted).)

The Second Circuit's holding applies with equal force in this case. The government is free to advance its own message regarding free and low cost access to abortion and pregnancy related services, *through its own means*, but mandating that pro-life pregnancy resource centers do so unlawfully commandeers ICU Mobile into speaking a message against its identity and viewpoint. The government may have the right to form and fashion *its own speech*, but it does not have a right to form and fashion the speech *of its citizens*, especially on a contested public issue like abortion. (*See Stenberg v. Carhart* (2000) 530 U.S. 914, 947 (O'Connor, J., concurring) ("The issue of abortion is one of the most contentious and controversial in contemporary American society.").

In *Centro Tepeyac v. Montgomery County*, Montgomery County in Maryland adopted a resolution requiring "limited service pregnancy resource centers" to post at least one sign on its premises disclosing two things: (1) "the Center does not have a licensed medical professional on staff," and (2) "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider." *Centro Tepeyac v. Montgomery County* (4th Cir. 2013) 722 F.3d 184, 186 (en banc).) The Fourth Circuit upheld the district court's grant of a preliminary injunction with respect to the second statement. The Court affirmed the lower court's holding that the compelled speech was a content-based, and that "several options less restrictive than compelled speech could be used to encourage pregnant women to see a licensed medical professional," noting that the County "could post notices [in its own facilities] encouraging women to see a doctor" or "launch a public awareness campaign." (*Id.* at 189, 190.) After the entry of the preliminary injunction, the district court ultimately granted summary judgment to the pregnancy center as to *both* of the government-mandated messages. (*Tepeyac v. Montgomery County*, (D. Md. 2014) 5 F. Supp. 3d 745.)

II. The Balance of Harms Tips Strongly in Favor of ICU Mobile

ICU Mobile has made a sufficiently strong showing of likelihood of success on the merits that tips the scales heavily in favor of granting the injunction. Moreover, ICU Mobile will suffer great and irreparable harm if a preliminary injunction is not granted. In considering whether to grant an injunction, the court must exercise its discretion "in favor of the party most likely to be injured ... If

denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Robbins v. Superior Court* (1985) 38 Cal. 3d 199, 205.) Inadequacy of a legal remedy is a factor in considering irreparable harm. (Code Civ. Proc. § 526 (a).)

The harm ICU Mobile will face on January 1, 2016, by being required to disseminate the government-message mandated by the Act, which runs in opposition to their religious beliefs, is great and irreparable. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod v. Burns* (1976) 427 U.S. 347, 373; *See also*, *Sammartano v. First Judicial Dist. Court* (9th Cir. 2002) 303 F.3d 959, 973 ("a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury [] by demonstrating the existence of a colorable First Amendment claim.") (quotations omitted). If an injunction is not issued, ICU Mobile will be required to violate its religious beliefs by spending its own money to provide information in furtherance of abortion, which ICU Mobile abhors. On the other hand, the Defendants will not be harmed by maintaining the status quo pending the litigation.

The balance of equities significantly tips heavily in favor of ICU Mobile. There can be no question that ICU Mobile's freedom of speech, a core liberty of the Bill of Rights, outweighs the government's interest in disseminating a message that the government can disseminate itself. "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists 'the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [the movant's] favor.'" S*ammartano v. First Judicial Dist. Court* (9th Cir. 2002) 303 F.3d 959, 973 (quoting *Viacom Int'l, Inc. v. FCC*, (N.D. Ca. 1993) 828 F. Supp. 741, 744.)

CONCLUSION

For the foregoing reasons, ICU Mobile's Motion should be granted, and Defendants should be enjoined from enforcing the Act during the pendency of this action.

TYLER & BURSCH, LLP

Dated: December 2, 2015

By: _____

Robert H. Tyler, Esq.
Counsel for Plaintiff, **THE SCHARPEN FOUNDATION**

EXHIBIT “A”

Assembly Bill No. 775

CHAPTER 700

An act to add Article 2.7 (commencing with Section 123470) to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, relating to public health.

[Approved by Governor October 9, 2015. Filed with Secretary of State October 9, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

AB 775, Chiu. Reproductive FACT Act.

Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, as defined, or when necessary to protect her life or health. Existing law specifies the circumstances under which the performance of an abortion is deemed unauthorized.

This bill would enact the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, which would require a licensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women. The bill would also require an unlicensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that the facility is not licensed as a medical facility by the State of California.

The bill would authorize the Attorney General, city attorney, or county counsel to bring an action to impose a specified civil penalty against covered facilities that fail to comply with these requirements.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) All California women, regardless of income, should have access to reproductive health services. The state provides insurance coverage of reproductive health care and counseling to eligible, low-income women. Some of these programs have been recently established or expanded as a result of the federal Patient Protection and Affordable Care Act.

(b) Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California

women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

(c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.

(d) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities that are unable to immediately enroll patients into the Family PACT or Presumptive Eligibility for Pregnant Women Medi-Cal programs to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources.

(e) It is also vital that pregnant women in California know when they are getting medical care from licensed professionals. Unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or obtaining care, that these facilities are not licensed to provide medical care.

SEC. 2. The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

SEC. 3. Article 2.7 (commencing with Section 123470) is added to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, to read:

Article 2.7. Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility offers pregnancy testing or pregnancy diagnosis.

(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(4) The facility has staff or volunteers who collect health information from clients.

(c) This article shall not apply to either of the following:

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

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

123472. (a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state:

"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]."

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

(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.

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

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state: "This 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."

(2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.

(3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous" means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

123473. (a) Covered facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

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

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

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

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

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