

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL INSTITUTE OF FAMILY)

4 AND LIFE ADVOCATES, DBA NIFLA,)

5 ET AL.,)

6 Petitioners,)

7 v.) No. 16-1140

8 XAVIER BECERRA, ATTORNEY GENERAL)

9 OF CALIFORNIA, ET AL.,)

10 Respondents.)

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12 Washington, D.C.

13 Tuesday, March 20, 2018

14

15 The above-entitled matter came on for oral

16 argument before the Supreme Court of the United

17 States at 10:09 a.m.

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1 APPEARANCES:

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11 JOSHUA A. KLEIN, Deputy Solicitor General,

12 San Francisco, California, on behalf of the

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MICHAEL P. FARRIS, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	JEFFREY B. WALL	
7	On behalf of the United States,	
8	as amicus curiae, in support of	
9	neither party	25
10	ORAL ARGUMENT OF:	
11	JOSHUA A. KLEIN	
12	On behalf of the Respondents	37
13	REBUTTAL ARGUMENT OF:	
14	MICHAEL P. FARRIS, ESQ.	
15	On behalf of the Petitioners	63
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
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5
6
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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case Number 16-1140, the National Institute of Family and Life Advocates versus Becerra.

Mr. Farris.

ORAL ARGUMENT OF MICHAEL P. FARRIS

ON BEHALF OF THE PETITIONERS

MR. FARRIS: Mr. Chief Justice, and may it please the Court:

California took aim at pro-life pregnancy centers by compelling licensed centers to point the way to an abortion and imposing onerous advertising rules on unlicensed centers that do not provide ultrasounds or any other medical services.

The state then provided exemptions for all other medical providers who serve pregnant women. This law -- law targets a particular topic of discussion, employs compelled speech, and is directed at disfavored speakers with disfavored viewpoints. So for --

JUSTICE GINSBURG: What would be the situation, taking the other side, if the state

1 law were that all women's health providers that
2 perform abortions would have to tell the
3 patients: If you would like to carry the
4 pregnancy to term, you will have access to a
5 clinic that will assist them, provide adoption
6 facilities they might contact, or provide
7 instruction on how to care for infants?

8 Suppose that were the statute. Would
9 that be unconstitutional?

10 MR. FARRIS: No, Your Honor. This
11 Court decided a very similar case in the Casey
12 decision from Pennsylvania. Pennsylvania
13 imposed that requirement in the context of an
14 informed consent discussion. Informed consent
15 is triggered by a doctor proposing to perform a
16 particular medical intervention.

17 Medical interventions are surgeries.
18 Abortion is a medical intervention. And in
19 that case, medical interventions require the
20 discussion of the benefits of the procedure,
21 the risk of the procedure --

22 JUSTICE GINSBURG: But why isn't this
23 also informed consent?

24 MR. FARRIS: Well, Your Honor --

25 JUSTICE GINSBURG: So -- so that the

1 patient will know what are the array of
2 services available to her?

3 MR. FARRIS: Your Honor, the services
4 provided by our licensed centers are not
5 medical interventions. Perhaps the best
6 explanation is a Planned Parenthood center in
7 Pennsylvania did pregnancy tests and
8 ultrasounds but did not perform abortions,
9 requiring that Planned Parenthood center, they
10 talked about abortion, encouraged abortion,
11 that would be unconstitutional to compel them
12 to give this disclaimer because it's not a
13 procedure --

14 JUSTICE KENNEDY: Well, I -- may --
15 Justice Ginsburg can protect her own question,
16 but I was interested. Her -- her question is a
17 hypothetical case.

18 MR. FARRIS: Yes.

19 JUSTICE KENNEDY: The hypothetical
20 case is doctors who are offering abortion
21 services have to say that if the pregnancy is
22 carried to a full -- full term, there's
23 assistance.

24 MR. FARRIS: Your Honor, that would
25 be --

1 JUSTICE KENNEDY: It's a hypothetical
2 case.

3 MR. FARRIS: I understand, Your Honor.
4 If the state anchors that in the informed
5 consent framework, then it would be considered
6 under the -- the Casey legal principles,
7 because, in Casey, this Court recognized that
8 --

9 JUSTICE GINSBURG: It doesn't anchor
10 it under any -- it's just -- that's what the
11 law is, what it says. If you are an abortion
12 provider, you have to tell patients that if
13 they want to carry the pregnancy to term, they
14 can have assistance, call this number.

15 MR. FARRIS: Your Honor, yes. That is
16 in the context of proposing a medical
17 intervention, describing the alternatives.
18 This Court in Harris versus McRae and in Casey
19 indicated that the state has an additional
20 interest beyond the health of the woman in the
21 interest of advancing the life of the unborn
22 child, to a degree. It can't go too far.

23 JUSTICE KAGAN: But you're -- but
24 you're saying that if there is a non-medical
25 facility -- I mean, I don't want to put words

1 in your mouth. This is a question. If there
2 is a non-medical facility that the state has
3 reason to think is -- is a -- is telling women
4 about only one set of options and not another
5 set of options, but here, the case would be
6 they're only telling women about abortion
7 providers, and they're not telling women about
8 other ways that they may be able to complete
9 their pregnancy, that the state could not
10 impose a requirement that that facility post a
11 notice saying, in fact, there are many kinds of
12 facilities in the world and some are abortion
13 providers and some are crisis pregnancy centers
14 and some are something else, that -- that that
15 would not be permissible?

16 MR. FARRIS: Your Honor, that would be
17 decide -- since it's in an unlicensed facility
18 that the requirement is being framed up, that
19 would be judged under strict judicial scrutiny,
20 and I don't believe it would be required.

21 If in the license context, however, it
22 would still be the same framework, but the
23 analysis would be slightly different because
24 it's -- here, in this case, it's being --

25 JUSTICE KAGAN: I guess I'm not sure,

1 licensed, unlicensed. You -- you were
2 suggesting that everything turned on whether a
3 medical procedure was going to be performed.
4 And my hypothetical was designed to take out
5 the medical procedure; in other words, this is
6 a facility that just refers women, but it
7 refers women only to abortion providers.

8 And the state decides we don't want
9 facilities that refer women only to abortion
10 providers. We want facilities that will tell
11 women about the full range of their options.

12 And so the question is: Would a -- a
13 requirement that such a facility post a notice
14 saying there actually are a lot of options and
15 here's how you can access them, would that be
16 unconstitutional?

17 MR. FARRIS: Yes, Your Honor, because,
18 under your hypothetical, it's a targeted law.
19 It's aimed at particular people, and not given
20 to all doctors who diagnose and confirm
21 pregnancies.

22 JUSTICE ALITO: Well, what if it
23 wasn't targeted? What if there were a state
24 law that required every doctor or facility that
25 provides medical treatment for pregnant women

1 to post a notice setting out the full range of
2 options available to those women and where they
3 might obtain services at no cost, if those --
4 if -- if those are available?

5 Would there be anything wrong with a
6 law like that?

7 MR. FARRIS: Well, Your Honor, if it's
8 done in a manner similar to what's being done
9 here in California, to require pro-life
10 doctors, whether in a clinic or otherwise, to
11 point the way to an abortion facility and to
12 facilitate abortion would be constitutionally
13 problem --

14 JUSTICE ALITO: What if it did that to
15 -- what if this notice provided for -- set out
16 all of the options and it applied to everybody,
17 so it would apply to pro-life facilities, but
18 it would also apply to clinics that perform
19 abortions?

20 MR. FARRIS: I understand --

21 JUSTICE ALITO: And provide no other
22 form of assistance for pregnant women?

23 MR. FARRIS: Your Honor, I -- the -- I
24 think the outcome would still be the same.
25 Perhaps it would arise under a free exercise --

1 CHIEF JUSTICE ROBERTS: I'm sorry, the
2 outcome would still be the same as?

3 MR. FARRIS: As my prior answer. I'm
4 sorry, Your Honor.

5 CHIEF JUSTICE ROBERTS: And that was
6 what?

7 MR. FARRIS: And that is it would be
8 unconstitutional to require that statement to a
9 doctor who is pro-life, principally because of
10 the free exercise issues that would arise in
11 that case.

12 But this case is different because not
13 only is the requirements of which doctors have
14 to give the notice gerrymandered, the notice
15 itself is gerrymandered. It is not giving
16 women all their options.

17 The notification required says that
18 the state will pay for abortion services, but
19 it does not tell California women it will pay
20 for pregnancy-related --

21 JUSTICE BREYER: There are a lot of
22 different things. I mean, the simple basic
23 thing, if you can just say it as simply as
24 possible. In law, as you well know, what is
25 sauce for the goose is sauce for the gander.

1 And so I think what's bothering from these
2 questions people, as it bothers me, we -- there
3 -- there are pro-choice states and there are
4 pro-life states. All right? So, if a pro-life
5 state can tell a doctor you have to tell people
6 about adoption, why can't a pro-choice state
7 tell a doctor, a facility, whatever it is, you
8 have to tell people about abortion? See?
9 That's simple.

10 The one we've said you can make a
11 doctor who is very pro-life tell her about
12 abortion, okay, I -- get it? And why don't we
13 have to say, to keep sauces the same --

14 MR. FARRIS: Well, your Honor --

15 JUSTICE BREYER: -- that you're a
16 pro-choice state, then you -- you can make
17 these people tell them about abortions?

18 MR. FARRIS: Your Honor, if it is
19 simply a line of demarcation about your
20 position on abortion, that would be
21 unconstitutional in any state. But the -- the
22 laws that have been upheld are doctors who are
23 going to perform abortions, not doctors who
24 give a --

25 JUSTICE BREYER: All right, so you

1 want to draw a line as to whether the -- it's
2 actually the doctor, medical treatment about to
3 do it, as not?

4 MR. FARRIS: Yes, Your Honor.

5 JUSTICE BREYER: Okay, I got it. My
6 other question, and it's the only other one I
7 have, is you have a totally different line in
8 which you are attacking this, and that is, you
9 say, which is certainly a point, that this
10 statute picks out 60 to 70 really pro-life
11 facilities and says you have to post these
12 signs, but nobody else does. Right? Isn't
13 that basic --

14 MR. FARRIS: That's correct, Your
15 Honor.

16 JUSTICE BREYER: Okay. Now what are
17 -- that sounds like you have a point there if
18 that's correct. But doesn't there have to be a
19 trial on that? What did you argue? This is
20 just a preliminary injunction. Don't you have
21 to have a -- a trial or present some evidence?
22 I don't know what your evidence is. I don't
23 know what the evidence is on the other side.

24 And -- and can we decide that without
25 knowing the evidence?

1 MR. FARRIS: Well, Your Honor, the --
2 the gerrymandering of the statute is evidence
3 from the face of the statute. The way the
4 statute works is that it begins by only
5 regulating clinics that are licensed under
6 Section 1204 of the California code.

7 That is limited principally to
8 nonprofit community clinics. So all doctors in
9 private practice are out of the statute to
10 begin with, and the state admits this in its
11 brief.

12 Additionally, among those nonprofit
13 clinics, the clinics that are in general
14 practice are exempted out even though they
15 serve pregnant women.

16 Then you take the class -- the last
17 gerrymandering in this statute is, among those
18 that are principally giving pregnancy services,
19 if you're willing to sign up for the state's
20 Family PACT program, which requires you to
21 dispense abortifacient drugs, then you're out
22 of the program as well.

23 So through a clever series of
24 legislative gerrymandering, the state has ended
25 up with a result that only nonprofit pro-life

1 pregnancy centers are required to post the
2 notice. And the notice itself is biased.

3 JUSTICE GORSUCH: Well, along those
4 lines, one other question occurs to me that's
5 similar to Justice Breyer's with respect to the
6 adequacy of the record we have for unlicensed
7 clinics.

8 We don't have a lot of evidence with
9 respect to the nature of the burden that would
10 be imposed by the 48-font requirement on all
11 ads. There's some evidence in the amicus
12 briefs that it might be like a \$9,000 a month
13 tax for advertisements.

14 But what -- what do we do about the
15 lack of a record here and whether we should
16 wait for an as-applied challenge --

17 MR. FARRIS: Your Honor --

18 JUSTICE GORSUCH: -- as the government
19 suggests?

20 MR. FARRIS: -- Your Honor, this Court
21 faced a similar situation in the Ibanez case
22 where there was a detailed disclosure required
23 in a certain financial profession.

24 And this Court didn't have a financial
25 record. It didn't have a financial record in

1 the Miami Herald case either, in which it
2 simply read the statute and made comments on
3 its inferences.

4 In the advertising context, the rule
5 is the font must be larger than the main body
6 of the ad or the same size as the main body of
7 the ad with special fonts and colors. If
8 that's the case, think of a Chevrolet ad where
9 the warnings about -- or the disclaimers about
10 financing had to be as big or bigger than the
11 word Chevrolet. That is not an effort to
12 inform people. That's an effort to clutter the
13 ad and drown out the message of the ad.

14 JUSTICE GINSBURG: We don't know what
15 kind --

16 JUSTICE SOTOMAYOR: Can we separate --

17 JUSTICE GINSBURG: We don't know what
18 kind of adjustments might have been made
19 because this case went off without any kind of
20 an evidentiary hearing, as was pointed out.

21 But to -- to test what your position
22 is, suppose the -- the -- the law had been
23 simply: The people who don't provide abortions
24 or contraceptive services would have to say we
25 don't perform abortions and we don't provide

1 contraceptive services, period. Then that
2 would be -- everybody would know what -- what's
3 being offered.

4 MR. FARRIS: Well, Your Honor --

5 JUSTICE GINSBURG: Would that be --
6 would that be constitutional?

7 MR. FARRIS: -- not if it's done in a
8 targeted fashion. Again, if -- if all doctors
9 in California who treat pregnant women are
10 under the same requirements, but when there's
11 special imposition upon a targeted group of
12 people because they don't like their position
13 on abortion, that is the form of targeting that
14 this Court outlawed in Sorrell. And that's
15 what's going on here when you talk --

16 JUSTICE SOTOMAYOR: Counsel, can --
17 can you please explain to me what the
18 difference is between the licensed and
19 unlicensed in terms of the services?

20 MR. FARRIS: Certainly.

21 JUSTICE SOTOMAYOR: And then I have a
22 question based on that. But you seem to be
23 basing your argument on the point that at least
24 the unlicensed people are not providing
25 procedures, correct?

1 MR. FARRIS: They're not providing any
2 medical services as --

3 JUSTICE SOTOMAYOR: Well, they -- they
4 are advertising themselves. I looked at one --
5 a few of them. An exemplary of this is the
6 Fallbrook Pregnancy Resource Center website.

7 And it's -- I'm fairly
8 sophisticated -- there's a woman on the home
9 page with a uniform that looks like a nurse's
10 uniform in front of an ultrasound machine. It
11 shows an exam room. The text of the page
12 titled "Abortion" says Fallbrook will educate
13 clients about different abortion methods
14 available, and describe in medical terms
15 different abortion procedures.

16 The website also says clients will be
17 evaluated by nurses and that they follow all
18 HIPAA regulations, which, if they're not a
19 medical provider, they don't have to follow
20 HIPAA.

21 If a reasonable person could look at
22 this website and think that you're giving
23 medical advice, would the unlicensed notice be
24 wrong?

25 MR. FARRIS: Your Honor, to answer the

1 first part of your question, our unlicensed
2 facilities do not provide any medical services
3 being defined as --

4 JUSTICE SOTOMAYOR: But they do
5 provide medical advice?

6 MR. FARRIS: Well, they -- they
7 provide advice on the topic of pregnancy, which
8 is basically --

9 JUSTICE SOTOMAYOR: So let me ask you,
10 how's that different from what a doctor does?
11 When you go in for a pregnancy, you see the
12 doctor, and the doctor will describe,
13 hopefully, the benefits of a pregnancy and
14 perhaps its risk because, depending -- not all
15 pregnancies are without complications.

16 So this is consulting about a medical
17 condition. How is that any different than
18 Casey? You come in to talk to an -- a doctor
19 about abortion. The state says you have to
20 tell the person the alternatives.

21 MR. FARRIS: Your Honor --

22 JUSTICE SOTOMAYOR: So, if you're
23 going to choose to talk to people about -- if
24 you're an unlicensed facility, about pregnancy,
25 why shouldn't you tell people that you're not a

1 doctor?

2 MR. FARRIS: Well, Your Honor, in --
3 in Casey, again, the -- the doctors that were
4 being regulated were the ones that were
5 performing abortion. The Court made note in
6 Casey that it upheld that requirement because
7 it was parallel to the general practice of
8 informed consent.

9 Unlicensed people who talk to women
10 say you can choose parenthood. You can talk
11 about adoption. They talk about the issue of
12 pregnancy, to be sure, but it's --

13 JUSTICE SOTOMAYOR: So is it okay for
14 -- is it wrong for a state to tell agencies who
15 give advice on immigration rights -- there's a
16 couple of states like this -- who say, if
17 you're going to give advice on immigration
18 matters, you better tell people you're not a
19 lawyer. Those are unconstitutional?

20 MR. FARRIS: No, Your Honor. That New
21 York statute that does that gives those
22 immigration people who are required to give the
23 notice the ability to intervene in cases and
24 matters.

25 That would otherwise be the practice

1 of law. And so what that amounts to is similar
2 to a statute referred to by the state in its
3 brief where naturopaths and other alternative
4 providers, who are clearly otherwise engaged in
5 the practice of medicine, are allowed to do so
6 if they give a disclaimer.

7 JUSTICE SOTOMAYOR: Now you're
8 redefining medicine. Medicine is defined by
9 the state. You need a license to practice
10 medicine.

11 MR. FARRIS: True. In normal
12 circumstances, but --

13 JUSTICE SOTOMAYOR: So, if you're
14 giving people advice about pregnancy when
15 you're not a licensed facility, please explain
16 to me what is both misleading, incorrect, or
17 suggestive in any way that a person has to do
18 something like go to this doc -- to a doctor,
19 how is it doing anything other than telling
20 people that, despite how the picture looks on
21 the website, this is not a medical facility?

22 MR. FARRIS: Your Honor, it is illegal
23 in California to practice medicine without a
24 license. It's illegal to pretend to practice
25 medicine without a license.

1 If that's what's going on here,
2 surely, the -- California would have found a
3 way to do that before now.

4 JUSTICE KAGAN: Mr. Farris --

5 JUSTICE KENNEDY: Well, in this case,
6 I -- I didn't go beyond the record to look on
7 the Internet because I don't think we should do
8 that, but I do have a hypothetical.

9 MR. FARRIS: Okay.

10 JUSTICE KENNEDY: What would happen if
11 an unlicensed entity, unlicensed center, just
12 had a billboard that said "Choose Life"? Would
13 they have to make the disclosure?

14 MR. FARRIS: Yes, Your Honor.

15 JUSTICE KENNEDY: All right. So
16 they'd have to make a 20-line -- or 20-word --
17 how many words in it? I forget.

18 MR. FARRIS: Right. It would be 29
19 words.

20 JUSTICE KENNEDY: Twenty-nine words.

21 MR. FARRIS: In -- in the same size
22 font as "Choose Life."

23 JUSTICE KENNEDY: In the same size as
24 "Choose Life."

25 MR. FARRIS: And in a number of

1 languages, whatever is required by that county.

2 JUSTICE KENNEDY: Yeah, it's -- we can
3 ask -- we can ask the State of California.
4 Will the State of California disagree with
5 that, do you think? I mean, you don't know?

6 MR. FARRIS: I -- I don't think
7 they'll disagree with that.

8 JUSTICE KENNEDY: Because it seems to
9 me that that means that this is an undue burden
10 in that instance, and that should suffice to
11 invalidate the statute.

12 MR. FARRIS: Yes, Your Honor, that's
13 our position.

14 JUSTICE KAGAN: Mr. -- Mr. Farris, can
15 I ask -- you've been pinning a lot when you've
16 tried to distinguish Casey on the idea of
17 informed consent. And, certainly, some of the
18 requirements in Casey are informed consent in
19 the way we would understand that, talking about
20 the risks of various procedures, all the things
21 that we want doctors to talk about when we go
22 to them and seek medical care.

23 But there were definitely requirements
24 in Casey that don't have much to do with
25 informed consent, as I've ever understood it.

1 You know, the -- the -- the doctor having to
2 inform patients about -- that medical
3 assistance benefits may be available for
4 childbirth in neonatal care, inform women that
5 the father would be liable to pay child
6 support. So those kinds of requirements, they
7 -- they just don't seem to have much to do
8 about informed consent.

9 And they are, and this goes back to
10 Justice Breyer's sauce for the goose point,
11 they're -- they're really the exact flip side
12 of the requirements in this case. So how am I
13 supposed to think about that?

14 MR. FARRIS: Your Honor, they are
15 triggered by a medical intervention, rather
16 than -- in this case, it's triggered by a
17 discussion.

18 JUSTICE KAGAN: Well, I realize that
19 that's a factual difference, that there's a
20 doctor in the room, and in one case, there's
21 not, but these are not informed consent
22 requirements.

23 MR. FARRIS: Well, Your Honor, this
24 Court held they were in Casey because they were
25 components of informing women about the

1 alternatives to the abortion process.

2 I see that my time has got to the
3 point that I'd like to reserve the balance for
4 rebuttal. Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Wall.

8 ORAL ARGUMENT OF JEFFREY B. WALL
9 ON BEHALF OF THE UNITED STATES,
10 AS AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY

11 MR. WALL: Mr. Chief Justice, and may
12 it please the Court:

13 The First Amendment allows states to
14 require truthful, factual disclosures about
15 one's own goods or services. What the First
16 Amendment does not allow and what California
17 has done is to require pregnancy centers to
18 make disclosures about services they do not
19 provide and that would violate their most
20 deeply held beliefs without any showing by the
21 state that it truly needs to compel speech
22 rather than speak its own message. That sets
23 --

24 JUSTICE GINSBURG: What about -- what
25 about if the -- the law were instead, if you

1 are providing women's health services, you have
2 to list all the services that you provide? And
3 that would apply to everybody. It would apply
4 to facilities that provide abortion and
5 contraceptive services, and it would apply to
6 the natal care -- every -- everyone. Like on
7 food, you have to list all the ingredients.

8 MR. WALL: Yes. I think if California
9 said to -- to all providers across the board in
10 the state you've got to put a notice up on the
11 wall that lists the services you provide, that
12 -- that looks to the United States like
13 truthful, factual information about what you're
14 doing. That seems like -- you know, pretty
15 close to the core of Zauderer.

16 I think the concern here is that the
17 license notice in California and similar
18 statutes in two states, Hawaii and Illinois,
19 are really different from the vast bulk of
20 disclosure requirements like that one.

21 CHIEF JUSTICE ROBERTS: I didn't
22 understand the question to be along the lines
23 that you've answered. It's not simply a
24 requirement of whether or not the facility must
25 list the services they provide. The question

1 is, can they be required to list services that
2 they don't provide but that may be provided
3 elsewhere?

4 JUSTICE GINSBURG: And that wasn't --
5 my question was, does everyone in the health --
6 women's healthcare business -- if the state
7 decides we want you to tell the public what you
8 provide, what you provide, that's -- that's
9 all.

10 MR. WALL: I may have misunderstood
11 the question. To the extent the notice is
12 about your own services?

13 JUSTICE GINSBURG: Yes.

14 MR. WALL: We -- we think that it's
15 permissible. It's a -- a truthful disclosure
16 about your own services. As you move away from
17 that in the way that three states have done,
18 then I think you're -- you're triggering
19 heightened scrutiny under the First Amendment,
20 which would be --

21 JUSTICE BREYER: So, in your view,
22 family planning clinics do not have to tell any
23 woman about abortion -- adoption?

24 MR. WALL: I think it depends on
25 whether it's tied --

1 JUSTICE BREYER: No, they don't
2 provide adoption; it's not their service.

3 MR. WALL: As -- as Petitioners were
4 saying, if it is just a center that counsels
5 people on abortion in a general sense, no, we
6 --

7 JUSTICE BREYER: No, it doesn't. It's
8 a center that helps women plan their families.
9 That's what it is. Now it's not -- they don't
10 have doctors who are performing abortions
11 there. I'm just saying it's a family planning
12 center. Okay? It's an information center.

13 My point is the same. There are
14 millions of people in this country who have
15 views on this subject that are absolutely
16 opposed, one to the other. So that, to me,
17 suggests the law should keep it as simple as
18 possible. And that's why saucers for the goose
19 -- and the gander.

20 I mean, if the law is permissible
21 which says, Doctor, you must tell the woman
22 about adoption, then why shouldn't the law say,
23 Family Planning Center, you must tell the woman
24 about abortion? Sounds even-handed, sounds as
25 if everybody in the same business is -- the

1 same rules.

2 Now you, the government, and -- and
3 the NIFLA are trying to make a distinction
4 there. And I need to know if you're right, and
5 the only distinction I hear so far is one has a
6 doctor about to perform and the other has just
7 a counselor. Is there any other distinction
8 possible?

9 MR. WALL: Justice Breyer, that is the
10 crucial distinction. I agree with you on the
11 sauce is for the goose and the gander. But,
12 when you are performing a medical procedure and
13 you're making disclosures about your own
14 services, what the plurality opinion in Casey
15 says is -- this is at page 83 --

16 JUSTICE BREYER: Yeah, I kept -- it
17 was about doctors. I agree with that.

18 MR. WALL: That's right.

19 JUSTICE BREYER: But I think for most
20 people, you'd think family planning, you know,
21 family planning. That's the category.

22 And the woman will make a decision,
23 and then the state can tell them some things
24 they have to say. And we know they can tell
25 them about adoption. They can make them tell

1 them about adoption. So why can't they make
2 them tell them about abortion?

3 MR. WALL: Because, Justice Breyer,
4 that -- when you are going in to have a
5 procedure and you've got to make certain
6 disclosures, that's a disclosure related to --

7 JUSTICE SOTOMAYOR: I'm sorry, but
8 isn't the --

9 CHIEF JUSTICE ROBERTS: Maybe could we
10 let him finish the answer, please?

11 MR. WALL: That's a disclosure related
12 to the service that you're providing. And then
13 it's just a question of how much you have to
14 disclose, and Casey drew that pretty broadly to
15 say at page 83 --

16 JUSTICE KAGAN: But -- but, Mr. Wall,
17 why -- go ahead. I'm sorry.

18 MR. WALL: You've got to make an
19 informed choice. And all the government is
20 saying -- we're not saying not goose for the
21 gander; we agree. What we're saying is the
22 more you get away from that kind of a
23 disclosure that's about what you're doing with
24 that patient or customer or client, the more
25 scrutiny it ought to get under the First

1 Amendment.

2 JUSTICE KAGAN: But I think the
3 question is why shouldn't there -- a state
4 says, you know what, this is the regime we
5 want. We want to say to family planning
6 clinics that they should put up a poster saying
7 we do family planning; we do not do adoption.

8 And we want to say to crisis pregnancy
9 centers, along the lines of Petitioners here,
10 we do adoption; we do not do family planning or
11 abortion.

12 And -- and -- and -- and -- and the
13 state thinks that would be a good system
14 because, when a woman goes in to either one of
15 these kinds of places, they'll know what's
16 there and they'll know what's not there.

17 And what -- why would that be
18 problematic?

19 MR. WALL: Well, I think because, once
20 it's no longer tied to the specific goods or
21 services that the -- the clinic or center or
22 whomever is -- is providing, then the more we
23 ought to be worried that they're making you
24 just advertise what other people are doing.

25 And this case is even one step beyond

1 your hypothetical because it's not even saying
2 to the clinics, say what you do and don't do.
3 It's saying, look, we want people to know about
4 services that the state provides and --

5 JUSTICE SOTOMAYOR: Mr. Wall, how is
6 that different than Casey? In Casey, we
7 require doctors to hand out state-created
8 materials telling the women about what services
9 the state and others provided, adoption
10 centers, fathers had to pay things.

11 Now I think your distinction, and you
12 keep repeating it, is these centers, I'm
13 assuming both the licensed and unlicensed ones,
14 are not doing procedures. But I don't know
15 what an ultrasound is if not a procedure. I
16 don't know what a pregnancy test is if not a
17 procedure. I don't know how counseling on the
18 pregnancy state is not part of medical advice
19 in the same way a doctor gives it when he's
20 considering an abortion procedure. I don't
21 understand the difference.

22 MR. WALL: So --

23 JUSTICE SOTOMAYOR: Both of them are
24 doing medical-related procedures, and both are
25 being asked -- the Chief said there's a

1 distinction in not advertising someone else's
2 services, but in Casey, we permitted it.

3 So please explain to me again why
4 there's a difference here.

5 MR. WALL: So, Justice Sotomayor, I
6 agree with everything you said in the back half
7 there. And if California were coming in and
8 saying, before you, licensed clinic, perform an
9 ultrasound, you've got to provide certain
10 information to make sure that's an informed
11 choice by that woman to get the ultrasound in
12 the face of risks and alternatives, then it's
13 like Casey, and the question is just how much
14 disclosure do you have to provide. And Casey,
15 I think, gives us important guidance on that.

16 California's notice isn't doing that,
17 at least on the licensed side. On the licensed
18 side, it's not helping the women who come into
19 the clinic make an informed choice to opt into
20 one of the medical procedures. And I'm not
21 disputing that ultrasounds and the rest are
22 procedures that could trigger those kinds of
23 disclosure requirements. It's saying we have a
24 generalized interest in having them know that
25 we provide some low- and free-cost services.

1 And if that's their generalized
2 interest, that's tailor-made to an obvious
3 alternative, which is let the state do what
4 pregnancy centers do --

5 JUSTICE SOTOMAYOR: I'm sorry --

6 JUSTICE ALITO: Now, Mr. Wall, before
7 your --

8 MR. WALL: -- and tell people about
9 what it provides.

10 JUSTICE ALITO: -- before your time
11 expires, can I -- can I ask you something about
12 your brief that -- that troubles me, and that
13 is the government's request that we recognize a
14 new category of speech called professional
15 speech, which is subject to a -- a lesser
16 standard of review.

17 I mean, this case is very important in
18 itself, but adopting this new category of
19 speech would have far-reaching consequences.
20 And I -- I -- I'd like you to explain why that
21 is consistent with Stevens and other cases
22 where the Court has recently said we are not
23 going to recognize any new categories of
24 unprotected speech and how you would define the
25 boundaries of professional speech.

1 And there have been a lot of cases on
2 -- there have been some cases on this in the
3 lower courts. But just take -- to take a
4 couple of examples: Journalists are
5 professionals. So would they be subject to
6 this standard? How about economists? How
7 about climate scientists?

8 How about a fortune teller? The
9 Fourth Circuit said that a fortune teller is a
10 -- is a professional. How about somebody who
11 writes an advice column for parents?

12 Wouldn't we be getting into very
13 dangerous territory if we do this?

14 MR. WALL: So, Justice Alito, there's
15 a lot there, and I just want to make a few
16 points, and I think the Third Circuit's opinion
17 in King does a pretty nice job of this. The
18 Court's already talked about professional
19 speech. Now it's often talked about it in the
20 context of commercial speech and it's lumped
21 them together in cases like Zauderer and
22 Ohralik.

23 But what we tried to do in our brief
24 was to say, look, they're similar doctrines,
25 they overlap, but they have somewhat different

1 origins, and, historically, there are certain
2 professions that are regulated. That wouldn't
3 include fortune tellers. It wouldn't include
4 economists or journalists. But it would
5 include doctors and lawyers and maybe
6 accountants. And so we do think that there is
7 some room for the states historically in that
8 area.

9 And what we've tried to say is,
10 whether it's Zauderer or some equivalent for
11 professional speech, if it's a disclosure about
12 what you're doing, we should think that's a
13 fairly low level of scrutiny. And the more
14 that we shift away from that, even in the
15 commercial and professional speech box, we may
16 not get to strict scrutiny, but it is
17 heightened scrutiny and the states' license
18 notice can't satisfy it.

19 I would say if the -- if the Court
20 goes all the way to strict scrutiny, every
21 corrective disclosure that a manufacturer has
22 to make about some product that it's put out in
23 the public that has a risk I think would get
24 strict scrutiny. And our concern is that's
25 going to dilute strict scrutiny and we're

1 concerned that's going to undermine the First
2 Amendment.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Wall.

5 MR. WALL: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Klein.

7 ORAL ARGUMENT OF JOSHUA A. KLEIN

8 ON BEHALF OF THE RESPONDENTS

9 MR. KLEIN: Mr. Chief Justice, and may
10 it please the Court:

11 The interests served by the licensed
12 disclosure is very much like that of the
13 disclosure in Casey, promoting informed choice
14 by a patient.

15 More specifically, it allows -- it
16 empowers the woman by explaining that her
17 financial circumstance does not make her unable
18 to access alternative and supplemental care,
19 including full prenatal and delivery care that
20 Petitioners do not themselves supply.

21 And it gives her that knowledge in
22 time to be useful, because pregnancy and
23 medical care is extraordinarily time-critical.

24 JUSTICE KAGAN: There is a -- a sense
25 when you read this statute, Mr. Klein, there's

1 at least a question that arises as to whether
2 this statute has been gerrymandered.

3 So would you speak to that? Because
4 if it has been gerrymandered, that's a serious
5 issue. In other words, if, you know, it's
6 like, look, we have these general disclosure
7 requirements, but we don't really want to apply
8 them generally, we just want to apply them to
9 some speakers whose speech we don't much like.

10 MR. KLEIN: Your Honor, the disclosure
11 is targeted at women who seek free care for
12 pregnancy, not at any particular viewpoint.

13 And clinics that, by their very
14 licensing status, provide free or sliding scale
15 low-cost pregnancy care are the ones where
16 those women are going to be found and where
17 this information is immediately useful to them.

18 JUSTICE ALITO: If you have a law
19 that's -- that's neutral on its face, but then
20 it has a lot of crazy exemptions, and when you
21 apply all the exemptions, what you're left with
22 is a very strange pattern and, gee, it turns
23 out that just about the only clinics that are
24 covered by this are pro-life clinics.

25 Do you think it's possible to infer

1 intentional discrimination in that situation?

2 MR. KLEIN: Yes. That kind of
3 hypothetical can support --

4 JUSTICE ALITO: Okay. So let me ask
5 you about these -- some of these exemptions
6 which I think are hard to understand. Why does
7 this apply only to clinics whose primary
8 function is providing service to pregnant
9 women? You could have a small clinic, let's
10 say it's -- it has 30 pregnant women come in a
11 month, but that's the primary thing it does.

12 Then you could have a big clinic that
13 has 100 pregnant women come in a month, but it
14 does so many other things that pregnancy is not
15 the primary concern. Why -- why would -- why
16 does the law apply to one and not the other?

17 MR. KLEIN: Well, Your Honor, that
18 serves the purpose of having the disclosure
19 mostly made in the context in which it's useful
20 as opposed to being made in a lot of contexts
21 where it's not.

22 And this Court has said that
23 legislatures should be encouraged to apply
24 speech requirements more narrowly when they can
25 rather than --

1 JUSTICE ALITO: Well, I mean, I don't
2 understand that. What -- how -- why does it
3 apply almost only to for -- to nonprofits and
4 not for-profits? If the purpose is to get this
5 information out to poor women, don't you think
6 there are examples of poor women who stumble
7 into a for-profit facility? Wouldn't it be
8 beneficial to -- for them to know that they
9 could get treatment at no cost through the
10 state?

11 Why are most for-profits exempted?

12 MR. KLEIN: Your Honor, as a category,
13 for-profit clinics do not seem to treat
14 primarily women who need free and sliding-cost
15 scale -- sliding-cost care in the same way.

16 Now I will say it's always possible to
17 imagine a new boundary for the law. But, under
18 intermediate scrutiny, a law does not need to
19 be perfect, and a legislature can concentrate
20 its efforts at where the need for the law is
21 most apparent.

22 JUSTICE ALITO: What about individual
23 doctors? Why are they exempt?

24 MR. KLEIN: Your Honor, individual
25 doctors specialize as a category in treating

1 people who have a way to pay for care, whether
2 they're already enrolled in Medicaid or health
3 insurance or whether they just have the
4 finances. Free clinics are not on the same --

5 CHIEF JUSTICE ROBERTS: Well --

6 JUSTICE ALITO: So, when you put all
7 this together, you get a very suspicious
8 pattern. And I don't know that we need to go
9 into statistics about what the percentage of
10 covered clinics are -- are pro-life and -- and
11 -- and what are not, but we do -- we have an
12 amicus brief from a party in the state court
13 case where the state court held that this law
14 is unconstitutional. And according to their
15 statistics, 98.5 percent of the covered clinics
16 are pro-life clinics.

17 MR. KLEIN: Your Honor --

18 JUSTICE ALITO: Do you dispute that?

19 MR. KLEIN: -- yes. And I understand
20 we're speaking outside of the record here, but
21 that amici's evidence in the state court did
22 not -- was off by I think a factor of 10 in
23 terms of how many covered non -- I mean, it
24 differed by a factor of 10 when it told the
25 state court how many covered non-anti-abortion

1 facilities there were.

2 JUSTICE ALITO: So what is your
3 position on that? What's the percentage?

4 MR. KLEIN: Your Honor, the state does
5 not have firm numbers on this. We have done a
6 preliminary assessment which found a
7 significant number of non-anti-abortion-covered
8 facilities.

9 However, I will also say that deriving
10 this from purely state databases is very tricky
11 because they rely on self-reporting that's hard
12 to interpret as to who really does primarily
13 pregnancy care. It's exactly the kind of thing
14 --

15 JUSTICE KAGAN: Well, could you say --

16 MR. KLEIN: -- where a record would be
17 useful.

18 JUSTICE KAGAN: Could you say a few
19 words about how these boundaries came about?
20 In other words, you have these various lines
21 that the statute draws and then it has these
22 exemptions.

23 And what was the state thinking -- I
24 mean, you know, and I realize that the state --
25 you know, there are lots of people who were

1 thinking different things, but is there a --
2 give me a little bit more about your theory of
3 the case even as to why these exemptions exist
4 and why these lines are drawn.

5 You've been saying, well, we go where
6 the problem is. But tell me how you knew where
7 the problem was. Tell me how -- what you
8 thought the problem actually was. What were
9 you doing? What were you trying to do?

10 MR. KLEIN: Well, let me start with
11 the question of what the problem is. And the
12 problem is that the state has overseen, and the
13 state legislature has overseen, an expansion of
14 public medical care in California, but has
15 experienced that publicity campaigns invariably
16 leave a gap that was highly concerning to them
17 in the pregnancy context because of the medical
18 issues and because of the severe timing
19 constraints to get care that makes a
20 difference.

21 And so the -- the goal of the statute
22 is to identify women who are seeking pregnancy
23 care and appear unable to pay for it themselves
24 or through insurance or public coverage they
25 already have. That's why it's targeted at free

1 clinics.

2 Now there was a reference to
3 exemptions, and the exemption, leaving aside
4 the exemption for federal clinics, which I
5 think is obvious, the exemption for Medi-Cal
6 F-PACT providers reflects that a notice would
7 serve little purpose at a provider which
8 already provides care under those programs and
9 which has --

10 JUSTICE KAGAN: I mean --

11 MR. KLEIN: -- the incentive to help
12 women enroll in them.

13 JUSTICE KAGAN: One way to think about
14 how a statute like this gets enacted is to say
15 we're -- you know, we're really concerned that
16 there are low-income women, don't have a lot of
17 access to information, don't realize what all
18 their options are, want to make sure in general
19 and across the board that they get the best
20 information that's available to them.

21 Another way to think about what the
22 problem is and how a statute like this comes
23 about is more targeted. It's to say there are
24 these crisis pregnancy centers all over
25 California and we know that women just go into

1 them and they don't realize what they are, and
2 they're being subject to being misled and we
3 think that this is a terrible problem.

4 And it might be that the -- you know,
5 that the state could legitimately view that as
6 a problem. It's a much more targeted problem.
7 Whether it's a problem or not, it's much more
8 targeted than the first.

9 And I guess what I'm asking is, is
10 this the second kind of statute or is it the
11 first kind of statute?

12 MR. KLEIN: It's the first kind of
13 statute, and the author's verbatim statements
14 about this --

15 JUSTICE GORSUCH: Well, if it's the
16 first kind of statute, then why shouldn't this
17 Court take cognizance of the state's other
18 available means to provide messages? If -- if
19 it's about just ensuring that everyone has full
20 information about their options, why should the
21 state free-ride on a limited number of clinics
22 to provide that information?

23 MR. KLEIN: Well, Your Honor, the
24 state -- the legislature is aware of the
25 shortcomings of other methods, as evidenced by

1 the gap that has remained despite their efforts
2 to publicize.

3 Now what you describe as -- as
4 free-riding, I'd respectfully submit, is a
5 permissible speech requirement in the
6 professional context. These --

7 JUSTICE GORSUCH: Well, but if you're
8 trying to educate a class of -- of persons
9 about their rights, it's -- it's pretty unusual
10 to force a private speaker to do that for you
11 under the First Amendment.

12 MR. KLEIN: Your Honor, I don't think
13 it's unusual to require a professional to
14 explain alternatives, as -- or additional
15 options that are available, as in Casey and
16 also as in the laws that have been cited in our
17 brief, the New York brief --

18 JUSTICE GORSUCH: Well, put -- put --
19 put aside --

20 CHIEF JUSTICE ROBERTS: Counsel,
21 maybe --

22 JUSTICE GORSUCH: I'm sorry.

23 CHIEF JUSTICE ROBERTS: I'm sorry.

24 Maybe you could finish your answer to Justice
25 Kagan's question.

1 MR. KLEIN: Let me ask first what is
2 the part --

3 JUSTICE KAGAN: Yeah.

4 MR. KLEIN: -- of Justice Kagan's
5 question she would like for me to --

6 JUSTICE KAGAN: Yeah, I don't -- I
7 don't even remember which was the first kind of
8 statute anymore and which was the second kind
9 of statute. But I was saying a state could
10 really be responding to a sort of
11 generalized -- a feeling that, in general, poor
12 women don't have access to information, or a
13 state could be responding to a -- a feeling
14 that there are a particular kind of a center
15 that is misleading women as to what they do and
16 don't provide.

17 And I can see this statute arising in
18 either of those two ways, and wanted you to
19 tell me why you thought it arose in the first
20 way and not in the second.

21 MR. KLEIN: Right. Well, let -- let
22 me say I don't think they're exclusive. The
23 primary issue is women not knowing where they
24 can get the free care they need for all of
25 their options, including carrying a healthy

1 pregnancy to term and having a healthy baby.
2 But, obviously, the informational problem is
3 going to be especially concerning where there
4 are cases of deception and -- and so forth.

5 And the legislature had some awareness
6 of this, but they didn't draw a statute with
7 that as the primary principle.

8 JUSTICE BREYER: You see, that's what
9 I give up on. I don't know. I came away from
10 these briefs and I think I got the impression
11 that there are about 60 or so centers, maybe
12 70, that are really pro-life for religious
13 reasons of different kinds, all right? And
14 they don't want to talk about abortions.

15 And then it seemed to me maybe there
16 are a thousand centers all together in
17 California, or several hundred, and I really
18 did end up wondering, well, you know, all those
19 centers, do the poor women really get the
20 information about free abortions? I have no
21 idea.

22 I mean, the fact that they may have a
23 Cal medical thing doesn't mean they tell
24 everybody about it. I don't know what they're
25 like. So this is my question: Don't we need a

1 trial on this?

2 And I don't see -- I mean, I'm just
3 telling you right now I have no idea. And your
4 answers don't tell me. They're not empirical.
5 You haven't told me whether women who don't go
6 to these 67 centers but do go to, say, 700, are
7 all informed whether the center is a -- is a --
8 is a member of the Cal medical program or not.

9 I don't know whether they're all
10 informed, and I suspect that you don't either.
11 And, therefore, I -- I -- I think trial, that's
12 what they're for. What's the answer to that?

13 MR. KLEIN: Your Honor, we agree.

14 JUSTICE BREYER: You agree with that?

15 MR. KLEIN: And the record at the
16 preliminary injunction stage, which is all this
17 concerns, was not sufficient to support an
18 injunction. At a merits stage, there would
19 presumably be a -- a great deal of evidence on
20 both sides and that would --

21 JUSTICE KENNEDY: What --

22 JUSTICE SOTOMAYOR: Mr. Klein, can we
23 go back to the question Justice Kennedy asked
24 the other side, which was for you to affirm or
25 disaffirm that if one of these facilities wrote

1 an ad that just said pro-life and put their
2 name, it appears as if the law would require
3 them to have the statement "This is not a
4 medical facility" in 48-point font?

5 MR. KLEIN: I don't think so, Your
6 Honor, unless the facility was -- I mean, what
7 subjects a facility to the law, if it's
8 unlicensed, is -- are -- this is on page 79a of
9 the Petitioners' Appendix, are things like
10 offering obstetric ultrasounds, sonograms --

11 CHIEF JUSTICE ROBERTS: Right. Well,
12 what if it weren't -- we're dealing with the
13 more general principle. What if you had an
14 organization that simply provided adoption
15 services and advertised there is an alternative
16 to abortion, try adoption?

17 Could the state make them include the
18 disclosure requirement that you have with
19 respect to licensed facilities because that's
20 an alternative to pregnancy? I would say you'd
21 want to make all the abortion alternatives also
22 fully available and make the low-income women
23 aware of those. Could you impose that
24 requirement on that facility?

25 MR. KLEIN: I don't think so, Your

1 Honor. And it wouldn't -- and such a
2 requirement wouldn't be serving the same
3 interests. And let me explain why.

4 These facilities -- the licensed
5 facilities provide medical care, page 91 of the
6 Petitioners' Appendix, their complaint,
7 describes medical care they provide to pregnant
8 women. And so women go there --

9 CHIEF JUSTICE ROBERTS: So what
10 additional, what, ultrasounds or discussion of
11 family planning, what more would it take to
12 require the adoption center to be covered? Any
13 one of the ones that you have listed for
14 licensed centers?

15 MR. KLEIN: In other words, what would
16 make it subjected to the same kind of
17 requirement as a licensed center?

18 CHIEF JUSTICE ROBERTS: Yeah. At what
19 point -- you know, you say -- let's say that
20 ultrasounds are out of it. Is the disclosure
21 still required for that facility?

22 MR. KLEIN: I don't think the
23 ultrasounds per se make the difference. What
24 would make the difference as a constitutional
25 matter is, is it licensed as a medical facility

1 that -- and does it provide medical care to
2 people whose --

3 CHIEF JUSTICE ROBERTS: Like pregnancy
4 testing, if -- if the adoption center also
5 provided pregnancy testing, could you cover
6 them?

7 MR. KLEIN: If it provided it as a --
8 as a licensed medical service through licensed
9 medical providers, then the state would have to
10 justify the sufficiently important state
11 interest with the -- and the --

12 CHIEF JUSTICE ROBERTS: What's your --
13 what's your answer, though? It provides two
14 services, adoption and pregnancy testing.
15 Could you impose the disclosure requirement on
16 that facility?

17 MR. KLEIN: Your Honor, I think it
18 would be much more difficult to justify there.

19 CHIEF JUSTICE ROBERTS: I know.
20 That's why I'm asking the question.

21 (Laughter.)

22 MR. KLEIN: Right.

23 CHIEF JUSTICE ROBERTS: I'm trying to
24 figure out -- I'm trying to figure out the
25 limits of your argument. I mean, the -- the

1 centers here have a variety of services they
2 provide, and you say, because of that, we can
3 impose this requirement on them.

4 Now, before we can say yes or no to
5 your argument, I would like to know the limits
6 of it. So a facility that provides adoption
7 services and pregnancy testing, can they be
8 covered by your law?

9 MR. KLEIN: Through a licensed
10 provider, yes, they could, except --

11 CHIEF JUSTICE ROBERTS: No, that's all
12 they do.

13 JUSTICE ALITO: No.

14 CHIEF JUSTICE ROBERTS: I don't know
15 what you mean by "through a licensed provider."
16 That is all they do. They counsel on adoption
17 and they provide pregnancy testing.

18 Could you require them to say, look,
19 there are other options you may want to
20 consider and, therefore, here's a disclosure
21 saying, you know, here are the facilities where
22 you can get other options?

23 MR. KLEIN: On reflection, I think
24 probably not. And here's the difference:
25 Because they're providing a -- a so much more

1 limited set of medical services that it may be
2 less -- less --

3 JUSTICE SOTOMAYOR: Mr. Klein, can we
4 go back to my question? I have read the law
5 with respect to facility, and it requires a
6 facility to do one of -- two of four things
7 before it qualifies under the law.

8 So abortion -- you appear right that
9 they have to, one, offer ultrasounds,
10 obstetrics, sonograms, or prenatal care,
11 pregnancy -- or pregnancy testing or diagnosis,
12 or, three, prenatal monogram tests or
13 pregnancy, and, four, collect health data. But
14 they have to do two or more of those things.

15 But let's go back to the question
16 Justice Kennedy asked. One of these medical
17 care facilities says "pro-life" and their name.
18 Is that -- are they required to post a notice?
19 And you started by answering the question, and
20 I don't think you finished.

21 MR. KLEIN: And the answer is no,
22 they're not required to.

23 JUSTICE SOTOMAYOR: Because they're --

24 MR. KLEIN: That is not --

25 JUSTICE SOTOMAYOR: -- not offering in

1 the advertising one of these services?

2 MR. KLEIN: Because they're not --
3 right, they're not doing two of the covered --

4 JUSTICE ALITO: No, that's not --
5 that's not -- show me where that is in the
6 statute. If it's a covered facility, then any
7 ad that they put out, including one that just
8 says "Choose Life," has to -- it has to include
9 this disclaimer: We're not licensed.

10 MR. KLEIN: But, in order to be a
11 covered unlicensed facility, it has to do two
12 or more of the list of things.

13 JUSTICE ALITO: Yes, it has to do
14 those things. So you have a facility that
15 offers pregnancy testing and they advertise
16 that they offer pregnancy testing. That's all
17 they do. And they put up an -- an ad that says
18 "Choose Life." They have to put in the
19 disclaimer?

20 MR. KLEIN: If -- yes, in that
21 circumstance, they may be required to do that.
22 And --

23 JUSTICE KENNEDY: Do you agree that
24 mandating speech that the speaker would not
25 otherwise give -- indeed, does not agree

1 with -- alters the content of the message?

2 MR. KLEIN: Yes, it does, Your Honor.

3 JUSTICE KENNEDY: All right. So then
4 you're saying that on this billboard, you --
5 the state can require that the message be --
6 the content of the message be altered, even
7 though they're not providing medical services?

8 MR. KLEIN: Yes, Your Honor, because
9 the criteria are designed, not to see who's
10 providing medical services, that's taken care
11 of by our unlicensed practice law, it's
12 designed to address instances where the
13 services that are offered and provided could
14 make a woman believe that she's going to
15 have -- be accessing medical services and is
16 spending her time and resources to -- to do
17 that and is unable to evaluate what she's
18 doing.

19 JUSTICE ALITO: Now, if this ad --

20 JUSTICE KENNEDY: If we uphold your --
21 your -- your argument, if we agree with your
22 argument, could the state then amend its
23 statute and say that any evangelical group that
24 has a seven-day rally for pro-life has to give
25 required information of this sort?

1 MR. KLEIN: No, Your Honor, I don't
2 think that would follow.

3 JUSTICE KENNEDY: Why not?

4 MR. KLEIN: Well, and even putting
5 aside the -- the free exercise targeting, the
6 --

7 JUSTICE KENNEDY: Oh, so religion is
8 not a part of this calculus in the case that
9 you have?

10 MR. KLEIN: Well, Your Honor, your
11 hypothetical statute did target at evangelical
12 groups. That is on its face unconstitutional.
13 So I'm assuming we want to take that out of the
14 --

15 JUSTICE KENNEDY: It didn't target it.
16 It included it.

17 MR. KLEIN: So I think the statute is
18 reasonably read and applied in -- in
19 recognition of its purposes, which are the
20 purpose to prevent women from making their
21 decisions about where to go based on mistake
22 and confusion about what's offered. That's a
23 classic Zauderer purpose.

24 JUSTICE GINSBURG: May I ask --

25 MR. KLEIN: Now, if in --

1 JUSTICE GINSBURG: -- the -- there was
2 a question raised about 13 different languages
3 and what a burden that that would be. I don't
4 know what the state's answer to that is. I
5 mean, it's one thing just to say: We are not a
6 licensed medical provider.

7 But if you have to say that, those two
8 sentences in 13 different languages, it can be
9 very burdensome.

10 MR. KLEIN: Your -- Your Honor, if the
11 statute -- if in application to a kind of ad
12 that the centers otherwise have been running
13 and would run, if it makes it too burdensome to
14 place those ads, the statute would be
15 unconstitutional as applied to that. That
16 would --

17 JUSTICE ALITO: Well, what is the
18 situation for Los Angeles County? This is
19 California law. You should know the answer.

20 Somebody is going to put up an ad. A
21 covered unlicensed facility posts an ad in Los
22 Angeles County. In how many language --
23 languages must they print the disclosure -- the
24 disclaimer?

25 MR. KLEIN: It would be 13. And it

1 would be -- if a plaintiff showed standing and
2 made a record of the kind of ad that -- that
3 they used to run and that it would be
4 impossible to run it that way, it would be
5 unconstitutional, but that requires actual
6 standing and --

7 JUSTICE ALITO: What kind of an ad --

8 MR. KLEIN: -- some sort of
9 demonstration.

10 JUSTICE ALITO: -- if it's -- what
11 kind of an ad would -- as to what type of ad
12 would that not be unconstitutional?

13 MR. KLEIN: Well, Your Honor, there's
14 nothing in the record about what ads these
15 plaintiffs do, in fact, run, so we don't know.

16 We do know this doesn't apply to TV
17 and radio ads, for instance.

18 I want to make sure, if I may, to
19 address one point.

20 JUSTICE KENNEDY: So -- so you want me
21 to have a remand for them to tell the court
22 what a billboard is, I -- because I don't know
23 that?

24 MR. KLEIN: Your Honor --

25 JUSTICE KENNEDY: There's a lot of

1 things we don't know, but I think we know what
2 a billboard is.

3 (Laughter.)

4 MR. KLEIN: We don't know what ads
5 these Petitioners or NIFLA's members run. It's
6 not in the complaint. And for a preliminary
7 injunction, the court was not -- and the
8 language issue wasn't raised at all on
9 preliminary injunction. So the court did not
10 abuse its discretion with respect to that.

11 JUSTICE GINSBURG: What -- what about
12 -- there were legislative findings about false
13 and misleading representations. Has California
14 ever brought charges against any of these
15 places for false and misleading advertising?

16 MR. KLEIN: I'm not aware that the
17 state has. I believe that the City and County
18 of San Francisco has, for instance.

19 But, in any case, that doesn't address
20 the -- such a procedure would not be superior.
21 First, that kind of -- policing that kind of
22 issue would not necessarily be more
23 speech-protective since it might involve
24 undercover patients, record subpoenas, site
25 visits and the rest.

1 JUSTICE GORSUCH: But, counsel, it
2 would have the virtue of applying evenly to all
3 persons and all industries and a law that is
4 very familiar. I mean, anti-fraud provisions
5 in commercial speech are well-known and -- and
6 don't pose any of the problems we've been
7 discussing today.

8 So why wouldn't that be a superior
9 mechanism for addressing these concerns, if --
10 if we're talking about a narrower set of
11 concerns --

12 MR. KLEIN: Right. So --

13 JUSTICE GORSUCH: -- just any fraud
14 concerns?

15 MR. KLEIN: So the narrower concerns,
16 which are not the only ones here, it could be
17 significantly more or at least it's an open
18 question about whether it would be as or more
19 speech-intrusive to be really getting into
20 everything that the Petitioners are saying to
21 assess it, as opposed to requiring a
22 two-sentence notice that mostly obviates the
23 need for that because it gives women the
24 information to protect themselves and make
25 informed decisions in the very limited time

1 that they have available, simply by seeing the
2 notice to call the government.

3 And --

4 JUSTICE GORSUCH: The one -- the one
5 is prophylactic and requires you to compel
6 speech from someone else, that -- that
7 implicates First Amendment concerns. The
8 second is -- puts the burden on the government
9 to prove that someone has abused their
10 free-speech rights.

11 And -- and this Court's normally
12 pretty jealously protective of speech. So why
13 isn't, again, that latter approach preferable?

14 MR. KLEIN: For -- for the same reason
15 that it wasn't a necessary step in Casey,
16 because, in the regulation of professional
17 speech, the government, given the close and
18 reliant relationship that the patient has on
19 her physician, can require a certain amount of
20 speech to ensure that the -- that the patient
21 makes informed decisions about very important
22 matters.

23 The main difference from Casey is how
24 much less burdensome this disclosure is because
25 there's more flexibility in how it can be

1 delivered and because it's only giving a phone
2 number for the patient to call and get
3 information from the government, rather than
4 requiring the physician to herself hand over a
5 complete state-written pamphlet, which is what
6 the disclosure in Casey required.

7 JUSTICE SOTOMAYOR: Would it be fair
8 to say -- and I still don't have a full answer
9 to my question -- all right, pro-life, nothing
10 else, a unlicensed facility, it meets all of
11 the criteria, has an ad that says just
12 "pro-life" and puts its name. Does it have to
13 give the notice? Yes or no?

14 MR. KLEIN: Yes, if it meets the other
15 criteria. And it's --

16 JUSTICE SOTOMAYOR: Is that -- that --

17 MR. KLEIN: -- possible in an
18 as-applied challenge --

19 JUSTICE SOTOMAYOR: -- seems to me
20 more burdensome and wrong because it's not tied
21 to an advertisement that is promoting medical
22 services.

23 MR. KLEIN: May I continue?

24 It's possible that that kind of
25 as-applied challenge would result in

1 invalidating that application, but, as in
2 Ayadi, injunctive relief addresses particular
3 problems. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Farris, you have five minutes
7 remaining.

8 REBUTTAL ARGUMENT OF MICHAEL P. FARRIS,
9 ON BEHALF OF PETITIONERS

10 MR. FARRIS: Thank you, Mr. Chief
11 Justice.

12 I'd like to first address Justice
13 Kagan's concern about the gerrymandering issue.

14 On page 5 of our reply brief in Note
15 2, we point out the state's website for where
16 the state tells low-income women how they can
17 go to private doctors and get information -- or
18 get services for pregnancy.

19 Yet those doctors are all exempt from
20 the -- this ad -- this Act, as are all
21 nonprofit clinics that have the general kind of
22 practice that Justice Alito's question
23 described.

24 As to the ad burden -- burden, the
25 amicus, Heartbeat International, on page 24 of

1 their brief gave a mock-up of what an ad would
2 look like when you have simply pregnancy
3 questions and a phone number, and all the --
4 the languages required in Los Angeles County.
5 That's what it would look like. And it's
6 clearly burdensome.

7 And the unlicensed center, I think the
8 last answer from California was correct, is it
9 would be triggered if they were otherwise
10 mandated by the -- by the law.

11 I'd last like to turn --

12 JUSTICE GINSBURG: The answer was that
13 -- that this was not brought up in this case
14 until now --

15 MR. FARRIS: Your Honor --

16 JUSTICE GINSBURG: -- and it should be
17 aired below.

18 MR. FARRIS: Your Honor, that's not
19 correct. It was raised below, as our reply
20 brief sets out. It's in the complaint. It's
21 in the briefing in the district court. It's in
22 the oral argument in the district court. It's
23 in the briefing and oral argument in the court
24 of appeals. All those details are on Footnote
25 5 of our reply brief.

1 The good for the goose, good for the
2 gander concern, here's what's going to happen
3 if California's law is upheld: A pro-life
4 state is going to find out that there is no
5 difference anymore between people who perform
6 abortions and -- and those who counsel about
7 it, who talk about it.

8 If merely talking about abortion is
9 sufficient to require you to give pro-life
10 information, we have taken a big step in the
11 wrong direction of politicizing the practice of
12 medicine.

13 If everyone who recommends abortion
14 can have to give these kind of --

15 JUSTICE BREYER: I mean, that's --
16 since it was mine, it's -- it's -- it's you
17 have to be a professional group giving advice
18 in a professional way. It's not -- I don't
19 think the goose and gander has to do with
20 everybody in the world.

21 MR. FARRIS: But --

22 JUSTICE BREYER: It has to do -- and
23 -- and there are things called plan -- family
24 planning clinics, et cetera.

25 MR. FARRIS: Certainly, Your Honor.

1 And so taking it on a narrow and then a broader
2 construction, the narrow construction, as I
3 understood your hypothetical, was a family
4 planning center that didn't actually perform
5 abortions but did all the other services.

6 I believe it would be unconstitutional
7 in a pro-life state to require that center
8 because -- to give a pro-life kind of
9 disclaimer that's -- was required in
10 Pennsylvania because they're not doing anything
11 that relates to the practice of medicine in
12 that context.

13 But taking the broader construction,
14 if we're not going to gerrymander this and say:
15 All doctors who treat pregnant women have to
16 give all the options. If -- if that's the
17 case, doctors who advise to deliver and doctors
18 who advise to get abortions are going to be
19 swept into this requirement.

20 And the political ramifications of
21 that are enormous. We should not politicize
22 the practice of medicine in that way. And the
23 line that Casey drew between performing
24 abortions versus advising about abortions is a
25 constitutionally appropriate line.

1 Thank you, Your Honor. I rest.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 11:10 a.m., the case in
5 the above-entitled matter was submitted.)

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\$9,000 [1] 15:12	absolutely [1] 28:15	33:12 46:14 50:21	baby [1] 48:1
1	abuse [1] 60:10	alters [1] 56:1	back [5] 24:9 33:6 49:23 54:4,15
10 [2] 41:22,24	abused [1] 62:9	amend [1] 56:22	balance [1] 25:3
10:09 [2] 1:17 4:2	access [5] 5:4 9:15 37:18 44:17	Amendment [7] 25:13,16 27:19	based [2] 17:22 57:21
100 [1] 39:13	47:12	31:1 37:2 46:11 62:7	basic [2] 11:22 13:13
11:10 [1] 68:4	accessing [1] 56:15	amici's [1] 41:21	basically [1] 19:8
1204 [1] 14:6	according [1] 41:14	amicus [6] 2:8 3:8 15:11 25:10 41:	basing [1] 17:23
13 [3] 58:2,8,25	accountants [1] 36:6	12 64:25	BECERRA [2] 1:8 4:6
16-1140 [1] 4:4	across [2] 26:9 44:19	among [2] 14:12,17	begin [1] 14:10
2	Act [1] 64:20	amount [1] 62:19	begins [1] 14:4
2 [1] 64:15	actual [1] 59:5	amounts [1] 21:1	behalf [11] 2:4,8,12 3:4,7,12,15 4:
20 [1] 1:13	actually [4] 9:14 13:2 43:8 67:4	analysis [1] 8:23	9 25:9 37:8 64:9
20-line [1] 22:16	ad [20] 16:6,7,8,13,13 50:1 55:7,17	anchor [1] 7:9	beliefs [1] 25:20
20-word [1] 22:16	56:19 58:11,20,21 59:2,7,11,11	anchors [1] 7:4	believe [4] 8:20 56:14 60:17 67:6
2018 [1] 1:13	63:11 64:20,24 65:1	Angeles [3] 58:18,22 65:4	below [2] 65:17,19
24 [1] 64:25	additional [3] 7:19 46:14 51:10	another [2] 8:4 44:21	beneficial [1] 40:8
25 [1] 3:9	Additionally [1] 14:12	answer [12] 11:3 18:25 30:10 46:	benefits [3] 5:20 19:13 24:3
29 [1] 22:18	address [4] 56:12 59:19 60:19 64:	24 49:12 52:13 54:21 58:4,19 63:	best [2] 6:5 44:19
3	12	8 65:8,12	better [1] 20:18
30 [1] 39:10	addresses [1] 64:2	answered [1] 26:23	between [3] 17:18 66:5 67:23
37 [1] 3:12	addressing [1] 61:9	answering [1] 54:19	beyond [3] 7:20 22:6 31:25
4	adequacy [1] 15:6	answers [1] 49:4	biased [1] 15:2
4 [1] 3:4	adjustments [1] 16:18	anti-fraud [1] 61:4	big [3] 16:10 39:12 66:10
48-font [1] 15:10	admits [1] 14:10	apparent [1] 40:21	bigger [1] 16:10
48-point [1] 50:4	adopting [1] 34:18	appeals [1] 65:24	billboard [4] 22:12 56:4 59:22 60:
5	adoption [18] 5:5 12:6 20:11 27:	appear [2] 43:23 54:8	2
5 [2] 64:14 65:25	23 28:2,22 29:25 30:1 31:7,10 32:	APPEARANCES [1] 2:1	bit [1] 43:2
6	9 50:14,16 51:12 52:4,14 53:6,16	appears [1] 50:2	board [2] 26:9 44:19
60 [2] 13:10 48:11	ads [5] 15:11 58:14 59:14,17 60:4	Appendix [2] 50:9 51:6	body [2] 16:5,6
63 [1] 3:15	advancing [1] 7:21	application [2] 58:11 64:1	both [5] 21:16 32:13,23,24 49:20
67 [1] 49:6	advertise [2] 31:24 55:15	applied [3] 10:16 57:18 58:15	bothering [1] 12:1
7	advertised [1] 50:15	apply [13] 10:17,18 26:3,3,5 38:7,8,	bothers [1] 12:2
70 [2] 13:10 48:12	advertisement [1] 63:21	21 39:7,16,23 40:3 59:16	boundaries [2] 34:25 42:19
700 [1] 49:6	advertisements [1] 15:13	applying [1] 61:2	boundary [1] 40:17
79a [1] 50:8	advertising [6] 4:15 16:4 18:4 33:	approach [1] 62:13	box [1] 36:15
8	1 55:1 60:15	appropriate [1] 67:25	BREYER [16] 11:21 12:15,25 13:5,
83 [2] 29:15 30:15	advice [9] 18:23 19:5,7 20:15,17	area [1] 36:8	16 27:21 28:1,7 29:9,16,19 30:3
9	21:14 32:18 35:11 66:17	argue [1] 13:19	48:8 49:14 66:15,22
91 [1] 51:5	advise [2] 67:17,18	argument [17] 1:16 3:2,5,10,13 4:	Breyer's [2] 15:5 24:10
98.5 [1] 41:15	advising [1] 67:24	4,8 17:23 25:8 37:7 52:25 53:5 56:	brief [11] 14:11 21:3 34:12 35:23
A	ADVOCATES [2] 1:4 4:6	21,22 64:8 65:22,23	41:12 46:17,17 64:14 65:1,20,25
a.m [3] 1:17 4:2 68:4	affirm [1] 49:24	arise [2] 10:25 11:10	briefing [2] 65:21,23
ability [1] 20:23	agencies [1] 20:14	arises [1] 38:1	briefs [2] 15:12 48:10
able [1] 8:8	agree [9] 29:10,17 30:21 33:6 49:	arising [1] 47:17	broad [2] 67:1,13
abortifacient [1] 14:21	13,14 55:23,25 56:21	arose [1] 47:19	broadly [1] 30:14
abortion [35] 4:14 5:18 6:10,10,20	ahead [1] 30:17	array [1] 6:1	brought [2] 60:14 65:13
7:11 8:6,12 9:7,9 10:11,12 11:18	aim [1] 4:12	as-applied [3] 15:16 63:18,25	bulk [1] 26:19
12:8,12,20 17:13 18:12,13,15 19:	aimed [1] 9:19	aside [3] 44:3 46:19 57:5	burden [6] 15:9 23:9 58:3 62:8 64:
19 20:5 25:1 26:4 27:23 28:5,24	aired [1] 65:17	assess [1] 61:21	24,24
30:2 31:11 32:20 50:16,21 54:8	AL [2] 1:5,9	assessment [1] 42:6	burdensome [5] 58:9,13 62:24 63:
66:8,13	ALITO [20] 9:22 10:14,21 34:6,10	assist [1] 5:5	20 65:6
abortions [15] 5:2 6:8 10:19 12:17,	35:14 38:18 39:4 40:1,22 41:6,18	assistance [4] 6:23 7:14 10:22 24:	business [2] 27:6 28:25
23 16:23,25 28:10 48:14,20 66:6	42:2 53:13 55:4,13 56:19 58:17	3	
67:5,18,24,24	59:7,10	assuming [2] 32:13 57:13	C
above-entitled [2] 1:15 68:5	Alito's [1] 64:22	attacking [1] 13:8	Cal [2] 48:23 49:8
	allow [1] 25:16	ATTORNEY [1] 1:8	calculus [1] 57:8
	allowed [1] 21:5	author's [1] 45:13	CALIFORNIA [21] 1:9 2:12 4:12
	allows [2] 25:13 37:15	available [10] 6:2 10:2,4 18:14 24:	10:9 11:19 14:6 17:9 21:23 22:2
	almost [1] 40:3	3 44:20 45:18 46:15 50:22 62:1	23:3,4 25:16 26:8,17 33:7 43:14
	already [4] 35:18 41:2 43:25 44:8	aware [3] 45:24 50:23 60:16	44:25 48:17 58:19 60:13 65:8
	altered [1] 56:6	awareness [1] 48:5	California's [2] 33:16 66:3
	alternative [5] 21:3 34:3 37:18 50:	away [4] 27:16 30:22 36:14 48:9	call [3] 7:14 62:2 63:2
	15,20	Ayadi [1] 64:2	
	alternatives [6] 7:17 19:20 25:1		

Official

<p>called [2] 34:14 66:23 came [3] 1:15 42:19 48:9 campaigns [1] 43:15 care [23] 5:7 23:22 24:4 26:6 37:18, 19,23 38:11,15 40:15 41:1 42:13 43:14,19,23 44:8 47:24 51:5,7 52:1 54:10,17 56:10 carried [1] 6:22 carry [2] 5:3 7:13 carrying [1] 47:25 Case [28] 4:4 5:11,19 6:17,20 7:2 8:5,24 11:11,12 15:21 16:1,8,19 22:5 24:12,16,20 31:25 34:17 41:13 43:3 57:8 60:19 65:13 67:17 68:3,4 cases [6] 20:23 34:21 35:1,2,21 48:4 Casey [24] 5:11 7:6,7,18 19:18 20:3,6 23:16,18,24 24:24 29:14 30:14 32:6,6 33:2,13,14 37:13 46:15 62:15,23 63:6 67:23 categories [1] 34:23 category [5] 29:21 34:14,18 40:12,25 center [18] 6:6,9 18:6 22:11 28:4,8,12,12,23 31:21 47:14 49:7 51:12,17 52:4 65:7 67:4,7 centers [19] 4:13,14,16 6:4 8:13 15:1 25:17 31:9 32:10,12 34:4 44:24 48:11,16,19 49:6 51:14 53:1 58:12 certain [5] 15:23 30:5 33:9 36:1 62:19 certainly [4] 13:9 17:20 23:17 66:25 cetera [1] 66:24 challenge [3] 15:16 63:18,25 charges [1] 60:14 Chevrolet [2] 16:8,11 CHIEF [27] 4:3,10 11:1,5 25:5,11 26:21 30:9 32:25 37:3,6,9 41:5 46:20,23 50:11 51:9,18 52:3,12,19,23 53:11,14 64:4,10 68:2 child [2] 7:22 24:5 childbirth [1] 24:4 choice [4] 30:19 33:11,19 37:13 choose [7] 19:23 20:10 22:12,22,24 55:8,18 Circuit [1] 35:9 Circuit's [1] 35:16 circumstance [2] 37:17 55:21 circumstances [1] 21:12 cited [1] 46:16 City [1] 60:17 class [2] 14:16 46:8 classic [1] 57:23 clearly [2] 21:4 65:6 clever [1] 14:23 client [1] 30:24 clients [2] 18:13,16 climate [1] 35:7 clinic [7] 5:5 10:10 31:21 33:8,19 39:9,12 clinics [23] 10:18 14:5,8,13,13 15:</p>	<p>7 27:22 31:6 32:2 38:13,23,24 39:7 40:13 41:4,10,15,16 44:1,4 45:21 64:21 66:24 close [2] 26:15 62:17 clutter [1] 16:12 code [1] 14:6 cognizance [1] 45:17 collect [1] 54:13 colors [1] 16:7 column [1] 35:11 come [4] 19:18 33:18 39:10,13 comes [1] 44:22 coming [1] 33:7 comments [1] 16:2 commercial [3] 35:20 36:15 61:5 community [1] 14:8 compel [3] 6:11 25:21 62:5 compelled [1] 4:21 compelling [1] 4:13 complaint [3] 51:6 60:6 65:20 complete [2] 8:8 63:5 complications [1] 19:15 components [1] 24:25 concentrate [1] 40:19 concern [5] 26:16 36:24 39:15 64:13 66:2 concerned [2] 37:1 44:15 concerning [2] 43:16 48:3 concerns [6] 49:17 61:9,11,14,15 62:7 condition [1] 19:17 confirm [1] 9:20 confusion [1] 57:22 consent [10] 5:14,14,23 7:5 20:8 23:17,18,25 24:8,21 consequences [1] 34:19 consider [1] 53:20 considered [1] 7:5 considering [1] 32:20 consistent [1] 34:21 constitutional [2] 17:6 51:24 constitutionally [2] 10:12 67:25 constraints [1] 43:19 construction [3] 67:2,2,13 consulting [1] 19:16 contact [1] 5:6 content [2] 56:1,6 context [9] 5:13 7:16 8:21 16:4 35:20 39:19 43:17 46:6 67:12 contexts [1] 39:20 continue [1] 63:23 contraceptive [3] 16:24 17:1 26:5 core [1] 26:15 correct [5] 13:14,18 17:25 65:8,19 corrective [1] 36:21 cost [2] 10:3 40:9 Counsel [8] 17:16 25:6 46:20 53:16 61:1 64:5 66:6 68:3 counseling [1] 32:17 counselor [1] 29:7 counsels [1] 28:4 country [1] 28:14 county [5] 23:1 58:18,22 60:17 65:4</p>	<p>couple [2] 20:16 35:4 COURT [27] 1:1,16 4:11 5:11 7:7,18 15:20,24 17:14 20:5 24:24 25:12 34:22 36:19 37:10 39:22 41:12,13,21,25 45:17 59:21 60:7,9 65:21,22,23 Court's [2] 35:18 62:11 courts [1] 35:3 cover [1] 52:5 coverage [1] 43:24 covered [11] 38:24 41:10,15,23,25 51:12 53:8 55:3,6,11 58:21 crazy [1] 38:20 crisis [8] 8:13 31:8 44:24 criteria [3] 56:9 63:11,15 crucial [1] 29:10 curiae [3] 2:9 3:8 25:10 customer [1] 30:24</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [3] 1:12 2:3,7 dangerous [1] 35:13 data [1] 54:13 databases [1] 42:10 DBA [1] 1:4 deal [1] 49:19 dealing [1] 50:12 deception [1] 48:4 decide [2] 8:17 13:24 decided [1] 5:11 decides [2] 9:8 27:7 decision [2] 5:12 29:22 decisions [3] 57:21 61:25 62:21 deeply [1] 25:20 define [1] 34:24 defined [2] 19:3 21:8 definitely [1] 23:23 degree [1] 7:22 deliver [1] 67:17 delivered [1] 63:1 delivery [1] 37:19 demarcation [1] 12:19 demonstration [1] 59:9 Department [1] 2:7 depending [1] 19:14 depends [1] 27:24 Deputy [2] 2:6,11 deriving [1] 42:9 describe [3] 18:14 19:12 46:3 described [1] 64:23 describes [1] 51:7 describing [1] 7:17 designed [3] 9:4 56:9,12 despite [2] 21:20 46:1 detailed [1] 15:22 details [1] 65:24 diagnose [1] 9:20 diagnosis [1] 54:11 differed [1] 41:24 difference [10] 17:18 24:19 32:21 33:4 43:20 51:23,24 53:24 62:23 66:5 different [15] 8:23 11:12,22 13:7 18:13,15 19:10,17 26:19 32:6 35:</p>	<p>25 43:1 48:13 58:2,8 difficult [1] 52:18 dilute [1] 36:25 directed [1] 4:22 direction [1] 66:11 disaffirm [1] 49:25 disagree [2] 23:4,7 disclaimer [6] 6:12 21:6 55:9,19 58:24 67:9 disclaimers [1] 16:9 disclose [1] 30:14 disclosure [23] 15:22 22:13 26:20 27:15 30:6,11,23 33:14,23 36:11,21 37:12,13 38:6,10 39:18 50:18 51:20 52:15 53:20 58:23 62:24 63:6 disclosures [4] 25:14,18 29:13 30:6 discretion [1] 60:10 discrimination [1] 39:1 discussing [1] 61:7 discussion [5] 4:21 5:14,20 24:17 51:10 disfavored [2] 4:22,23 dispense [1] 14:21 dispute [1] 41:18 disputing [1] 33:21 distinction [6] 29:3,5,7,10 32:11 33:1 distinguish [1] 23:16 district [2] 65:21,22 doc [1] 21:18 doctor [18] 5:15 9:24 11:9 12:5,7,11 13:2 19:10,12,12,18 20:1 21:18 24:1,20 28:21 29:6 32:19 doctors [21] 6:20 9:20 10:10 11:13 12:22,23 14:8 17:8 20:3 23:21 28:10 29:17 32:7 36:5 40:23,25 64:17,19 67:15,17,17 doctrines [1] 35:24 doing [12] 21:19 26:14 30:23 31:24 32:14,24 33:16 36:12 43:9 55:3 56:18 67:10 done [6] 10:8,8 17:7 25:17 27:17 42:5 draw [2] 13:1 48:6 drawn [1] 43:4 draws [1] 42:21 drew [2] 30:14 67:23 drown [1] 16:13 drugs [1] 14:21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>economists [2] 35:6 36:4 educate [2] 18:12 46:8 effort [2] 16:11,12 efforts [2] 40:20 46:1 either [4] 16:1 31:14 47:18 49:10 else's [1] 33:1 elsewhere [1] 27:3 empirical [1] 49:4 employs [1] 4:21 empowers [1] 37:16 enacted [1] 44:14</p>
--	--	---	---

Official

<p>encouraged [2] 6:10 39:23</p> <p>end [1] 48:18</p> <p>ended [1] 14:24</p> <p>engaged [1] 21:4</p> <p>enormous [1] 67:21</p> <p>enroll [1] 44:12</p> <p>enrolled [1] 41:2</p> <p>ensure [1] 62:20</p> <p>ensuring [1] 45:19</p> <p>entity [1] 22:11</p> <p>equivalent [1] 36:10</p> <p>especially [1] 48:3</p> <p>ESQ [3] 2:3 3:3,14</p> <p>ET [3] 1:5,9 66:24</p> <p>evaluate [1] 56:17</p> <p>evaluated [1] 18:17</p> <p>evangelical [2] 56:23 57:11</p> <p>even [8] 14:14 31:25 32:1 36:14 43:3 47:7 56:6 57:4</p> <p>even-handed [1] 28:24</p> <p>evenly [1] 61:2</p> <p>everybody [6] 10:16 17:2 26:3 28:25 48:24 66:20</p> <p>everyone [4] 26:6 27:5 45:19 66:13</p> <p>everything [3] 9:2 33:6 61:20</p> <p>evidence [9] 13:21,22,23,25 14:2 15:8,11 41:21 49:19</p> <p>evidenced [1] 45:25</p> <p>evidentiary [1] 16:20</p> <p>exact [1] 24:11</p> <p>exactly [1] 42:13</p> <p>exam [1] 18:11</p> <p>examples [2] 35:4 40:6</p> <p>except [1] 53:10</p> <p>exclusive [1] 47:22</p> <p>exemplary [1] 18:5</p> <p>exempt [2] 40:23 64:19</p> <p>exempted [2] 14:14 40:11</p> <p>exemption [3] 44:3,4,5</p> <p>exemptions [7] 4:18 38:20,21 39:5 42:22 43:3 44:3</p> <p>exercise [3] 10:25 11:10 57:5</p> <p>exist [1] 43:3</p> <p>expansion [1] 43:13</p> <p>experienced [1] 43:15</p> <p>expires [1] 34:11</p> <p>explain [6] 17:17 21:15 33:3 34:20 46:14 51:3</p> <p>explaining [1] 37:16</p> <p>explanation [1] 6:6</p> <p>extent [1] 27:11</p> <p>extraordinarily [1] 37:23</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>F-PACT [1] 44:6</p> <p>face [4] 14:3 33:12 38:19 57:12</p> <p>faced [1] 15:21</p> <p>facilitate [1] 10:12</p> <p>facilities [16] 5:6 8:12 9:9,10 10:17 13:11 19:2 26:4 42:1,8 49:25 50:19 51:4,5 53:21 54:17</p> <p>facility [29] 7:25 8:2,10,17 9:6,13,24 10:11 12:7 19:24 21:15,21 26:</p>	<p>24 40:7 50:4,6,7,24 51:21,25 52:16 53:6 54:5,6 55:6,11,14 58:21 63:10</p> <p>fact [3] 8:11 48:22 59:15</p> <p>factor [2] 41:22,24</p> <p>factual [3] 24:19 25:14 26:13</p> <p>fair [1] 63:7</p> <p>fairly [2] 18:7 36:13</p> <p>Fallbrook [2] 18:6,12</p> <p>false [2] 60:12,15</p> <p>familiar [1] 61:4</p> <p>families [1] 28:8</p> <p>FAMILY [14] 1:3 4:5 14:20 27:22 28:11,23 29:20,21 31:5,7,10 51:11 66:23 67:3</p> <p>far [2] 7:22 29:5</p> <p>far-reaching [1] 34:19</p> <p>FARRIS [56] 2:3 3:3,14 4:7,8,10 5:10,24 6:3,18,24 7:3,15 8:16 9:17 10:7,20,23 11:3,7 12:14,18 13:4,14 14:1 15:17,20 17:4,7,20 18:1,25 19:6,21 20:2,20 21:11,22 22:4,9,14,18,21,25 23:6,12,14 24:14,23 64:6,8,10 65:15,18 66:21,25</p> <p>fashion [1] 17:8</p> <p>father [1] 24:5</p> <p>fathers [1] 32:10</p> <p>federal [1] 44:4</p> <p>feeling [2] 47:11,13</p> <p>few [3] 18:5 35:15 42:18</p> <p>figure [2] 52:24,24</p> <p>finances [1] 41:4</p> <p>financial [4] 15:23,24,25 37:17</p> <p>financing [1] 16:10</p> <p>find [1] 66:4</p> <p>findings [1] 60:12</p> <p>finish [2] 30:10 46:24</p> <p>finished [1] 54:20</p> <p>firm [1] 42:5</p> <p>first [17] 19:1 25:13,15 27:19 30:25 37:1 45:8,11,12,16 46:11 47:1,7,19 60:21 62:7 64:12</p> <p>five [1] 64:6</p> <p>flexibility [1] 62:25</p> <p>flip [1] 24:11</p> <p>follow [3] 18:17,19 57:2</p> <p>font [3] 16:5 22:22 50:4</p> <p>fonts [1] 16:7</p> <p>food [1] 26:7</p> <p>Footnote [1] 65:24</p> <p>for-profit [2] 40:7,13</p> <p>for-profits [2] 40:4,11</p> <p>force [1] 46:10</p> <p>forget [1] 22:17</p> <p>form [2] 10:22 17:13</p> <p>forth [1] 48:4</p> <p>fortune [3] 35:8,9 36:3</p> <p>found [3] 22:2 38:16 42:6</p> <p>four [2] 54:6,13</p> <p>Fourth [1] 35:9</p> <p>framed [1] 8:18</p> <p>framework [2] 7:5 8:22</p> <p>Francisco [2] 2:12 60:18</p> <p>fraud [1] 61:13</p>	<p>free [10] 10:25 11:10 38:11,14 40:14 41:4 43:25 47:24 48:20 57:5</p> <p>free-cost [1] 33:25</p> <p>free-ride [1] 45:21</p> <p>free-riding [1] 46:4</p> <p>free-speech [1] 62:10</p> <p>front [1] 18:10</p> <p>full [7] 6:22,22 9:11 10:1 37:19 45:19 63:8</p> <p>fully [1] 50:22</p> <p>function [1] 39:8</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gander [6] 11:25 28:19 29:11 30:21 66:2,19</p> <p>gap [2] 43:16 46:1</p> <p>gave [1] 65:1</p> <p>gee [1] 38:22</p> <p>GENERAL [11] 1:8 2:6,11 14:13 20:7 28:5 38:6 44:18 47:11 50:13 64:21</p> <p>generalized [3] 33:24 34:1 47:11</p> <p>generally [1] 38:8</p> <p>gerrymander [1] 67:14</p> <p>gerrymandered [4] 11:14,15 38:2,4</p> <p>gerrymandering [4] 14:2,17,24 64:13</p> <p>gets [1] 44:14</p> <p>getting [2] 35:12 61:19</p> <p>GINSBURG [16] 4:24 5:22,25 6:15 7:9 16:14,17 17:5 25:24 27:4,13 57:24 58:1 60:11 65:12,16</p> <p>give [16] 6:12 11:14 12:24 20:15,17,22 21:6 43:2 48:9 55:25 56:24 63:13 66:9,14 67:8,16</p> <p>given [2] 9:19 62:17</p> <p>gives [5] 20:21 32:19 33:15 37:21 61:23</p> <p>giving [6] 11:15 14:18 18:22 21:14 63:1 66:17</p> <p>goal [1] 43:21</p> <p>goods [2] 25:15 31:20</p> <p>goose [7] 11:25 24:10 28:18 29:11 30:20 66:1,19</p> <p>GORSUCH [9] 15:3,18 45:15 46:7,18,22 61:1,13 62:4</p> <p>got [7] 13:5 25:2 26:10 30:5,18 33:9 48:10</p> <p>government [7] 15:18 29:2 30:19 62:2,8,17 63:3</p> <p>government's [1] 34:13</p> <p>great [1] 49:19</p> <p>group [3] 17:11 56:23 66:17</p> <p>groups [1] 57:12</p> <p>guess [2] 8:25 45:9</p> <p>guidance [1] 33:15</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half [1] 33:6</p> <p>hand [2] 32:7 63:4</p> <p>happen [2] 22:10 66:2</p> <p>hard [2] 39:6 42:11</p> <p>Harris [1] 7:18</p>	<p>Hawaii [1] 26:18</p> <p>health [6] 5:1 7:20 26:1 27:5 41:2 54:13</p> <p>healthcare [1] 27:6</p> <p>healthy [2] 47:25 48:1</p> <p>hear [2] 4:3 29:5</p> <p>hearing [1] 16:20</p> <p>Heartbeat [1] 64:25</p> <p>heightened [2] 27:19 36:17</p> <p>held [3] 24:24 25:20 41:13</p> <p>help [1] 44:11</p> <p>helping [1] 33:18</p> <p>helps [1] 28:8</p> <p>Herald [1] 16:1</p> <p>herself [1] 63:4</p> <p>highly [1] 43:16</p> <p>HIPAA [2] 18:18,20</p> <p>historically [2] 36:1,7</p> <p>home [1] 18:8</p> <p>Honor [52] 5:10,24 6:3,24 7:3,15 8:16 9:17 10:7,23 11:4 12:14,18 13:4,15 14:1 15:17,20 17:4 18:25 19:21 20:2,20 21:22 22:14 23:12 24:14,23 25:4 38:10 39:17 40:12,24 41:17 42:4 45:23 46:12 49:13 50:6 51:1 52:17 56:2,8 57:1,10 58:10 59:13,24 65:15,18 66:25 68:1</p> <p>hopefully [1] 19:13</p> <p>how's [1] 19:10</p> <p>however [2] 8:21 42:9</p> <p>hundred [1] 48:17</p> <p>hypothetical [10] 6:17,19 7:1 9:4,18 22:8 32:1 39:3 57:11 67:3</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>Ibanez [1] 15:21</p> <p>idea [3] 23:16 48:21 49:3</p> <p>identify [1] 43:22</p> <p>illegal [2] 21:22,24</p> <p>Illinois [1] 26:18</p> <p>imagine [1] 40:17</p> <p>immediately [1] 38:17</p> <p>immigration [3] 20:15,17,22</p> <p>implicates [1] 62:7</p> <p>important [4] 33:15 34:17 52:10 62:21</p> <p>impose [4] 8:10 50:23 52:15 53:3</p> <p>imposed [2] 5:13 15:10</p> <p>imposing [1] 4:15</p> <p>imposition [1] 17:11</p> <p>impossible [1] 59:4</p> <p>impression [1] 48:10</p> <p>incentive [1] 44:11</p> <p>include [5] 36:3,3,5 50:17 55:8</p> <p>included [1] 57:16</p> <p>including [3] 37:19 47:25 55:7</p> <p>incorrect [1] 21:16</p> <p>indeed [1] 55:25</p> <p>indicated [1] 7:19</p> <p>individual [2] 40:22,24</p> <p>industries [1] 61:3</p> <p>infants [1] 5:7</p> <p>infer [1] 38:25</p> <p>inferences [1] 16:3</p>
---	---	---	--

Official

<p>inform ^[3] 16:12 24:2,4 information ^[16] 26:13 28:12 33:10 38:17 40:5 44:17,20 45:20,22 47:12 48:20 56:25 61:24 63:3 64:17 66:10 informational ^[1] 48:2 informed ^[18] 5:14,14,23 7:4 20:8 23:17,18,25 24:8,21 30:19 33:10,19 37:13 49:7,10 61:25 62:21 informing ^[1] 24:25 ingredients ^[1] 26:7 injunction ^[5] 13:20 49:16,18 60:7,9 injunctive ^[1] 64:2 instance ^[3] 23:10 59:17 60:18 instances ^[1] 56:12 instead ^[1] 25:25 INSTITUTE ^[2] 1:3 4:5 instruction ^[1] 5:7 insurance ^[2] 41:3 43:24 intentional ^[1] 39:1 interest ^[5] 7:20,21 33:24 34:2 52:11 interested ^[1] 6:16 interests ^[2] 37:11 51:3 intermediate ^[1] 40:18 International ^[1] 64:25 Internet ^[1] 22:7 interpret ^[1] 42:12 intervene ^[1] 20:23 intervention ^[4] 5:16,18 7:17 24:15 interventions ^[3] 5:17,19 6:5 invalidate ^[1] 23:11 invalidating ^[1] 64:1 invariably ^[1] 43:15 involve ^[1] 60:23 isn't ^[5] 5:22 13:12 30:8 33:16 62:13 issue ^[6] 20:11 38:5 47:23 60:8,22 64:13 issues ^[2] 11:10 43:18 itself ^[3] 11:15 15:2 34:18</p>	<p>14,21,22,23 50:11 51:9,18 52:3,12,19,23 53:11,13,14 54:3,16,23,25 55:4,13,23 56:3,19,20 57:3,7,15,24 58:1,17 59:7,10,20,25 60:11 61:1,13 62:4 63:7,16,19 64:4,11,12,22 65:12,16 66:15,22 68:2 justify ^[2] 52:10,18</p>	<p>level ^[1] 36:13 liable ^[1] 24:5 license ^[6] 8:21 21:9,24,25 26:17 36:17 licensed ^[22] 4:13 6:4 9:1 14:5 17:18 21:15 32:13 33:8,17,17 37:11 50:19 51:4,14,17,25 52:8,8 53:9,15 55:9 58:6 licensing ^[1] 38:14 LIFE ^[8] 1:4 4:5 7:21 22:12,22,24 55:8,18 limited ^[4] 14:7 45:21 54:1 61:25 limits ^[2] 52:25 53:5 line ^[5] 12:19 13:1,7 67:23,25 lines ^[5] 15:4 26:22 31:9 42:20 43:4 list ^[5] 26:2,7,25 27:1 55:12 listed ^[1] 51:13 lists ^[1] 26:11 little ^[2] 43:2 44:7 longer ^[1] 31:20 look ^[8] 18:21 22:6 32:3 35:24 38:6 53:18 65:2,5 looked ^[1] 18:4 looks ^[3] 18:9 21:20 26:12 Los ^[3] 58:18,21 65:4 lot ^[10] 9:14 11:21 15:8 23:15 35:1,15 38:20 39:20 44:16 59:25 lots ^[1] 42:25 low ^[2] 33:25 36:13 low-cost ^[1] 38:15 low-income ^[3] 44:16 50:22 64:16 lower ^[1] 35:3 lumped ^[1] 35:20</p>	<p>9 54:1,16 56:7,10,15 58:6 63:21 medical-related ^[1] 32:24 medicine ^[9] 21:5,8,8,10,23,25 66:12 67:11,22 meets ^[2] 63:10,14 member ^[1] 49:8 members ^[1] 60:5 merely ^[1] 66:8 merits ^[1] 49:18 message ^[5] 16:13 25:22 56:1,5,6 messages ^[1] 45:18 methods ^[2] 18:13 45:25 Miami ^[1] 16:1 MICHAEL ^[5] 2:3 3:3,14 4:8 64:8 might ^[6] 5:6 10:3 15:12 16:18 45:4 60:23 millions ^[1] 28:14 mine ^[1] 66:16 minutes ^[1] 64:6 misleading ^[4] 21:16 47:15 60:13,15 misled ^[1] 45:2 mistake ^[1] 57:21 misunderstood ^[1] 27:10 mock-up ^[1] 65:1 monogram ^[1] 54:12 month ^[3] 15:12 39:11,13 morning ^[1] 4:4 most ^[4] 25:19 29:19 40:11,21 mostly ^[2] 39:19 61:22 mouth ^[1] 8:1 move ^[1] 27:16 much ^[11] 23:24 24:7 30:13 33:13 37:12 38:9 45:6,7 52:18 53:25 62:24 must ^[5] 16:5 26:24 28:21,23 58:23</p>
<p>J jealously ^[1] 62:12 JEFFREY ^[3] 2:6 3:6 25:8 job ^[1] 35:17 JOSHUA ^[3] 2:11 3:11 37:7 Journalists ^[2] 35:4 36:4 judged ^[1] 8:19 judicial ^[1] 8:19 Justice ^[15] 2:7 4:3,10,24 5:22,25 6:14,15,19 7:1,9,23 8:25 9:22 10:14,21 11:1,5,21 12:15,25 13:5,16 15:3,5,18 16:14,16,17 17:5,16,21 18:3 19:4,9,22 20:13 21:7,13 22:4,5,10,15,20,23 23:2,8,14 24:10,18 25:5,11,24 26:21 27:4,13,21 28:1,7 29:9,16,19 30:3,7,9,16 31:2 32:5,23 33:5 34:5,6,10 35:14 37:3,6,9,24 38:18 39:4 40:1,22 41:5,6,18 42:2,15,18 44:10,13 45:15 46:7,18,20,22,23,24 47:3,4,6 48:8 49:</p>	<p>K KAGAN ^[14] 7:23 8:25 22:4 23:14 24:18 30:16 31:2 37:24 42:15,18 44:10,13 47:3,6 Kagan's ^[3] 46:25 47:4 64:13 keep ^[3] 12:13 28:17 32:12 KENNEDY ^[21] 6:14,19 7:1 22:5,10,15,20,23 23:2,8 49:21,23 54:16 55:23 56:3,20 57:3,7,15 59:20,25 kept ^[1] 29:16 kind ^[24] 16:15,18,19 30:22 39:2 42:13 45:10,11,12,16 47:7,8,14 51:16 58:11 59:2,7,11 60:21,21 63:24 64:21 66:14 67:8 kinds ^[5] 8:11 24:6 31:15 33:22 48:13 King ^[1] 35:17 KLEIN ^[6] 2:11 3:11 37:6,7,9,25 38:10 39:2,17 40:12,24 41:17,19 42:4,16 43:10 44:11 45:12,23 46:12 47:1,4,21 49:13,15,22 50:5,25 51:15,22 52:7,17,22 53:9,23 54:3,21,24 55:2,10,20 56:2,8 57:1,4,10,17,25 58:10,25 59:8,13,24 60:4,16 61:12,15 62:14 63:14,17,23 knowing ^[2] 13:25 47:23 knowledge ^[1] 37:21</p>	<p>M machine ^[1] 18:10 made ^[6] 16:2,18 20:5 39:19,20 59:2 main ^[3] 16:5,6 62:23 mandated ^[1] 65:10 mandating ^[1] 55:24 manner ^[1] 10:8 manufacturer ^[1] 36:21 many ^[6] 8:11 22:17 39:14 41:23,25 58:22 March ^[1] 1:13 materials ^[1] 32:8 matter ^[3] 1:15 51:25 68:5 matters ^[3] 20:18,24 62:22 McRae ^[1] 7:18 mean ^[18] 7:25 11:22 23:5 28:20 34:17 40:1 41:23 42:24 44:10 48:22,23 49:2 50:6 52:25 53:15 58:5 61:4 66:15 means ^[2] 23:9 45:18 mechanism ^[1] 61:9 Medi-Cal ^[1] 44:5 Medicaid ^[1] 41:2 medical ^[45] 4:17,19 5:16,17,18,19 6:5 7:16 9:3,5,25 13:2 18:2,14,19,23 19:2,5,16 21:21 23:22 24:2,15 29:12 32:18 33:20 37:23 43:14,17 48:23 49:8 50:4 51:5,7,25 52:1,8,</p>	<p>N name ^[3] 50:2 54:17 63:12 narrow ^[2] 67:1,2 narrower ^[2] 61:10,15 narrowly ^[1] 39:24 natal ^[1] 26:6 NATIONAL ^[2] 1:3 4:5 nature ^[1] 15:9 naturopaths ^[1] 21:3 necessarily ^[1] 60:22 necessary ^[1] 62:15 need ^[9] 21:9 29:4 40:14,18,20 41:8 47:24 48:25 61:23 needs ^[1] 25:21 neither ^[3] 2:9 3:9 25:10 neonatal ^[1] 24:4 neutral ^[1] 38:19 New ^[6] 20:20 34:14,18,23 40:17 46:17 nice ^[1] 35:17 NIFLA ^[2] 1:4 29:3 NIFLA's ^[1] 60:5 nobody ^[1] 13:12 non ^[1] 41:23 non-anti-abortion ^[1] 41:25 non-anti-abortion-covered ^[1]</p>

<p>42:7 non-medical [2] 7:24 8:2 nonprofit [4] 14:8,12,25 64:21 nonprofits [1] 40:3 normal [1] 21:11 normally [1] 62:11 note [2] 20:5 64:14 nothing [2] 59:14 63:9 notice [20] 8:11 9:13 10:1,15 11:14,14 15:2,2 18:23 20:23 26:10,17 27:11 33:16 36:18 44:6 54:18 61:22 62:2 63:13 notification [1] 11:17 Number [7] 4:4 7:14 22:25 42:7 45:21 63:2 65:3 numbers [1] 42:5 nurse's [1] 18:9 nurses [1] 18:17</p>	<p>others [1] 32:9 otherwise [6] 10:10 20:25 21:4 55:25 58:12 65:9 ought [2] 30:25 31:23 out [2] 9:4 10:1,15 13:10 14:9,14,21 16:13,20 32:7 36:22 38:23 40:5 51:20 52:24,24 55:7 57:13 64:15 65:20 66:4 outcome [2] 10:24 11:2 outlawed [1] 17:14 outside [1] 41:20 over [2] 44:24 63:4 overlap [1] 35:25 overseen [2] 43:12,13 own [6] 6:15 25:15,22 27:12,16 29:13</p>	<p>pinning [1] 23:15 place [1] 58:14 places [2] 31:15 60:15 plaintiff [1] 59:1 plaintiffs [1] 59:15 plan [2] 28:8 66:23 Planned [2] 6:6,9 planning [1] 27:22 28:11,23 29:20,21 31:5,7,10 51:11 66:24 67:4 please [7] 4:11 17:17 21:15 25:12 30:10 33:3 37:10 plurality [1] 29:14 point [1] 4:14 10:11 13:9,17 17:23 24:10 25:3 28:13 51:19 59:19 64:15 pointed [1] 16:20 points [1] 35:16 policing [1] 60:21 political [1] 67:20 politicize [1] 67:21 politicizing [1] 66:11 poor [4] 40:5,6 47:11 48:19 pose [1] 61:6 position [5] 12:20 16:21 17:12 23:13 42:3 possible [7] 11:24 28:18 29:8 38:25 40:16 63:17,24 post [6] 8:10 9:13 10:1 13:11 15:1 54:18 poster [1] 31:6 posts [1] 58:21 practice [13] 14:9,14 20:7,25 21:5,9,23,24 56:11 64:22 66:11 67:11,22 preferable [1] 62:13 pregnancies [2] 9:21 19:15 pregnancy [43] 4:13 5:4 6:7,21 7:13 8:9,13 14:18 15:1 18:6 19:7,11,13,24 20:12 21:14 25:17 31:8 32:16,18 34:4 37:22 38:12,15 39:14 42:13 43:17,22 44:24 48:1 50:20 52:3,5,14 53:7,17 54:11,11,13 55:15,16 64:18 65:2 pregnancy-related [1] 11:20 pregnant [10] 4:19 9:25 10:22 14:15 17:9 39:8,10,13 51:7 67:15 preliminary [5] 13:20 42:6 49:16 60:6,9 prenatal [3] 37:19 54:10,12 present [1] 13:21 presumably [1] 49:19 pretend [1] 21:24 pretty [5] 26:14 30:14 35:17 46:9 62:12 prevent [1] 57:20 primarily [2] 40:14 42:12 primary [5] 39:7,11,15 47:23 48:7 principally [2] 48:7 50:13 principle [2] 48:7 50:13 principles [1] 7:6 print [1] 58:23 prior [1] 11:3 private [3] 14:9 46:10 64:17 pro-choice [3] 12:3,6,16</p>	<p>pro-life [22] 4:12 10:9,17 11:9 12:4,4,11 13:10 14:25 38:24 41:10,16 48:12 50:1 54:17 56:24 63:9,12 66:3,9 67:7,8 probably [1] 53:24 problem [12] 10:13 43:6,7,8,11,12 44:22 45:3,6,6,7 48:2 problematic [1] 31:18 problems [2] 61:6 64:3 procedure [1] 5:20,21 6:13 9:3,5 29:12 30:5 32:15,17,20 60:20 procedures [7] 17:25 18:15 23:20 32:14,24 33:20,22 process [1] 25:1 product [1] 36:22 profession [1] 15:23 professional [1] 34:14,25 35:10,18 36:11,15 46:6,13 62:16 66:17,18 professionals [1] 35:5 professions [1] 36:2 program [3] 14:20,22 49:8 programs [1] 44:8 promoting [2] 37:13 63:21 prophylactic [1] 62:5 proposing [2] 5:15 7:16 protect [2] 6:15 61:24 protective [1] 62:12 prove [1] 62:9 provide [30] 4:16 5:5,6 10:21 16:23,25 19:2,5,7 25:19 26:2,4,11,25 27:2,8,8 28:2 33:9,14,25 38:14 45:18,22 47:16 51:5,7 52:1 53:2,17 32:9 50:14 52:5,7 56:13 provider [6] 7:12 18:19 44:7 53:10,15 58:6 providers [10] 4:19 5:1 8:7,13 9:7,10 21:4 26:9 44:6 52:9 provides [6] 9:25 32:4 34:9 44:8 52:13 53:6 providing [9] 17:24 18:1 26:1 30:12 31:22 39:8 53:25 56:7,10 provisions [1] 61:4 public [4] 27:7 36:23 43:14,24 publicity [1] 43:15 publicize [1] 46:2 purely [1] 42:10 purpose [5] 39:18 40:4 44:7 57:20,23 purposes [1] 57:19 put [13] 7:25 26:10 31:6 36:22 41:6 46:18,18,19 50:1 55:7,17,18 58:20 puts [2] 62:8 63:12 putting [1] 57:4</p>
O			
<p>obstetric [1] 50:10 obstetrics [1] 54:10 obtain [1] 10:3 obviates [1] 61:22 obvious [2] 34:2 44:5 obviously [1] 48:2 occurs [1] 15:4 offer [2] 54:9 55:16 offered [3] 17:3 56:13 57:22 offering [6] 6:20 50:10 54:25 offers [1] 55:15 often [1] 35:19 Ohralik [1] 35:22 okay [7] 12:12 13:5,16 20:13 22:9 28:12 39:4 once [1] 31:19 one [25] 8:4 12:10 13:6 15:4 18:4 24:20 26:20 28:16 29:5 31:14,25 33:20 39:16 44:13 49:25 51:13 54:6,9,16 55:1,7 58:5 59:19 62:4,4 one's [1] 25:15 onerous [1] 4:15 ones [5] 20:4 32:13 38:15 51:13 61:16 only [14] 8:4,6 9:7,9 11:13 13:6 14:4,25 29:5 38:23 39:7 40:3 61:16 63:1 open [1] 61:17 opinion [2] 29:14 35:16 opposed [3] 28:16 39:20 61:21 opt [1] 33:19 options [14] 8:4,5 9:11,14 10:2,16 11:16 44:18 45:20 46:15 47:25 53:19,22 67:16 oral [9] 1:15 3:2,5,10 4:8 25:8 37:7 65:22,23 order [1] 55:10 organization [1] 50:14 origins [1] 36:1 other [29] 4:17,19,25 8:8 9:5 10:21 13:6,6,23 15:4 21:3,19 28:16 29:6,7 31:24 34:21 38:5 39:14,16 42:20 45:17,25 49:24 51:15 53:19,22 63:14 67:5</p>	<p>others [1] 32:9 otherwise [6] 10:10 20:25 21:4 55:25 58:12 65:9 ought [2] 30:25 31:23 out [2] 9:4 10:1,15 13:10 14:9,14,21 16:13,20 32:7 36:22 38:23 40:5 51:20 52:24,24 55:7 57:13 64:15 65:20 66:4 outcome [2] 10:24 11:2 outlawed [1] 17:14 outside [1] 41:20 over [2] 44:24 63:4 overlap [1] 35:25 overseen [2] 43:12,13 own [6] 6:15 25:15,22 27:12,16 29:13</p> <p style="text-align: center;">P</p> <p>PACT [1] 14:20 PAGE [9] 3:2 18:9,11 29:15 30:15 50:8 51:5 64:14,25 pamphlet [1] 63:5 parallel [1] 20:7 Parenthood [3] 6:6,9 20:10 parents [1] 35:11 part [4] 19:1 32:18 47:2 57:8 particular [6] 4:20 5:16 9:19 38:12 47:14 64:2 party [4] 2:9 3:9 25:10 41:12 patient [6] 6:1 30:24 37:14 62:18,20 63:2 patients [4] 5:3 7:12 24:2 60:24 pattern [2] 38:22 41:8 pay [6] 11:18,19 24:5 32:10 41:1 43:23 Pennsylvania [4] 5:12,12 6:7 67:10 people [26] 9:19 12:2,5,8,17 16:12,23 17:12,24 19:23,25 20:9,18,22 21:14,20 28:5,14 29:20 31:24 32:3 34:8 41:1 42:25 52:2 66:5 per [1] 51:23 percent [1] 41:15 percentage [2] 41:9 42:3 perfect [1] 40:19 perform [10] 5:2,15 6:8 10:18 12:23 16:25 29:6 33:8 66:5 67:4 performed [1] 9:3 performing [4] 20:5 28:10 29:12 67:23 Perhaps [3] 6:5 10:25 19:14 period [1] 17:1 permissible [4] 8:15 27:15 28:20 46:5 permitted [1] 33:2 person [3] 18:21 19:20 21:17 persons [2] 46:8 61:3 Petitioners [11] 1:6 2:4 3:4,15 4:9 28:3 31:9 37:20 60:5 61:20 64:9 Petitioners' [2] 50:9 51:6 phone [2] 63:1 65:3 physician [2] 62:19 63:4 picks [1] 13:10 picture [1] 21:20</p>	<p>pinning [1] 23:15 place [1] 58:14 places [2] 31:15 60:15 plaintiff [1] 59:1 plaintiffs [1] 59:15 plan [2] 28:8 66:23 Planned [2] 6:6,9 planning [1] 27:22 28:11,23 29:20,21 31:5,7,10 51:11 66:24 67:4 please [7] 4:11 17:17 21:15 25:12 30:10 33:3 37:10 plurality [1] 29:14 point [1] 4:14 10:11 13:9,17 17:23 24:10 25:3 28:13 51:19 59:19 64:15 pointed [1] 16:20 points [1] 35:16 policing [1] 60:21 political [1] 67:20 politicize [1] 67:21 politicizing [1] 66:11 poor [4] 40:5,6 47:11 48:19 pose [1] 61:6 position [5] 12:20 16:21 17:12 23:13 42:3 possible [7] 11:24 28:18 29:8 38:25 40:16 63:17,24 post [6] 8:10 9:13 10:1 13:11 15:1 54:18 poster [1] 31:6 posts [1] 58:21 practice [13] 14:9,14 20:7,25 21:5,9,23,24 56:11 64:22 66:11 67:11,22 preferable [1] 62:13 pregnancies [2] 9:21 19:15 pregnancy [43] 4:13 5:4 6:7,21 7:13 8:9,13 14:18 15:1 18:6 19:7,11,13,24 20:12 21:14 25:17 31:8 32:16,18 34:4 37:22 38:12,15 39:14 42:13 43:17,22 44:24 48:1 50:20 52:3,5,14 53:7,17 54:11,11,13 55:15,16 64:18 65:2 pregnancy-related [1] 11:20 pregnant [10] 4:19 9:25 10:22 14:15 17:9 39:8,10,13 51:7 67:15 preliminary [5] 13:20 42:6 49:16 60:6,9 prenatal [3] 37:19 54:10,12 present [1] 13:21 presumably [1] 49:19 pretend [1] 21:24 pretty [5] 26:14 30:14 35:17 46:9 62:12 prevent [1] 57:20 primarily [2] 40:14 42:12 primary [5] 39:7,11,15 47:23 48:7 principally [2] 48:7 50:13 principle [2] 48:7 50:13 principles [1] 7:6 print [1] 58:23 prior [1] 11:3 private [3] 14:9 46:10 64:17 pro-choice [3] 12:3,6,16</p>	<p>pro-life [22] 4:12 10:9,17 11:9 12:4,4,11 13:10 14:25 38:24 41:10,16 48:12 50:1 54:17 56:24 63:9,12 66:3,9 67:7,8 probably [1] 53:24 problem [12] 10:13 43:6,7,8,11,12 44:22 45:3,6,6,7 48:2 problematic [1] 31:18 problems [2] 61:6 64:3 procedure [1] 5:20,21 6:13 9:3,5 29:12 30:5 32:15,17,20 60:20 procedures [7] 17:25 18:15 23:20 32:14,24 33:20,22 process [1] 25:1 product [1] 36:22 profession [1] 15:23 professional [1] 34:14,25 35:10,18 36:11,15 46:6,13 62:16 66:17,18 professionals [1] 35:5 professions [1] 36:2 program [3] 14:20,22 49:8 programs [1] 44:8 promoting [2] 37:13 63:21 prophylactic [1] 62:5 proposing [2] 5:15 7:16 protect [2] 6:15 61:24 protective [1] 62:12 prove [1] 62:9 provide [30] 4:16 5:5,6 10:21 16:23,25 19:2,5,7 25:19 26:2,4,11,25 27:2,8,8 28:2 33:9,14,25 38:14 45:18,22 47:16 51:5,7 52:1 53:2,17 32:9 50:14 52:5,7 56:13 provider [6] 7:12 18:19 44:7 53:10,15 58:6 providers [10] 4:19 5:1 8:7,13 9:7,10 21:4 26:9 44:6 52:9 provides [6] 9:25 32:4 34:9 44:8 52:13 53:6 providing [9] 17:24 18:1 26:1 30:12 31:22 39:8 53:25 56:7,10 provisions [1] 61:4 public [4] 27:7 36:23 43:14,24 publicity [1] 43:15 publicize [1] 46:2 purely [1] 42:10 purpose [5] 39:18 40:4 44:7 57:20,23 purposes [1] 57:19 put [13] 7:25 26:10 31:6 36:22 41:6 46:18,18,19 50:1 55:7,17,18 58:20 puts [2] 62:8 63:12 putting [1] 57:4</p> <p style="text-align: center;">Q</p> <p>qualifies [1] 54:7 question [29] 6:15,16 8:1 9:12 13:6 15:4 17:22 19:1 26:22,25 27:5,11 30:13 31:3 33:13 38:1 43:11 46:25 47:5 48:25 49:23 52:20 54:4,15,19 58:2 61:18 63:9 64:22</p>

Official

<p>questions [2] 12:2 65:3</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>radio [1] 59:17 raised [3] 58:2 60:8 65:19 rally [1] 56:24 ramifications [1] 67:20 range [2] 9:11 10:1 rather [4] 24:15 25:22 39:25 63:3 read [4] 16:2 37:25 54:4 57:18 realize [4] 24:18 42:24 44:17 45:1 really [11] 13:10 24:11 26:19 38:7 42:12 44:15 47:10 48:12,17,19 61:19 reason [2] 8:3 62:14 reasonable [1] 18:21 reasonably [1] 57:18 reasons [1] 48:13 REBUTTAL [3] 3:13 25:4 64:8 recently [1] 34:22 recognition [1] 57:19 recognize [2] 34:13,23 recognized [1] 7:7 recommends [1] 66:13 record [11] 15:6,15,25,25 22:6 41:20 42:16 49:15 59:2,14 60:24 redefining [1] 21:8 refer [1] 9:9 reference [1] 44:2 referred [1] 21:2 refers [2] 9:6,7 reflection [1] 53:23 reflects [1] 44:6 regime [1] 31:4 regulated [2] 20:4 36:2 regulating [1] 14:5 regulation [1] 62:16 regulations [1] 18:18 related [2] 30:6,11 relates [1] 67:11 relationship [1] 62:18 reliant [1] 62:18 relief [1] 64:2 religion [1] 57:7 religious [1] 48:12 rely [1] 42:11 remained [1] 46:1 remaining [1] 64:7 remand [1] 59:21 remember [1] 47:7 repeating [1] 32:12 reply [3] 64:14 65:19,25 representations [1] 60:13 request [1] 34:13 require [14] 5:19 10:9 11:8 25:14,17 32:7 46:13 50:2 51:12 53:18 56:5 62:19 66:9 67:7 required [16] 8:20 9:24 11:17 15:1,22 20:22 23:1 27:1 51:21 54:18,22 55:21 56:25 63:6 65:4 67:9 requirement [15] 5:13 8:10,18 9:13 15:10 20:6 26:24 46:5 50:18,24 51:2,17 52:15 53:3 67:19 requirements [11] 11:13 17:10 23:</p>	<p>18,23 24:6,12,22 26:20 33:23 38:7 39:24 requires [4] 14:20 54:5 59:5 62:5 requiring [3] 6:9 61:21 63:4 reserve [1] 25:3 Resource [1] 18:6 resources [1] 56:16 respect [5] 15:5,9 50:19 54:5 60:10 respectfully [1] 46:4 Respondents [4] 1:10 2:13 3:12 37:8 responding [2] 47:10,13 rest [3] 33:21 60:25 68:1 result [2] 14:25 63:25 review [1] 34:16 rights [3] 20:15 46:9 62:10 risk [3] 5:21 19:14 36:23 risks [2] 23:20 33:12 ROBERTS [22] 4:3 11:1,5 25:5 26:21 30:9 37:3,6 41:5 46:20,23 50:11 51:9,18 52:3,12,19,23 53:11,14 64:4 68:2 room [3] 18:11 24:20 36:7 rule [1] 16:4 rules [2] 4:15 29:1 run [5] 58:13 59:3,4,15 60:5 running [1] 58:12</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same [17] 8:22 10:24 11:2 12:13 16:6 17:10 22:21,23 28:13,25 29:1 32:19 40:15 41:4 51:2,16 62:14 San [2] 2:12 60:18 satisfy [1] 36:18 sauce [4] 11:25,25 24:10 29:11 sauces [2] 12:13 28:18 saying [18] 7:24 8:11 9:14 28:4,11 30:20,20,21 31:6 32:1,3 33:8,23 43:5 47:9 53:21 56:4 61:20 says [13] 7:11 11:17 13:11 18:12,16 19:19 28:21 29:15 31:4 54:17 55:8,17 63:11 scale [2] 38:14 40:15 scientists [1] 35:7 scrutiny [10] 8:19 27:19 30:25 36:13, 16,17,20,24,25 40:18 se [1] 51:23 second [4] 45:10 47:8,20 62:8 Section [1] 14:6 See [7] 12:8 19:11 25:2 47:17 48:8 49:2 56:9 seeing [1] 62:1 seek [2] 23:22 38:11 seeking [1] 43:22 seem [3] 17:22 24:7 40:13 seemed [1] 48:15 seems [3] 23:8 26:14 63:19 self-reporting [1] 42:11 sense [2] 28:5 37:24 sentences [1] 58:8 separate [1] 16:16 series [1] 14:23 serious [1] 38:4</p>	<p>serve [3] 4:19 14:15 44:7 served [1] 37:11 serves [1] 39:18 service [4] 28:2 30:12 39:8 52:8 services [41] 4:17 6:2,3,21 10:3 11:18 14:18 16:24 17:1,19 18:2 19:2 25:15,18 26:1,2,5,11,25 27:1, 12,16 29:14 31:21 32:4,8 33:2,25 50:15 52:14 53:1,7 54:1 55:1 56:7, 10,13,15 63:22 64:18 67:5 servicing [1] 51:2 set [5] 8:4,5 10:15 54:1 61:10 sets [2] 25:22 65:20 setting [1] 10:1 seven-day [1] 56:24 several [1] 48:17 severe [1] 43:18 she's [2] 56:14,17 shift [1] 36:14 shortcomings [1] 45:25 shouldn't [4] 19:25 28:22 31:3 45:16 show [1] 55:5 showed [1] 59:1 showing [1] 25:20 shows [1] 18:11 side [6] 4:25 13:23 24:11 33:17,18 49:24 sides [1] 49:20 sign [1] 14:19 significant [1] 42:7 significantly [1] 61:17 signs [1] 13:12 similar [7] 5:11 10:8 15:5,21 21:1 26:17 35:24 simple [3] 11:22 12:9 28:17 simply [8] 11:23 12:19 16:2,23 26:23 50:14 62:1 65:2 since [3] 8:17 60:23 66:16 site [1] 60:24 situation [4] 4:25 15:21 39:1 58:18 size [3] 16:6 22:21,23 sliding [1] 38:14 sliding-cost [2] 40:14,15 slightly [1] 8:23 small [1] 39:9 Solicitor [2] 2:6,11 somebody [2] 35:10 58:20 someone [3] 33:1 62:6,9 somewhat [1] 35:25 sonograms [2] 50:10 54:10 sophisticated [1] 18:8 Sorrell [1] 17:14 sorry [7] 11:1,4 30:7,17 34:5 46:22, 23 sort [3] 47:10 56:25 59:8 SOTOMAYOR [22] 16:16 17:16,21 18:3 19:4,9,22 20:13 21:7,13 30:7 32:5,23 33:5 34:5 49:22 54:3, 23,25 63:7,16,19 sounds [3] 13:17 28:24,24 speaker [2] 46:10 55:24 speakers [2] 4:22 38:9</p>	<p>speaking [1] 41:20 special [2] 16:7 17:11 specialize [1] 40:25 specific [1] 31:20 specifically [1] 37:15 speech [20] 4:21 25:21 34:14,15, 19,24,25 35:19,20 36:11,15 38:9 39:24 46:5 55:24 61:5 62:6,12,17, 20 speech-intrusive [1] 61:19 speech-protective [1] 60:23 spending [1] 56:16 stage [2] 49:16,18 standard [2] 34:16 35:6 standing [2] 59:1,6 start [1] 43:10 started [1] 54:19 state [56] 4:18,25 7:4,19 8:2,9 9:8, 23 11:18 12:5,6,16,21 14:10,24 19:19 20:14 21:2,9 23:3,4 25:21 26:10 27:6 29:23 31:3,13 32:4,9, 18 34:3 40:10 41:12,13,21,25 42:4, 10,23,24 43:12,13 45:5,21,24 47:9, 13 50:17 52:9,10 56:5,22 60:17 64:16 66:4 67:7 state's [4] 14:19 45:17 58:4 64:15 state-created [1] 32:7 state-written [1] 63:5 statement [2] 11:8 50:3 statements [1] 45:13 STATES [13] 1:1,17 2:8 3:7 12:3,4 20:16 25:9,13 26:12,18 27:17 36:7 states' [1] 36:17 statistics [2] 41:9,15 status [1] 38:14 statute [31] 5:8 13:10 14:2,3,4,9, 17 16:2 20:21 21:2 23:11 37:25 38:2 42:21 43:21 44:14,22 45:10, 11,13,16 47:8,9,17 48:6 55:6 56:23 57:11,17 58:11,14 statutes [1] 26:18 step [3] 31:25 62:15 66:10 Stevens [1] 34:21 still [5] 8:22 10:24 11:2 51:21 63:8 strange [1] 38:22 strict [5] 8:19 36:16,20,24,25 stumble [1] 40:6 subject [4] 28:15 34:15 35:5 45:2 subjected [1] 51:16 subjects [1] 50:7 submit [1] 46:4 submitted [2] 68:3,5 subpoenas [1] 60:24 suffice [1] 23:10 sufficient [2] 49:17 66:9 sufficiently [1] 52:10 suggesting [1] 9:2 suggestive [1] 21:17 suggests [2] 15:19 28:17 superior [2] 60:20 61:8 supplemental [1] 37:18 supply [1] 37:20 support [6] 2:9 3:8 24:6 25:10 39:</p>
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Official

<p>3 49:17 Suppose [2] 5:8 16:22 supposed [1] 24:13 SUPREME [2] 1:1,16 surely [1] 22:2 surgeries [1] 5:17 suspect [1] 49:10 suspicious [1] 41:7 swept [1] 67:19 system [1] 31:13</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tailor-made [1] 34:2 talked [3] 6:10 35:18,19 target [2] 57:11,15 targeted [9] 9:18,23 17:8,11 38:11 43:25 44:23 45:6,8 targeting [2] 17:13 57:5 targets [1] 4:20 tax [1] 15:13 teller [2] 35:8,9 tellers [1] 36:3 tells [1] 64:16 term [4] 5:4 6:22 7:13 48:1 terms [3] 17:19 18:14 41:23 terrible [1] 45:3 territory [1] 35:13 test [2] 16:21 32:16 testing [8] 52:4,5,14 53:7,17 54:11 55:15,16 tests [2] 6:7 54:12 text [1] 18:11 themselves [4] 18:4 37:20 43:23 61:24 theory [1] 43:2 there's [14] 6:22 15:11 17:10 18:8 20:15 24:19,20 32:25 33:4 35:14 37:25 59:13,25 62:25 therefore [2] 49:11 53:20 they'll [3] 23:7 31:15,16 thinking [2] 42:23 43:1 thinks [1] 31:13 Third [1] 35:16 though [3] 14:14 52:13 56:7 thousand [1] 48:16 three [2] 27:17 54:12 tied [3] 27:25 31:20 63:20 time-critical [1] 37:23 timing [1] 43:18 titled [1] 18:12 today [1] 61:7 together [3] 35:21 41:7 48:16 took [1] 4:12 topic [2] 4:21 19:7 totally [1] 13:7 treat [3] 17:9 40:13 67:15 treating [1] 40:25 treatment [3] 9:25 13:2 40:9 trial [4] 13:19,21 49:1,11 tricky [1] 42:10 tried [3] 23:16 35:23 36:9 trigger [1] 33:22 triggered [4] 5:15 24:15,16 65:9 triggering [1] 27:18</p>	<p>troubles [1] 34:12 True [1] 21:11 truly [1] 25:21 truthful [3] 25:14 26:13 27:15 try [1] 50:16 trying [5] 29:3 43:9 46:8 52:23,24 Tuesday [1] 1:13 turn [1] 65:11 turned [1] 9:2 turns [1] 38:22 TV [1] 59:16 Twenty-nine [1] 22:20 two [8] 26:18 47:18 52:13 54:6,14 55:3,11 58:7 two-sentence [1] 61:22 type [1] 59:11</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultrasound [4] 18:10 32:15 33:9, 11 ultrasounds [8] 4:17 6:8 33:21 50: 10 51:10,20,23 54:9 unable [3] 37:17 43:23 56:17 unborn [1] 7:21 unconstitutional [12] 5:9 6:11 9: 16 11:8 12:21 20:19 41:14 57:12 58:15 59:5,12 67:6 under [13] 7:6,10 8:19 9:18 10:25 14:5 17:10 27:19 30:25 40:17 44: 8 46:11 54:7 undercover [1] 60:24 undermine [1] 37:1 understand [8] 7:3 10:20 23:19 26:22 32:21 39:6 40:2 41:19 understood [2] 23:25 67:3 undue [1] 23:9 uniform [2] 18:9,10 UNITED [6] 1:1,16 2:8 3:7 25:9 26: 12 unless [1] 50:6 unlicensed [19] 4:16 8:17 9:1 15: 6 17:19,24 18:23 19:1,24 20:9 22: 11,11 32:13 50:8 55:11 56:11 58: 21 63:10 65:7 unprotected [1] 34:24 until [1] 65:14 unusual [2] 46:9,13 up [10] 8:18 14:19,25 26:10 31:6 48:9,18 55:17 58:20 65:13 upheld [3] 12:22 20:6 66:3 uphold [1] 56:20 useful [4] 37:22 38:17 39:19 42:17</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>variety [1] 53:1 various [2] 23:20 42:20 vast [1] 26:19 verbatim [1] 45:13 versus [3] 4:6 7:18 67:24 view [2] 27:21 45:5 viewpoint [1] 38:12 viewpoints [1] 4:23 views [1] 28:15 violate [1] 25:19</p>	<p>virtue [1] 61:2 visits [1] 60:25</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait [1] 15:16 WALL [26] 2:6 3:6 25:7,8,11 26:8, 11 27:10,14,24 28:3 29:9,18 30:3, 11,16,18 31:19 32:5,22 33:5 34:6, 8 35:14 37:4,5 wanted [1] 47:18 warnings [1] 16:9 Washington [3] 1:12 2:3,7 way [17] 4:14 10:11 14:3 21:17 22: 3 23:19 27:17 32:19 36:20 40:15 41:1 44:13,21 47:20 59:4 66:18 67:22 ways [2] 8:8 47:18 website [5] 18:6,16,22 21:21 64: 15 well-known [1] 61:5 whatever [2] 12:7 23:1 Whereupon [1] 68:4 whether [15] 9:2 10:10 13:1 15:15 26:24 27:25 36:10 38:1 41:1,3 45: 7 49:5,7,9 61:18 who's [1] 56:9 whomever [1] 31:22 will [13] 5:4,5 6:1 9:10 11:18,19 18: 12,16 19:12 23:4 29:22 40:16 42: 9 willing [1] 14:19 without [6] 13:24 16:19 19:15 21: 23,25 25:20 woman [10] 7:20 18:8 27:23 28:21, 23 29:22 31:14 33:11 37:16 56:14 women [45] 4:20 8:3,6,7 9:6,7,9, 11,25 10:2,22 11:16,19 14:15 17: 9 20:9 24:4,25 28:8 32:8 33:18 38: 11,16 39:9,10,13 40:5,6,14 43:22 44:12,16,25 47:12,15,23 48:19 49: 5 50:22 51:8,8 57:20 61:23 64:16 67:15 women's [3] 5:1 26:1 27:6 wondering [1] 48:18 word [1] 16:11 words [9] 7:25 9:5 22:17,19,20 38: 5 42:19,20 51:15 works [1] 14:4 world [2] 8:12 66:20 worried [1] 31:23 writes [1] 35:11 wrote [1] 49:25</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>XAVIER [1] 1:8</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>York [2] 20:21 46:17</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zauderer [4] 26:15 35:21 36:10 57:23</p>
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