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## Compelled Speech and State Advertising of Abortion: A Look at the Split between a Woman's Friend and Evergreen

Nicholas M. Lauer

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## NOTE

### COMPELLED SPEECH AND STATE ADVERTISING OF ABORTION: A LOOK AT THE SPLIT BETWEEN A WOMAN'S FRIEND AND EVERGREEN

Nicholas M. Lauer<sup>†</sup>

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#### ABSTRACT

When a person dedicates his life to ending a practice he considers evil, the state should not force him to promote that evil. Ever since the Supreme Court in *West Virginia State Board of Education v. Barnette* declared that the First Amendment right to speak naturally implied the right not to speak, the courts have sought to protect this right. As with all constitutional rights, the debate is now where to place its limits. In *A Woman's Friend Pregnancy Resource Clinic v. Harris*, the Eastern District of California upheld an act requiring any organization that performs pregnancy testing to inform its clients that California provides low-cost access to abortions. The act

mandates that the notice be put in a conspicuous place where individuals wait and where it may be easily read by those seeking services from the organization. The court in *A Woman's Friend* framed the issue as a conflict between the state's ability to regulate the medical profession and the free speech rights of the organization.

A couple years before *A Woman's Friend*, the Second Circuit dealt with a similar situation. In *Evergreen Ass'n v. City of New York*, New York City passed a law that required pregnancy service centers to inform clients 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 city's act also required pregnancy service centers to tell their clients whether they provided abortions or provided referrals for abortions. The Second Circuit held that these two provisions passed neither strict nor intermediate scrutiny. The Second Circuit reasoned that the New York City law was forcing the pro-life organizations to advertise on behalf of the city. The court held that the government could not mandate that one espouse a government position on a contested public issue, finding that the city's act failed under both strict and intermediate scrutiny.

Contrarily, the court in *A Woman's Friend* found that the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("the Act") passed both intermediate and strict scrutiny. The court in *A Woman's Friend* attempted to distinguish its case from *Evergreen*, and found that the California Act did not burden speech to the extent that the law did in *Evergreen*. The court reasoned that the Act sought to protect a different government interest that was more closely related to providing women with information regarding their pregnancy. The court found the Act's language to be merely a neutral fact, not expressing an ideological message. The court also found that the Act was less burdensome on speech because the Act did not require actual speech, but only that the message be posted.

But the Second Circuit's *Evergreen* decision is not easily distinguishable from *A Woman's Friend*. Just like the situation in *Evergreen*, the required postings in *A Woman's Friend* compel a private organization to advertise on behalf of the state, and against the private organization's will.

## I. INTRODUCTION

Following the passage of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("the Act"), A Woman's Friend Pregnancy Resource Clinic discovered that it would have

to post a notice in its waiting room advertising that California provided low-cost abortions.<sup>1</sup> This pro-life institution claimed that the Act violates the compelled speech doctrine and the First Amendment's Free Exercise Clause.<sup>2</sup> Supporting its assertion, *A Woman's Friend* looked to a case from the Second Circuit, *Evergreen Ass'n v. City of New York*.<sup>3</sup> In that case, the Second Circuit reasoned that it did not need to resolve the level of scrutiny because the result would be the same under both intermediate and strict scrutiny.<sup>4</sup>

The district court in *A Woman's Friend* held that the Act satisfied both strict and intermediate scrutiny.<sup>5</sup> The district court attempted to distinguish the case from the Second Circuit case in *Evergreen*, but the Ninth Circuit later undermined many of its distinctions.<sup>6</sup> While discrediting the district court's reasoning, the Ninth Circuit affirmed the core result of the district court due to the Ninth Circuit's creation of the *Pickup* factors.<sup>7</sup> These factors were designed to evaluate professional speech cases and the Ninth Circuit's version of intermediate scrutiny.<sup>8</sup>

The district court in *A Woman's Friend*—and the Ninth Circuit in affirming the case—has created a split between the Ninth and the Second Circuits.<sup>9</sup> To resolve this conflict, the reasoning of the Second Circuit should prevail. The Second Circuit's reasoning in *Evergreen* is more consistent with the Supreme Court's guidance concerning compelled speech cases. It recognizes the policy against states commandeering private organizations for advertising purposes, and it recognizes the constitutional

1. *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1179-80 (E.D. Cal. 2015), *aff'd sub nom.* *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 669 F. App'x 495 (9th Cir. 2016). When this writing process began, only the district court had ruled on *A Woman's Friend*. As this Note was being written, the Ninth Circuit affirmed, and within the past few weeks the Supreme Court of the United States has decided to hear the case.

2. *Id.* at 1179.

3. *Evergreen Ass'n v. City of New York*, 740 F.3d 233 (2d Cir. 2014), *cert. denied sub nom.* *Evergreen Ass'n, Inc. v. City of New York*, 135 S. Ct. 435 (2014), *and cert. denied sub nom.* *Pregnancy Care Ctr. of N.Y. v. City of New York*, 135 S. Ct. 435 (2014).

4. *Evergreen*, 740 F.3d at 245.

5. *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1206-07 (E.D. Cal. 2015), *aff'd sub nom.* *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 669 F. App'x 495 (9th Cir. 2016).

6. See *infra* Section IV.B.

7. See *infra* Section III.C.4.

8. See *infra* Section II.C.1.c.

9. See *infra* Section IV.A.

distaste for forcing a private organization to proclaim a message with which it disagrees. Furthermore, the California courts have already been overruled when they tried to force an organization to spread the message of a third party.<sup>10</sup> Therefore, the decision in *A Woman's Friend* should be replaced with the stricter scrutiny applied in the Second Circuit's *Evergreen* case.

This Note covers the origins and expansion of the compelled speech doctrine. It further highlights commercial speech and professional speech, as well as the Ninth Circuit's creation of the *Pickup* continuum to evaluate professional speech cases. The Note lays out the precedent regarding speech related to abortion cases. The Note next discusses *A Woman's Friend* and contrasts that decision with the *Evergreen* case from the Second Circuit. The Note concludes that the Second Circuit's *Evergreen* case was correctly decided and that the court in *A Woman's Friend* should have followed the reasoning in *Evergreen*, striking down California's Act.

## II. BACKGROUND: FROM THE FIRST AMENDMENT TO MODERN COMPELLED SPEECH DOCTRINE

The First Amendment's application has grown from protecting the right to speak to also protecting the right not to speak. This right not to speak is often referred to as the compelled speech doctrine. This doctrine has grown over the years, and has been split up into many categories. In a compelled speech case, the court must decide what category of speech is implicated and which standard of review should be applied. For instance, commercial speech is subject to a four-part test, whereas regular compelled speech generally receives heightened scrutiny. As may be expected, the circuits are not always consistent in how they handle categories and standards of review; nor are they consistent in how they apply the facts to the standards of review. When abortion is involved, the courts have become even more conflicted.

### A. *The First Amendment Basis*

The First Amendment forbids Congress from "abridging the freedom of speech."<sup>11</sup> Originally, the Bill of Rights only applied to the federal government. After the Civil War and the passage of the Fourteenth

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10. *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 20-21 (1986).

11. 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.").

Amendment, the Supreme Court found that many of the rights found in the Bill of Rights are incorporated by the Fourteenth Amendment, forcing the states to acknowledge certain rights. Near the beginning of the twentieth century, the Supreme Court declared the freedom of speech to be a fundamental right, which is only restricted in the face of a “clear and present danger.”<sup>12</sup> Once the fundamental right was established, the challenge of determining when and how it applied in different situations began.

### B. *The Supreme Court Recognizes the Compelled Speech Doctrine*

In 1943, during World War II, the Supreme Court recognized that the First Amendment protected both the right to speak as well as the right not to speak. Though first applied to educational settings, the compelled speech doctrine has now been applied to license plates, government grants, and professional institutions. The compelled speech doctrine was first enunciated in *West Virginia State Board of Education v. Barnette*.<sup>13</sup>

#### 1. The Compelled Speech Doctrine Forms

In 1943, the Supreme Court recognized that the freedom to speak implies the freedom not to speak.<sup>14</sup> Earlier, in 1942, the West Virginia legislature required all of its schools to conduct courses in a way that would foster the “principles and spirit of Americanism.”<sup>15</sup> As a result, the children at school were required to salute and pledge allegiance to the American flag.<sup>16</sup> However, some students, who were Jehovah’s Witnesses, did not salute because they believed the flag was an image.<sup>17</sup> According to the Jehovah’s Witnesses, saluting an image violates the second commandment of Exodus

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12. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”).

13. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

14. *Id.* at 645 (Murphy, J., concurring) (“The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society . . .”).

15. *Id.* at 625.

16. *Id.* at 627-29.

17. *Id.* at 629-30.

20:4-5.<sup>18</sup> Thus, for religious reasons, the Jehovah's Witnesses would not partake in a mandatory act of American patriotism.

The Supreme Court declared that this requirement to pledge allegiance to the American flag violated a fundamental right as applied to the states by the Fourteenth Amendment.<sup>19</sup> The Court declared, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>20</sup> The Court reasoned that the right to differ on important matters that "touch the heart of the existing order" shows that the right is not "a mere shadow of freedom."<sup>21</sup>

The Court made this decision in spite of its recent ruling in *Minersville School District v. Gobitis*.<sup>22</sup> Since the Court had upheld the mandatory pledge of allegiance in schools only three years earlier in *Gobitis*, Justice Black and Justice Douglas found it appropriate to add a concurring opinion justifying their change of mind.<sup>23</sup> Aside from violating speech rights, they also viewed the mandatory pledge as violating the freedom of religion.<sup>24</sup> They reasoned that the mandatory pledge of allegiance was a "form of test oath" that has "always been abhorrent in the United States."<sup>25</sup> Justices Black and Douglas concluded that the mandatory pledge was "inconsistent with

18. *Id.* at 629. "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me." *Exodus* 20:4-5 (KJV).

19. The Court stated that:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

*Barnette*, 319 U.S. at 638.

20. *Id.* at 642.

21. *Id.* at 642.

22. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

23. *Id.* at 643 (Black, Douglas, J.J., concurring).

24. *Id.*

25. *Id.* at 644.



our Constitution's plan and purpose."<sup>26</sup> In the end, the Court overruled *Gobitis*, thereby creating a precedent for the compelled speech doctrine.<sup>27</sup>

## 2. Expanding the Compelled Speech Doctrine in *Wooley v. Maynard*<sup>28</sup>

In *Wooley*, the Supreme Court declared that making a citizen promote a state's message on his license plate—essentially becoming a “mobile billboard”—violated the compelled speech doctrine.<sup>29</sup> Since 1969, New Hampshire had required license plates to display the state motto: “Live Free or Die.”<sup>30</sup> A Jehovah's Witness covered up the state motto because he disagreed with the political message.<sup>31</sup> On the second offense, the defendant was sentenced with a fifty dollar fine and six months in the Grafton County House of Correction.<sup>32</sup> The Court framed the issue as whether the State could make a person display the state's message on his private property in a place where it could be observed by the public.<sup>33</sup>

The Supreme Court affirmed the district court, declaring unconstitutional the mandate to display the state motto on an individual's license plate.<sup>34</sup> The Court declared that the “right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”<sup>35</sup> While the Court admitted that the majority of Americans would deem the statute acceptable, it reasoned that the First Amendment protects the rights of those who differ with the views of the majority.<sup>36</sup> Thus, the state could not commandeer its citizens to

26. *Barnette*, 319 U.S. at 644. Black and Douglas said, “The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution.” *Id.*

27. *Id.* at 642.

28. *Wooley v. Maynard*, 430 U.S. 705 (1977).

29. *Id.* at 715.

30. *Id.* at 707.

31. *Id.* at 707-08.

32. *Id.* at 708. On the first offense, the defendant had been fined twenty-five dollars. *Id.*

33. The Court provided the following holding:

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

*Id.* at 713

34. *Wooley*, 430 U.S. at 717.

35. *Id.* at 714.

36. *Id.* at 715.

advertise the state's message, even when the message was on a state-issued license plate.

3. Removing the Disagreement Requirement in *AID v. Open Society*<sup>37</sup>

As the Court dealt with compelled speech cases, it sometimes removed what were thought to be essential elements required for the compelled speech doctrine to apply. For instance, in *AID v. Open Society*, the Court decided that the individual does not need to disagree with the government message in order to be justified in not saying the message.<sup>38</sup> In that case, the Supreme Court dealt with the Leadership Act of 2003, an act that was designed to combat HIV/AIDS overseas; Congress attached funding to a mandate that the accepting organization declare that it opposes prostitution and sex trafficking.<sup>39</sup> Some corporations feared that making such a declaration would alienate them from certain governments that they worked with.<sup>40</sup>

The Court struck down the mandate in the Leadership Act.<sup>41</sup> While the Court recognized the policy that Congress wanted to achieve, it maintained that there is “a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’”<sup>42</sup> Congress could not require these organizations to “pledge allegiance to the Government’s policy of eradicating prostitution.”<sup>43</sup> The Court reasoned that Congress violated the compelled speech doctrine when it required the organizations to “profess a specific belief.”<sup>44</sup>

*AID* shows how far the compelled speech doctrine can extend. For the compelled speech doctrine to apply, the organization may even believe the message that the state wants to promote. But for business reasons, the organization may simply not want to say the message. Under the compelled speech doctrine, the organization would still be protected by the First Amendment.

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37. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321 (2013).

38. *Id.* at 2332.

39. *Id.* at 2326.

40. *Id.*

41. *Id.* at 2332.

42. *Id.* at 2327 (internal citations omitted).

43. *Agency for Int’l Dev.*, 133 S. Ct. at 2332.

44. *Id.* at 2330.

### C. *Categories of the Compelled Speech Doctrine*

The compelled speech doctrine has been applied in various situations, and the courts have struggled with determining the extent of its application and the level of scrutiny to apply. To help aid the courts, the Supreme Court has created certain categories of compelled speech and has assigned them general levels of scrutiny. With professional speech, courts generally apply either strict or intermediate scrutiny. With commercial speech, courts apply a four-part test.

#### 1. Professional Speech

The professional speech doctrine deals with how extensively the state may regulate the speech of professionals who are licensed by the state. The Supreme Court has not officially recognized the existence of the professional speech doctrine, but Justice Jackson and Justice White have mentioned it in concurring opinions. These two justices no longer serve on the Supreme Court, and with only their two concurring opinions to rely on, some circuits have defined professional speech doctrines for their jurisdictions. For instance, the Ninth Circuit has created the *Pickup* factors in an attempt to deal with professional speech.

##### a. Justice Jackson in *Thomas v. Collins*<sup>45</sup>

Justice Jackson was the first of the two Supreme Court justices to mention the professional speech doctrine. In *Thomas v. Collins*, Justice Jackson illustrated his view of the professional speech doctrine with his belief that a “state may forbid one without its license to practice law as a vocation.”<sup>46</sup> He thought the state “could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views.”<sup>47</sup> Considering the medical field, Justice Jackson stated that “the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.”<sup>48</sup>

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45. *Thomas v. Collins*, 323 U.S. 516, 544 (1945).

46. *Id.* at 544 (Jackson, J., concurring).

47. *Id.*

48. *Id.*

b. Justice White in *Lowe v. S.E.C.*<sup>49</sup>

Crediting Justice Jackson's guidance from *Thomas*, Justice White suggested in *Lowe v. S.E.C.* that one "who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."<sup>50</sup> Justice White reasoned that just "as offer and acceptance are communications incidental to the regulable [sic] transaction called a contract, the professional's speech is incidental to the conduct of the profession."<sup>51</sup>

Justice White went on to say that the state has legitimate power to license those who would practice a profession, and that this is "no more subject to constitutional attack than state-imposed limits on those who may practice the professions of law and medicine."<sup>52</sup> Justice White finished by saying that applying the act's enforcement provisions "to prevent unregistered persons from engaging in the business of publishing investment advice for the benefit of any who would purchase their publications, however, is a direct restraint on freedom of speech and of the press subject to the searching scrutiny called for by the First Amendment."<sup>53</sup>

Thus, while Justices Jackson and White believed that professional speech should be a category of compelled speech, they have not given the circuits much guidance in how it should be applied. This has led circuits like the Ninth Circuit to form their own tests or continuums. Such circuit-created tests will stand until the Supreme Court either accepts or rejects them.

c. *The Ninth Circuit and the Pickup Factors*

The Ninth Circuit has developed the *Pickup* factors in order to determine the level of scrutiny that should be applied when the speech occurs in the context of medical regulation. In *Pickup v. Brown*, the Ninth Circuit resolved a conflict between two of its district courts regarding the place of professional speech.<sup>54</sup> Both district court cases dealt with California's Senate Bill 1172, which banned psychotherapists from sexual orientation change efforts ("SOCE") of patients under the age of eighteen.<sup>55</sup>

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49. *Lowe v. S.E.C.*, 472 U.S. 181, 211 (1985).

50. *Id.* at 232 (White, J., concurring).

51. *Id.*

52. *Id.* at 233.

53. *Id.*

54. *Pickup v. Brown*, 740 F.3d 1208, 1221-22 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014), and *cert. denied sub nom. Welch v. Brown*, 134 S. Ct. 2881 (2014).

55. *Id.* at 1223.

When this law was challenged on First Amendment grounds, the two district courts applied different levels of scrutiny and came to different conclusions. One district court held that the law was subject to strict scrutiny because it restricted the content of speech and particular viewpoints, a fact that was not changed by reason of it being a professional regulation.<sup>56</sup> This district court granted relief because it held that the state was unlikely to satisfy strict scrutiny.<sup>57</sup> In the other district court case, the court found that the case was about treatment rather than speech.<sup>58</sup> Thus, the court applied only a rational basis level of scrutiny, and found that the plaintiffs were unlikely to prevail, so it denied relief.<sup>59</sup> The two courts came to different results because they used different standards of review.

To resolve this conflict, the Ninth Circuit discussed two precedent cases and distilled their reasoning down into what is known as the *Pickup* factors.<sup>60</sup> The court declared that communication that occurs during psychoanalysis is speech, and thus entitled to First Amendment protection; the court reasoned that such speech was not immune from regulation, especially given “California’s strong interest in regulating mental health,” an interest that the court declared a “valid exercise of its police power.”<sup>61</sup>

To determine the level of scrutiny, the court laid out a continuum.<sup>62</sup> On one end of the continuum, the highest level of scrutiny applies when the professional is “engaged in a public dialogue,” such as when a doctor advocates an unpopular treatment.<sup>63</sup> At the midpoint of the continuum, the First Amendment protections are “somewhat diminished” when the speech occurs within the “confines of a professional relationship”; the court admitted that speech outside of the professional relationship would “almost certainly be considered impermissible compelled speech.”<sup>64</sup> And at the other end of the continuum, the First Amendment affords the least protection where the regulation regards professional conduct, which the court declared to only have an incidental effect on speech.<sup>65</sup>

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56. *Id.* at 1224.

57. *Id.*

58. *Id.* at 1225.

59. *Id.*

60. *Brown*, 740 F.3d at 1227.

61. *Id.* at 1226.

62. *Id.* at 1227.

63. *Id.*

64. *Id.* at 1228.

65. *Id.* at 1229.

The court compared the state's ban of a particular treatment of words with banning a particular drug.<sup>66</sup> It found that this case only called for a rational basis level of review.<sup>67</sup> Accordingly, the court held that the law only prohibited licensed health providers from engaging in conversion therapy with minors, and thus satisfied rational basis scrutiny.<sup>68</sup>

The creation of the *Pickup* factors came with a strong dissent from three judges who wanted to hear the case *en banc*.<sup>69</sup> The dissent declared that there was a false distinction between "conduct" and "speech."<sup>70</sup> It asserted that the "government's *ipse dixit* cannot transform 'speech' into 'conduct' that it may more freely regulate."<sup>71</sup> It later proclaimed that the "legislatures cannot nullify the First Amendment's protections for speech by playing this labeling game."<sup>72</sup>

The dissent further warned that the Supreme Court has disapproved of the inferior courts carving out categories where the First Amendment would not apply.<sup>73</sup> Since the Ninth Circuit did not find any cases holding that professional speech did not actually constitute "speech" under the First Amendment, the dissent declared that the Ninth Circuit should not be surprised if the Supreme Court did not recognize the new category.<sup>74</sup> Due to the split in the circuits, the dissent may see its prediction come true.

## 2. Commercial Speech

The commercial speech doctrine relates to speech that is economic in nature, such as advertising. With commercial speech, the courts apply a test higher than minimal scrutiny. Commercial speech is admittedly difficult for the courts to apply. Thus, a test has been developed to determine whether speech falls under the commercial speech doctrine. It is very difficult for a plaintiff to win in a compelled speech challenge that is classified under the commercial speech doctrine. Therefore, this lower standard of review is desired by the state when defending its statutes.

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66. *Brown*, 740 F.3d at 1229.

67. *Id.* at 1231.

68. *Id.* at 1229. ("Pursuant to its police power, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful.")

69. *Id.* at 1215.

70. *Id.* at 1216.

71. *Id.*

72. *Brown*, 740 F.3d at 1218.

73. *Id.* at 1221.

74. *Id.*

a. *Zauderer* and Identifying Commercial Speech<sup>75</sup>

For commercial speech, the Court only requires that a statute satisfy a four-part test. In *Zauderer v. Office of Disciplinary Counsel*, the state required lawyers to insert information in their advertisements that clients would be liable for significant litigation costs, even if the lawsuit were unsuccessful.<sup>76</sup> The Court held that such a state rule was valid under the First Amendment, noting that the state only wanted the lawyers to add a little more information to advertisements.<sup>77</sup> Hence, the Supreme Court clarified that some state laws that compel speech may violate the First Amendment, but other compelled speech is permissible when the State only attempts to “prescribe what shall be orthodox in commercial advertising.”<sup>78</sup>

With advertising, the Court only requires that the law be “reasonably related to the State’s interest in preventing” customers from being deceived.<sup>79</sup> Thus, while one “may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients,”<sup>80</sup> that person is not afforded the same level of protection for “commercial speech” as he would receive under “noncommercial speech.”<sup>81</sup>

b. *Central Hudson Gas* and the Four-Part Test<sup>82</sup>

Once the Supreme Court recognized commercial speech as a special form of speech with less protections, it tried to define it. In *Central Hudson Gas*, the Court defined commercial speech as an “expression related solely to the economic interests of the speaker and its audience.”<sup>83</sup> With commercial speech, the Court balanced its fear of becoming “highly paternalistic” with the state’s interest in protecting consumers.<sup>84</sup>

When addressing this situation, the Court balanced these interests with a four-part analysis. First, the court must determine whether the First Amendment protects the expression.<sup>85</sup> For commercial speech, this requires

75. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

76. *Id.* at 650.

77. *Id.*

78. *Id.* at 651.

79. *Id.*

80. *Id.* at 647.

81. *Zauderer*, 471 U.S. at 637.

82. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

83. *Id.* at 561.

84. *Id.* at 562.

85. *Id.* at 566.

that the expression be lawful and not misleading.<sup>86</sup> Second, the court must consider whether the government interest is substantial.<sup>87</sup> Only when both of these questions are answered in the affirmative will the court consider the next two parts of the test: “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”<sup>88</sup> Since this test is very deferential to the state, the state has an obvious incentive to argue that it applies in any given case.

#### D. *Compelled Speech Applied to the Abortion Issue*

Regarding abortion, the courts often look to *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>89</sup> In that case, the Court mentioned the compelled speech doctrine near the end of the opinion in a short paragraph.<sup>90</sup> The Circuits have debated the meaning of that short paragraph and have come to different conclusions, especially regarding the level of scrutiny that should be applied in cases surrounding abortion clinics.

##### 1. The Supreme Court References the Compelled Speech Doctrine in *Casey*

In *Casey*, the Court considered a state statute’s informed consent mandate requiring that, before an abortion, the physician must make available certain printed materials describing the unborn baby and other information such as a list of other services that serve as alternatives to abortion.<sup>91</sup> Regarding the First Amendment’s compelled speech doctrine, the Court dealt with the issue in a short paragraph, stating that the “physician’s First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . .”<sup>92</sup> The Court further clarified, “[w]e see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”<sup>93</sup> This short analysis has led to a circuit split, since different circuits have come to different conclusions as to the extent of its meaning and application.

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86. *Id.*

87. *Id.*

88. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

89. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

90. *Id.* at 884.

91. *Id.* at 881.

92. *Id.* at 884.

93. *Id.*



## 2. The Circuits Interpret the Supreme Court

The Fourth and Fifth Circuits are split as to what level of scrutiny should be used when a state regulates the disclosures an abortion doctor must make. The Fifth Circuit held that *Casey* dictated that informed consent laws did not violate the compelled speech doctrine.<sup>94</sup> The Fourth Circuit, on the other hand, held that *Casey* did not dictate any standard in that short paragraph, and further declared that a higher scrutiny should be used.<sup>95</sup> In that case, the Fourth Circuit applied intermediate scrutiny and struck down the statute.<sup>96</sup>

### a. The Fifth Circuit: *Texas Medical Providers Performing Abortion Services. v. Lakey*<sup>97</sup>

In *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit applied a rational basis review to Texas's statute requiring informed consent by women who undergo abortions.<sup>98</sup> After considering *Casey*, the Fifth Circuit asserted that the Supreme Court upheld an "informed-consent statute over precisely the same 'compelled speech' challenges made here."<sup>99</sup> The court noted that the Supreme Court explained that informed-consent statutes helped women comprehend the full consequence of their decision, and the statute also furthered the State's interest in protecting life.<sup>100</sup> When the Fifth Circuit evaluated *Casey*, the court declared that the Supreme Court's response to compelled speech under this situation is "clearly not a strict scrutiny analysis."<sup>101</sup>

### b. The Fourth Circuit in *Stuart v. Camnitz*<sup>102</sup>

Taking a different view than *Lakey*, the Fourth Circuit, in *Stuart v. Camnitz*, claimed that the Fifth Circuit read too much into *Casey*.<sup>103</sup> The

94. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576-77 (5th Cir. 2012).

95. *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill v. Stuart*, 135 S. Ct. 2838 (2015).

96. *Id.*

97. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012).

98. *Id.* at 575.

99. *Id.* at 574.

100. *Id.* at 575.

101. *Id.*

102. *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill v. Stuart*, 135 S. Ct. 2838 (2015).

Fourth Circuit did not believe that the *Casey* holding was a “particularized finding” and, thus, did not apply to “every subsequent compelled speech case involving abortion.”<sup>104</sup> Because *Casey* (under the Fourth Circuit’s interpretation) did not establish a level of scrutiny, the Fourth Circuit considered its heightened intermediate level of scrutiny to be consistent with Supreme Court precedent.<sup>105</sup>

c. The Second Circuit and Mandatory Disclosures: *Evergreen*<sup>106</sup>

In contrast to certain states trying to force disclosures regarding services, other states have attempted to advertise their programs by state law. In *Evergreen Ass’n v. City of New York*, the Second Circuit considered whether New York City could mandate pregnancy service centers to inform potential clients about the centers and the services that New York City provided or did not provide.<sup>107</sup> The New York City Council passed a law that imposed on pregnancy service centers certain confidentiality requirements and mandatory disclosures, such as (1) whether the pregnancy service center had a licensed medical provider who directly supervised the organization (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”), and (3) whether the organization “provide or provide referrals for abortion,” emergency contraception, or prenatal care (the “Services Disclosure”).<sup>108</sup> The law required that the pregnancy service centers provide the required disclosures at their entrances and waiting rooms, on advertisements, and during telephone conversations.<sup>109</sup> If this law was violated, it provided civil fines and granted authority to the Commissioner of Consumer Affairs to close down the center.<sup>110</sup>

The Evergreen Association, Inc. and three other pregnancy resource centers moved for a preliminary injunction to prevent the law from taking

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103. *Id.* at 249.

104. *Id.*

105. *Id.*

106. *Evergreen Ass’n v. City of New York*, 740 F.3d 233 (2d Cir. 2014), *cert. denied sub nom.* *Evergreen Ass’n, v. City of New York*, 135 S. Ct. 435 (2014), and *cert. denied sub nom.* *Pregnancy Care Ctr. of N.Y. v. City of New York*, 135 S. Ct. 435 (2014).

107. *Id.* at 239.

108. *Id.* at 238.

109. *Id.*

110. *Id.* at 238-39.

effect.<sup>111</sup> They claimed that the law violated their First Amendment free speech rights.<sup>112</sup> Evergreen provides pregnancy-related services that include pregnancy testing, counseling, ultrasounds, and sonograms.<sup>113</sup> On appeal, the Second Circuit affirmed the district court, regarding mandated forms, and held that the law violated the plaintiff's free speech rights.<sup>114</sup> Regarding the level of scrutiny, the Second Circuit acknowledged that the district court had rejected the defendant's arguments for a level of scrutiny lower than strict scrutiny.<sup>115</sup> These arguments included comparisons to campaign finance regulations, regulation of licensed physicians, and commercial speech.<sup>116</sup>

The Second Circuit reasoned that it did not need to resolve the level of scrutiny because the result would be the same under both intermediate and strict scrutiny.<sup>117</sup> The court found that the Government Message and Service Disclosure violated the First Amendment, but the Status Disclosure was constitutional.<sup>118</sup> Regarding Status Disclosures, the court held that this provision survived strict scrutiny because it is the "least restrictive means to ensure that a woman is aware" that a particular pregnancy services center has a licensed medical provider "at the time that she first interacts with it."<sup>119</sup> Regarding the Services Disclosure, the court found that the Services Disclosures overly burdened Plaintiff's speech, especially under strict scrutiny.<sup>120</sup>

The court reasoned that the context of the speech dealt with a "public debate over the morality and efficacy of contraception and abortions."<sup>121</sup> The court further reasoned that a requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care when they first meet potential clients alters the center's political speech "by mandating the manner in which the discussion of these issues begins."<sup>122</sup>

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111. *Id.* at 242.

112. *Evergreen Ass'n*, 740 F.3d at 242.

113. *Id.*

114. *Id.* at 237-38.

115. *Id.* at 242.

116. *Id.* at 245.

117. *Id.*

118. *Evergreen Ass'n*, 740 F.3d at 245.

119. *Id.* at 246-47.

120. *Id.* at 249.

121. *Id.*

122. *Id.*

Under intermediate scrutiny, the court reasoned that the law would still be invalid because of the nature of the political speech and “the fact that the Status Disclosure provides a more limited alternative regulation.”<sup>123</sup> Regarding the Government Message, the court held that it is insufficiently tailored to withstand scrutiny.<sup>124</sup> The court was concerned that pregnancy centers were being required to advertise for the City pursuant to New York City Department of Health and Mental Hygiene.<sup>125</sup> The court declared that the government cannot mandate that a person espouse a government position on a contested public issue.<sup>126</sup>

### III. PROBLEM: A WOMAN’S FRIEND PREGNANCY RESOURCE CLINIC V. HARRIS

Once again, the compelled speech doctrine has found itself caught in an abortion conflict. In *A Woman’s Friend Pregnancy Resource Clinic v. Harris*, the question was whether a state can make a pro-life organization inform everyone who walks into its office that the state provides low cost abortions.<sup>127</sup> Pro-life institutions challenged this statute as a violation of the First Amendment under both the compelled speech doctrine and the Free Exercise Clause.<sup>128</sup>

#### A. Overview of the Case

California passed an act mandating organizations that perform pregnancy testing to inform their clients that California provides low-cost access to abortions.<sup>129</sup> A Women’s Friend Pregnancy Resource Clinic (“A Woman’s Friend”), a pro-life organization, challenged California’s statute.<sup>130</sup> This pro-life institution claimed that the statute violated the compelled speech doctrine and First Amendment’s Free Exercise Clause.<sup>131</sup>

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123. *Id.* at 250.

124. *Evergreen Ass’n*, 740 F.3d at 251.

125. *Id.* at 250.

126. *Id.* at 251.

127. *A Woman’s Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1178-79 (E.D. Cal. 2015), *aff’d sub nom.* *A Woman’s Friend Pregnancy Res. Clinic v. Harris*, 669 F. App’x 495 (9th Cir. 2016).

128. *Id.* at 1179.

129. *Id.* at 1179-80.

130. *Id.* at 1179.

131. *Id.*

### 1. The Statute: Reproductive FACT Act

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (“the Act”) requires “licensed covered facilit[ies]” to post a notice saying, “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 . . . .”<sup>132</sup> The Act requires that the notice be disclosed in the following ways: posted in “a conspicuous place where individuals wait that may be easily read by those seeking services from the facility”; printed and distributed “to all clients in no less than 14-point type”; or provide digital notice “distributed to all clients that can be read at the time of check-in or arrival.”<sup>133</sup>

The Act defines “licensed covered facilities” as facilities that offer “pregnancy testing or pregnancy diagnosis” or that “advertise or solicit patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.”<sup>134</sup> The Act also applies to a facility that has “staff or volunteers who collect health information from clients.”<sup>135</sup> The Act imposes civil penalties of \$500 for the first offense and \$1,000 for subsequent offenses.<sup>136</sup>

### 2. A Woman’s Friend Pregnancy Resources Clinic

A Woman’s Friend is a non-profit religious corporation licensed under the California Health and Safety Code.<sup>137</sup> A Woman’s Friend was organized for “the express purpose of providing alternatives to abortion for women experiencing unplanned pregnancies.”<sup>138</sup> A Woman’s Friend believes that the Bible is the Word of God and that Jesus is the savior of the world.<sup>139</sup> Thus, A Woman’s Friend “requires its employees, volunteers, and board members to read and sign a statement of faith.”<sup>140</sup>

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132. *Id.* at 1180.

133. *A Woman’s Friend*, 153 F. Supp. 3d at 1180.

134. *Id.* at 1179-80.

135. *Id.* at 1180.

136. *Id.*

137. *Id.* at 1183.

138. *Id.*

139. *A Woman’s Friend*, 153 F. Supp. 3d at 1184.

140. *Id.*

Regarding its operation, A Woman's Friend consists of medical doctors, a doctor of obstetrics and gynecology, and several registered nurses.<sup>141</sup> A Woman's Friend offers services such as pre-parenting classes as well as "used and new children's clothing, maternity clothing, baby furniture, and other childcare supplies."<sup>142</sup> A Woman's Friend directs its clients to nurses who administer a pregnancy test, and the nurses teach the clients about "prenatal health and well-being, nutrition, and fetal development and offers to perform a limited first trimester ultrasound."<sup>143</sup> A Woman's Friend argues that the Act compels it to "make a statement" contradicting both its "religious belief and the purposes of [its] formation."<sup>144</sup>

### B. *Legal Issues Addressed by the District Court*

The district court in *A Woman's Friend* decided that the case involved speech, not just conduct.<sup>145</sup> The district court then declared that the speech fell into the category of professional speech, not commercial speech.<sup>146</sup> The court held that intermediate scrutiny applied and the statute survived this standard.<sup>147</sup> The court also analyzed under the strict scrutiny standard and declared that the statute would meet this standard as well.<sup>148</sup>

#### 1. Speech Versus Conduct

At trial, A Woman's Friend contended that strict scrutiny should be applied because "the required notice amounts to a content-based regulation."<sup>149</sup> On the other hand, the state argued that a lesser level of scrutiny should be applied, such as compelled commercial speech or professional speech.<sup>150</sup> The district court found that the "Act regulates professional speech within the confines of the patient-provider relationship, which is reviewed under no greater than intermediate scrutiny."<sup>151</sup>

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141. *Id.* at 1185.

142. *Id.* at 1184.

143. *Id.*

144. *Id.* at 1190.

145. *A Woman's Friend*, 153 F. Supp. 3d at 1195.

146. *Id.*

147. *Id.* at 1207.

148. *Id.*

149. *Id.* at 1195.

150. *Id.*

151. *A Woman's Friend*, 153 F. Supp. 3d at 1195.

## 2. Commercial Speech

The court dispensed with the state's argument regarding commercial speech.<sup>152</sup> It reasoned that under *Central Hudson Gas*, commercial speech resulted when the expression related solely to the economic interests of the speaker.<sup>153</sup> It also examined the compelled speech doctrine as seen in *Riley v. National Federation of the Blind of North Carolina*.<sup>154</sup> In *Riley*,<sup>155</sup> the state required that professional fundraisers disclose to potential donors the percentage of the donation retained by the organization (not making it to the charity's target).<sup>156</sup> On appeal, the Supreme Court affirmed the Fourth Circuit and found that the statute violated the compelled speech doctrine.<sup>157</sup> The Court reasoned that the statute mandated speech that the speaker would not want to say.<sup>158</sup> The Court maintained that the case could not be separated from other compelled speech cases because the compelled statements were facts.<sup>159</sup> Thus, the Court found that the state's regulation "is subject to exacting First Amendment scrutiny."<sup>160</sup> The Court maintained that the statute was unduly burdensome and not narrowly tailored.<sup>161</sup>

The district court found this case more closely related to *Riley* than to the commercial speech cases.<sup>162</sup> The court noted that when speech is "inextricably intertwined" with protected speech, the court views the speech as fully protected.<sup>163</sup> Thus, the court ruled that A Woman's Friend's speech was more than economic, because it was "integrally connected to their religious and political beliefs, and the speech required by the Act brushe[d] up against a controversial public debate revolving around abortion."<sup>164</sup> Therefore, the court concluded that, because the speech was not commercial speech, the test in *Zauderer* did not apply.<sup>165</sup>

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152. *Id.* at 1199.

153. *Id.* at 1196.

154. *Id.*

155. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

156. *Id.* at 784.

157. *Id.* at 803.

158. *Id.* at 795.

159. *Id.* at 786.

160. *Id.* at 798.

161. *Riley*, 487 U.S. at 798.

162. *A Woman's Friend*, 153 F. Supp. 3d at 1199.

163. *Id.*

164. *Id.* at 1198.

165. *Id.* at 1199.

### 3. Professional Speech

After deciding that the Commercial Speech doctrine did not apply, the court then held that the Act regulated professional speech.<sup>166</sup> The court noted that the Act's "primary purpose is to communicate information to patients about reproductive medical services."<sup>167</sup> Therefore, the court applied the *Pickup* continuum.<sup>168</sup>

While the court referenced the *Casey* decision, it decided that *Casey* did not provide enough guidance.<sup>169</sup> And the court acknowledged that the "framework for professional speech remained murky at best."<sup>170</sup> The court also acknowledged the split in the circuits, and noted that the interpretations would inevitably vary significantly when based on a single paragraph of guidance from the Supreme Court.<sup>171</sup>

The district court next used the *Pickup* continuum from *Pickup v. Brown*<sup>172</sup> to decide what level of scrutiny to apply.<sup>173</sup> In the *Pickup* continuum, the First Amendment protects professionals engaged "in public dialogue on matters of public concern," and it provides the least protection where the state regulates professional conduct.<sup>174</sup> Between these two poles, the district court listed examples such as "consent requirements, licensing requirements, professional disciplinary proceedings, and negligence actions."<sup>175</sup>

Applying this *Pickup* continuum, the district court reasoned that the Act did not stop any professionals from engaging in public dialogue.<sup>176</sup> The court described the compelled speech as "truthful, nonmisleading information to clinics' clients."<sup>177</sup> The court maintained that the Act's purpose is to "regulate[] speech within the confines of a professional relationship," not to suppress a message.<sup>178</sup> Further, the court found that the

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166. *Id.* at 1203.

167. *Id.*

168. *A Woman's Friend*, 153 F. Supp. 3d at 1203.

169. *Id.* at 1204.

170. *Id.* at 1200.

171. *Id.* at 1204-05.

172. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014), and *cert. denied sub nom. Welch v. Brown*, 134 S. Ct. 2881 (2014).

173. *A Woman's Friend*, 153 F. Supp. 3d at 1202.

174. *Id.* at 1202.

175. *Id.*

176. *Id.* at 1203.

177. *Id.*

178. *Id.*



midpoint of the continuum received “somewhat diminished” First Amendment protection, but the level of protection was not specified.<sup>179</sup> Thus, the court analyzed the case as a professional speech case at the midpoint of the Ninth Circuit’s *Pickup* continuum with “somewhat diminished” First Amendment protection.

### C. Levels of Scrutiny and Application

After consulting the Fourth and Fifth Amendment for guidance on what level of scrutiny to apply, the district court decided that this case fell under intermediate scrutiny.<sup>180</sup> It then found that the Act satisfied intermediate scrutiny.<sup>181</sup> Finally, the district court analyzed the case under strict scrutiny, and found that the Act satisfied strict scrutiny as well.<sup>182</sup>

#### 1. The Court Analyzes with Intermediate Scrutiny

The district court stated that the Act would survive intermediate scrutiny if it (1) directly advanced a substantial government interest and (2) was narrowly “drawn to achieve that interest.”<sup>183</sup> The court held that the Act survived intermediate scrutiny.<sup>184</sup> The court reasoned that the Act’s purpose is to inform California residents of “their rights and the health care resources available to them” regarding reproductive health care.<sup>185</sup> The court maintained that California had a strong interest in women knowing “the range of health care options available to them.”<sup>186</sup> The court stated that the California legislature found that thousands of women did not know of the public programs.<sup>187</sup> The court found that the Act advanced this substantial government interest.<sup>188</sup>

Next, the court found that the Act is narrowly “drawn to achieve that interest and does not overly burden speech.”<sup>189</sup> The court reasoned that the term “abortion” was surrounded by many words that dealt with other

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179. *A Woman’s Friend*, 153 F. Supp. 3d at 1203-04 (citing *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir.)).

180. *Id.* at 1207.

181. *Id.* at 1206.

182. *Id.* at 1208.

183. *Id.* at 1206 (citing *Sorrel v. IMS Health Inc.*, 54 U.S. 552, 572 (2011)).

184. *Id.*

185. *A Woman’s Friend*, 153 F. Supp. 3d at 1206.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 1207.

California provided health care services unrelated to abortions.<sup>190</sup> The court noted that every institution is still free to advocate its viewpoint, including any disagreement with the statute.<sup>191</sup> The court also emphasized the different options that the Act gave the organization to inform its clients of California's provision of low-cost abortion.<sup>192</sup> The court held that this evidence showed that the Act is narrowly drawn to achieve its interest and provide "manageable options."<sup>193</sup>

## 2. The Court Analyzes with Strict Scrutiny

The district court stated that the Act passes strict scrutiny if (1) it is "narrowly tailored to promote a compelling government interest," and (2) it uses the "least restrictive means to achieve its ends."<sup>194</sup> Concluding that California's interest is likely a compelling governmental interest, the court held that the Act survives strict scrutiny.<sup>195</sup> The court maintained that other methods, such as persuading private institutions to spread the desired information or the government disseminating the information itself, were not "the most effective" to ensure women "quickly obtain . . . publically funded family planning and pregnancy-related resources available in California" at the time that these decisions are being made.<sup>196</sup> Since pregnancy decisions are time-sensitive, the court held that the Act's required notice passed strict scrutiny.<sup>197</sup>

## 3. The Court Distinguishes *A Woman's Friend* from *Evergreen*<sup>198</sup>

The district court claimed that it had considered the Second Circuit's *Evergreen* case, but then asserted that *Evergreen* did not change the court's conclusion.<sup>199</sup> While the court noted that the Second Circuit struck down the government message because it overly burdened speech and mandated pregnancy centers to "affirmatively espouse the government's position on a contested public issue,"<sup>200</sup> the court distinguished the Act's notice

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190. *Id.*

191. *A Woman's Friend*, 153 F. Supp. 3d at 1207.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1207-08.

197. *A Woman's Friend*, 153 F. Supp. 3d at 1208.

198. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014).

199. *A Woman's Friend*, 153 F. Supp. 3d at 1208.

200. *Id.* (citing *Evergreen*, 740 F.3d at 250).

requirements from the disclosures in *Evergreen*.<sup>201</sup> The court reasoned that the Act seeks to advance a different government interest.<sup>202</sup>

The district court claimed that the Act resembles informed consent cases rather than free speech cases because the Act informs women of the free and low-cost publicly funded health services available to them “at the time they are making their time-sensitive reproductive decisions.”<sup>203</sup> The court further distinguished *A Woman’s Friend* from *Evergreen* based on the language of the two statutes.<sup>204</sup> The court reasoned that the notice in the Act only provided facts of health services available, which was unlike the Government Message in *Evergreen* wherein the government encouraged women to consult a licensed provider.<sup>205</sup> Moreover, unlike the requirement in *Evergreen* that the centers were required to provide the disclosures at the beginning of each contact with a client, the Act only required that the message be posted on a wall.<sup>206</sup> Thus, the court held that the Act’s burden of speech did not match the burden in *Evergreen*.

#### 4. The Ninth Circuit Affirms the Result of the District Court

In a similar case regarding the same statute, the Ninth Circuit, in *National Institute of Family & Life Advocates v. Harris*, upheld the Act.<sup>207</sup> Several pro-life organizations challenged the Act, but the district court held that these organizations were unlikely to succeed on their free speech claim.<sup>208</sup> The Ninth Circuit upheld the district court.<sup>209</sup>

In deciding the level of scrutiny, the Ninth Circuit reasoned that, even though the Act engaged in content-based discrimination, strict scrutiny did not apply.<sup>210</sup> The court looked to *Casey*, specifically where the Supreme

201. *Id.* at 1209.

202. *Id.*

203. *Id.*

204. *Id.*

205. *A Woman’s Friend*, 153 F. Supp. 3d at 1209.

206. *Id.*

207. *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 845 (9th Cir. 2016). I chose to describe the *Harris* case, a contemporaneous case with *A Woman’s Friend*, because the Ninth Circuit analyzed the arguments from *A Woman’s Friend*. For *A Woman’s Friend*, the Ninth Circuit dedicated less than ten sentences in affirming, and merely cited the *Harris* case for the First Amendment argument. Thus, if the Supreme Court overrules the Ninth Circuit’s decision in *A Woman’s Friend*, it will also be overruling the Ninth Circuit’s decision in *Harris*.

208. *Id.* at 832.

209. *Id.* at 845.

210. *Id.* at 836.

Court had said that the practice of medicine is “subject to reasonable licensing and regulation by the State.”<sup>211</sup> The Ninth Circuit discussed several cases such as *Stuart* and *Lakey* to show that strict scrutiny is not always applied to compelled speech cases concerning abortion-related disclosures.<sup>212</sup> Thus, the Ninth Circuit applied its own framework using the *Pickup* factors. It concluded that the licensed notice is professional speech, subject to intermediate scrutiny, because the licensed notices fell at the midpoint of the *Pickup* continuum.<sup>213</sup> The court expanded the professional speech doctrine to include not only the words of the professional, but also the words of the other staff members, and even what information is placed in the waiting room.<sup>214</sup>

Further, the Ninth Circuit held that the licensed notices survived intermediate scrutiny.<sup>215</sup> It declared that California had a substantial interest in the health of its citizens.<sup>216</sup> This interest includes that citizens have adequate access to information about “constitutionally-protected medical services like abortion.”<sup>217</sup> The court further concluded that the licensed notice was narrowly tailored to achieve California’s interest.<sup>218</sup> The court reasoned that the notice only informed the reader of the existence of publicly-funded family planning services.<sup>219</sup> The court deemed this to be reasonable and sufficient for intermediate scrutiny, but it acknowledged that the Second and Fourth Circuits had applied strict scrutiny in similar cases and had found similar laws to not be narrowly tailored.<sup>220</sup> In the end, the Ninth Circuit declared that its lower standard of review allowed the Act to survive scrutiny.

#### IV. EVERGREEN MUST PREVAIL

While the *Pickup* continuum of the Ninth Circuit creates a lower level of scrutiny similar to intermediate scrutiny, the debate is not what standard of review should be used. The debate regards how the standard of review is

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211. *Id.* at 837 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

212. *Id.* at 837-38.

213. *Nat’l Inst. of Family & Life Advocates*, 839 F.3d at 839.

214. *Id.* at 840.

215. *Id.* at 841.

216. *Id.*

217. *Id.* 842.

218. *Id.*

219. *Nat’l Inst. of Family & Life Advocates*, 839 F.3d at 842.

220. *Id.*

applied to the statute at issue. Both *A Woman's Friend* and *Evergreen* applied strict scrutiny and intermediate scrutiny to similar facts, but came to opposite conclusions. The district court in *A Woman's Friend* declared that the state satisfied both strict and intermediate scrutiny, but the Second Circuit in *Evergreen* held that the state failed under both. The solution to resolving the conflict between *A Woman's Friend* and the Second Circuit's *Evergreen* case is to simply follow the reasoning of the Second Circuit in *Evergreen*.

A. *The Act Is Not Distinguished from the Evergreen Case*

While the court in *A Woman's Friend* claimed to distinguish its case from the situation in *Evergreen*, the cases are not distinguishable. Much of the reasoning and policy concerns from *Evergreen* would be equally offended by the Act in California. Thus, because *Evergreen* found that the statute in its case failed both intermediate and strict scrutiny, the situation in *A Woman's Friend* should likewise fail under both strict and intermediate scrutiny.

1. The State Is Commandeering a Private Organization for Advertising

The Second Circuit in *Evergreen* was concerned that the state was commandeering a private organization to advertise on behalf of the state.<sup>221</sup> The district court in *A Woman's Friend* did not deny that the state of California is using private organizations to promote a state-funded government program. Thus, it is admitted that California is forcing pro-life facilities to be rooms of advertising for California programs.

According to *Evergreen*, this commandeering offends the Constitution even if it is clear that the message is known to come from the government.<sup>222</sup> To support this, the Second Circuit relied on *Wooley v. Maynard*, a case in which the Supreme Court declared that the state could not force its citizens to become advertising billboards for the state.<sup>223</sup> In *A Woman's Friend*, the advertising billboard of *Wooley* has been moved from public view on the road to the inside wall of a private organization. The Court in *Wooley* declared that the private individual's ability to disagree with the message on his car was not sufficient to allow the state to compel the speech. Thus, it is similarly not sufficient that the private organizations in *A Woman's Friend* can openly disagree with the message.

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221. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014).

222. *Id.*

223. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

Furthermore, the district court in *A Woman's Friend* reasoned that the mandated speech is less burdensome than in *Evergreen* because the Act states that the organization can put the message on a wall instead of telling the customer verbally.<sup>224</sup> But, this is a distinction without a difference. The Act is still forcing the organizations to promote a message with which they disagree.<sup>225</sup> Changing the medium of that message does not solve anything. That argument is akin to telling a Jehovah's Witness that he does not have to say the pledge of allegiance, but he has to put it on his car. Both of these scenarios in *Evergreen* and *A Woman's Friend* involve a statute that requires a private organization to declare the message of the state, and both make private parties affirm a government message to the public.

## 2. The State Is Forcing a Private Organization to State a Message with Which It Disagrees

*A Woman's Friend* was organized for "the express purpose of providing alternatives to abortion for women experiencing unplanned pregnancies."<sup>226</sup> And, as shown in *AID*, honest disagreement is not even required in compelled speech. In fact, had the organization truly agreed with the message, but simply declined to promote it, the compelled speech doctrine would still have applied.

Moreover, the debate over the professional speech doctrine misses the fact that the organization itself has free speech rights, not just the medical physicians who work for the organization. While California may be able to restrict the speech of certain medical personnel, it should not be able to force an organization to proclaim a message that the organization disagrees with.

### B. The Act Does Not Satisfy Either Strict or Intermediate Scrutiny

The Ninth Circuit created two problems for the district court's reasoning in *A Woman's Friend*. First, the Ninth Circuit admitted that the Act does not survive strict scrutiny. Second, the Ninth Circuit erred in stating that the Second Circuit applied only strict scrutiny. In *Evergreen*, the Second Circuit applied both strict and intermediate scrutiny and held that the statute failed under both.<sup>227</sup> Therefore, even though the Ninth Circuit upheld the overall reasoning of *A Woman's Friend*, it undermined it in two acute areas.

224. *A Woman's Friend*, 153 F. Supp. 3d at 1209.

225. *See id.* at 1185.

226. *Id.* at 1183.

227. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014).

As in the Second Circuit's *Evergreen* case, the state did not satisfy either strict or intermediate scrutiny.<sup>228</sup> The Second Circuit held that it failed under both standards, due to the issue being one of public contention.<sup>229</sup> It also failed because there were more limited alternatives, such as implementing a government advertising campaign.<sup>230</sup> Both critiques ring true in *A Woman's Friend*. Abortion is a controversial issue in most of the United States and, as shown in the facts of the case itself, California is no exception. The fact that California funds abortions while other private groups oppose abortions shows that the issue is controversial even within that state. Further, the use of an advertising campaign is the way the state should do its own advertising, not commandeering the waiting rooms of organizations that disagree with the state's program.

C. *The Lesson of Pacific Gas & Electric Co. v. Public Utilities Commission of California*<sup>231</sup>

California courts have already been reversed in a similar situation regarding a private organization that was compelled to become an advertiser for another organization. In *Pacific Gas*, the California Public Utility Commission permitted a third party to print information in the billing statements of Pacific Gas and Electric Company.<sup>232</sup> On appeal, the Supreme Court remanded the case back to the California Supreme Court with guidance.<sup>233</sup> The Supreme Court held that the Commission's order "impermissibly burdens" Pacific Gas's First Amendment rights because it forces Pacific Gas "to associate with the views of other speakers."<sup>234</sup> The Court reasoned that the order discriminated based on the viewpoints of the speakers by allowing a third party to disseminate information on a company's billing statement.<sup>235</sup> While the state's interest in "fair and effective utility regulation" could be compelling, the Court could not find a substantially relevant correlation between the government interest and the decision to require another organization to associate with the message of a third party.<sup>236</sup> The Court further found that the regulation was not content

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228. *Id.*

229. *Id.* at 245, 249.

230. *Id.* at 245, 250.

231. *Pac. Gas & Elec. Co. v. Pub. Utilities Com.*, 475 U.S. 1 (1986).

232. *Id.* at 5.

233. *Id.* at 21.

234. *Id.* at 20.

235. *Id.* at 13.

236. *Id.* at 19.

neutral due to the conflicting messages that may result between the company and the third party.<sup>237</sup> The Court found that the order was not narrowly tailored to further a compelling state interest.<sup>238</sup> It also was not a valid time, place, or manner regulation.<sup>239</sup>

Like the third-party speech in *Pacific Gas*, California is attempting to make a private organization promote a message with which it disagrees. When the state tried to hand this ability to a private organization in *Pacific Gas*, the Court struck it down under the compelled speech doctrine.<sup>240</sup> Likewise, in *A Woman's Friend*, the state is attempting to get an organization to advertise on behalf of a government program. Thus, the organization would be forced to associate with the message of the government, a message with which the organization disagrees. Indeed, the organization is being forced to associate with a message that it was created to combat. Indeed, common sense dictates that a state should not be able to force its advertisements into any facility, especially those places designed to counteract that advertisement. Thus, the plight of *A Woman's Friend* is even greater than that of the gas company in *Pacific Gas*.

Moreover, the disagreement and communication is more visible in *A Woman's Friend* than it was in *Pacific Gas*. In *Pacific Gas*, the conflicting message was buried in the billing statement, among the extra papers that its customers likely did not even read. In *A Woman's Friend*, however, the message would be put in the waiting room where customers are trying to find something to do or read. That is why doctors provide magazines for their customers to peruse. In fact, the reason that the state wants this message printed in the waiting room is to reach the organization's customers.<sup>241</sup> The state argued that doing so helped get its message to its desired target group, those making "time-sensitive reproductive decisions."<sup>242</sup>

The disagreement with the message is stronger in *A Woman's Friend* than it was in *Pacific Gas*. The Court in *Pacific Gas* overturned the Commission on the grounds that a conflicting message may result. In *A Woman's Friend*, the disagreement with the message is inherent and obvious. The message that the state of California provides abortions goes

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237. *Pac. Gas & Elec. Co. v. Pub. Utilities Com.*, 475 U.S. 1, 13 (1986).

238. *Id.* at 21.

239. *Id.*

240. *Id.* at 20-21.

241. *A Woman's Friend*, 153 F. Supp. 3d at 1209.

242. *Id.*



against the stated purpose of the organization, causing the organization to challenge the compulsion as soon as it was able.

#### V. CONCLUSION

In disregarding the guidance of the *Evergreen* case, the district court in *A Woman's Friend* has erred by finding that the Act satisfied both strict and intermediate scrutiny. When the Ninth Circuit affirmed the district court's decision, it created a circuit split between the Ninth and Second Circuit. To fix this split, the Second Circuit and its *Evergreen* case should prevail.

The Second Circuit's reasoning in *Evergreen* is more consistent with the Supreme Court's guidance concerning compelled speech cases, recognizing the policy against states commandeering private organizations for advertising purposes, and the distaste with forcing a private organization to proclaim a message with which it disagrees. Further, the California courts have already been overruled when they tried to force an organization to spread the message of a third party. Therefore, the decision in *A Woman's Friend*, should be abandoned for the stricter scrutiny applied in the Second Circuit's *Evergreen* case.