No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are familiar with federal laws enacted by Congress that, like the law challenged here, protect consumers' access to truthful information about goods and services by requiring disclosure of accurate information concerning consumers' rights and benefits, as well as how to exercise those rights and access those benefits. *Amici* are committed to ensuring that consumers and recipients of services have complete and accurate information when making important decisions that affect them, including about the rights and benefits they possess, and they understand the important role disclosure laws play in making such knowledge possible. *Amici* are also committed to the robust enforcement of the First Amendment's guarantee of freedom of speech. They recognize that disclosure rules, like the law at issue here, further First Amendment values by ensuring consumers' access to accurate information. Accordingly, they have a strong interest in the outcome of this case.

A full listing of *amici* appears in the Appendix.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In 2015, the California Legislature enacted the Reproductive FACT Act, Cal. Health & Safety Code §§ 123470-73 ("the Act"), to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Assem. Bill 775, 2015-2016 Reg. Sess., ch. 770, § 2 (Cal. 2015) ("Assembly Bill 775"). The legislature found that "[m]illions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and pre-natal care and delivery." *Id.* § 1(b). Yet "thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." *Id.* Compounding this problem, the legislature found that some clinics employ "intentionally deceptive advertising and counseling practices [that] confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." J.A. 39.

In light of these findings, the California legislature imposed a disclosure requirement on licensed health care clinics "whose primary purpose is providing family planning or pregnancy-related services," Cal. Health & Safety Code § 123471(a), and who are unable to enroll patients immediately into the state's publicly funded programs.[2] The California

[2] The Act also imposes a disclosure requirement applicable to unlicensed providers, which requires them to inform women that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who

legislature found that disclosure was the "most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions." Assembly Bill 775, § 1(d).

The Act requires licensed clinics to disclose that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Cal. Health & Safety Code § 123472(a)(1). This notice can be combined with other mandated disclosures and can be posted in a waiting room or distributed to patients in printed or digital form. *Id.* § 123472(a)(2).

Petitioners claim that the Act's disclosure requirement violates the First Amendment because it is, in their view, "[c]ompelled speech." According to petitioners, "[c]ompelled speech is antithetical to the First Amendment," and a law that requires a speaker to deliver a "government-mandated message"—even a neutrally worded statement informing persons of their rights and benefits and how to exercise them—"is precisely the kind of compelled speech that the Constitution forbids." Pet'rs Br. at 22. Petitioners' objection to the Act's disclosure requirement cannot be squared with this Court's precedents and should be rejected.

Disclosure requirements, such as those contained

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provides or directly supervises the provision of services." Cal. Health & Safety Code § 123472(b)(1).

in the Act, are pervasive in the law. They serve substantial governmental interests in "protecting consumers" and in "maintaining standards among members of the licensed professions." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). They reflect that "people will perceive their own best interests if only they are well enough informed." *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Such rules therefore ensure that statutory rights are actually enjoyed by the people they are designed to protect. They prevent important rights from being reduced to mere parchment barriers, ensuring they are not lost simply because of ignorance of the law. Moreover, disclosure laws that, like the Act, provide notice of rights and services to which people are legally entitled are "designed in a reasonable way to accomplish that end," *Edenfield v. Fane*, 507 U.S. 761, 769 (1993), using a "less restrictive alternative to more comprehensive regulations of speech," *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

Every day, because of such disclosure requirements, individuals learn of federal rights they possess, including rights to medical privacy, *see* 42 U.S.C. § 1320d-2; 45 C.F.R. § 164.520(a)(1), to continuing insurance coverage after loss of employment, *see* 29 U.S.C. § 1166; 29 C.F.R. §§ 2590.606-1-606-4, to insurance coverage for hospital stays of at least two days following childbirth, 29 U.S.C. § 1185(d); 45 C.F.R. § 146.130(d)(1), to rights to obtain a consumer credit report, to dispute erroneous information in an individual's file, and to redress fraud and identity theft, 15 U.S.C. § 1681g(c); *id.* § 1681g(d), to workplace equality under a long list of federal civil rights laws, *see* 42 U.S.C. § 2000e-10; *id.* § 12115, to rights to take family and medical leave from work, 29

U.S.C. § 2619(a), to return to civilian employment following military service, 38 U.S.C. § 4334(a), and to safe working conditions, *see* 29 U.S.C. § 657(c)(1). Even more such regulation occurs on the state level. *See* Amicus Br. of States in Supp. of Resp'ts.

The First Amendment does not stand in the way of such content-neutral regulation designed to ensure that rights-holders know about, and therefore can enjoy, their statutorily-protected rights. As *amici* well know, such disclosure requirements are consistent with the First Amendment and further its values, while ensuring that consumers have access to accurate information about their rights.

As this Court has recognized, "[w]hen a State . . . requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). Consistent with these principles, in a number of different First Amendment contexts, this Court has upheld properly tailored disclosure requirements, recognizing that disclosure represents a less restrictive alternative to suppression of speech. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 249 (2010); *Doe #1 v. Reed*, 561 U.S. 186, 195-96 (2010); *Citizens United*, 558 U.S. at 369; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985).

These principles do not change simply because a speaker disagrees—even vehemently—with the statutorily-protected rights that he is required to disclose. A physician who thinks that HIPAA disclosures are wasteful, unproductive, and damaging to

the environment still must provide those disclosures to his patients. An employer who is opposed on moral or religious grounds to giving leave under the Family and Medical Leave Act to married same-sex couples must nevertheless post the required notice informing employees about how to exercise their FMLA rights. An employer that believes that members of the military should not be hired for civilian jobs still has to notify his workforce of federal protections for service members.

Many federal protections spark bitter controversy. But opposition to a federal right—whether on religious, moral, or other grounds—does not give a speaker a First Amendment right to be exempt from generally-applicable content-neutral disclosure requirements that ensure individuals are informed about statutorily protected rights and how to exercise them. That is true whether the subject is medical privacy, equality, or, as in this case, women's health care.

NIFLA is opposed to abortion and contraception, and it counsels women in accordance with its beliefs. These views, of course, are entitled to respect and protection under the First Amendment. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2536-37 (2014). But California here has not undertaken to regulate how NIFLA counsels the persons it serves. The Act leaves that to the unfettered judgment of NIFLA and other petitioners. California simply insists that NIFLA post or distribute neutral, objective, factual information about legal rights and state-funded services California provides. NIFLA is entitled to counsel women to choose alternatives to abortion and to forego contraception, but it is not entitled to keep them in the dark about their rights under state law and publicly funded services the state offers. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. DISCLOSURE REQUIREMENTS THAT REQUIRE A SERVICE PROVIDER TO INFORM PERSONS OF AVAILABLE RIGHTS AND BENEFITS AND HOW TO EXERCISE THEM ARE PERVASIVE IN THE LAW AND DO NOT VIOLATE THE FIRST AMENDMENT.

The First Amendment's guarantee of freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), but the First Amendment has never been a shield against all regulation of speech by service providers, such as NIFLA and other petitioners in this case. When regulating the provision of services, "government is not only permitted to prohibit misleading speech that would be protected in other contexts, but it often requires affirmative disclosures that the speaker might not make voluntarily." *Rubins v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring) (citation omitted).

This Court's precedents give a wide berth to disclosure requirements—both in regulating commercial and professional activity and in other contexts—because "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369; *Zauderer*, 471 U.S. at 651 n.14 ("[A]ll our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech."). Disclosure requirements comport with "our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361; *Meese v. Keene*, 481 U.S. 465, 481 (1987) ("[T]he best

remedy for misleading or inaccurate speech . . . is fair, truthful, and accurate speech."); *see Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). And this is particularly true when the government enacts disclosure requirements that require a service provider to provide consumers complete, truthful, and accurate information about medical and health rights and services.

As this Court has recognized, "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Ibanez v. Fla. Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 142 (1994) (quoting *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.,* 496 U.S. 91, 108 (1990)). In fact, "[a] 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.' That reality has great relevance in the fields of medicine and public health, where information can save lives." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) (quoting *Bates v. State Bar*, 433 U.S. 350, 364 (1977)); *Va. Citizens Consumer Council*, 425 U.S. at 763-64 ("When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities."). Disclosure, as the facts of this case show, can mean the difference between enjoying a protected right or losing it.

Thus, "[w]hen a State . . . requires the disclosure of beneficial consumer information," *44 Liquormart*,

517 U.S. at 501, such as information about the rights and services to which people are legally entitled, "the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech," *id.* "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," *Zauderer*, 471 U.S. at 651, this Court has held that a professional's "constitutionally protected interest in not providing any particular factual information" related to his services "is minimal," *id.*; *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.").

So long as they do not chill protected speech, *see Milavetz*, 559 U.S. at 250; *Zauderer*, 471 U.S. at 651, or "distort [the] usual functioning," of the professional relationship for ideological ends, *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001), laws that require disclosure of legal rights and of services to which persons are legally entitled fall well within the confines of this Court's First Amendment precedents. *See* Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 877 (2015) ("[r]egulations that force a speaker to disgorge *more* information to an audience do not contradict the constitutional purpose of commercial speech doctrine. They may even enhance it" (emphasis in original)). Such laws "may increase the amount of information available to consumers," while "leav[ing] the speaker in greater control of her own message." Jonathan H. Adler, *Compelled Commercial Speech and the*

Consumer "Right to Know", 58 Ariz. L. Rev. 421, 436-37, 437 (2016); *see Milavetz*, 559 U.S. at 250 (emphasizing that challenged disclosure requirements "do not prevent debt relief agencies . . . from conveying any additional information"); *Keene*, 481 U.S. at 481 ("Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials.").

Consistent with these settled First Amendment principles, Congress has often acted to ensure the free flow of information, imposing generally applicable disclosure requirements that ensure that important information about rights and benefits available under federal law is accessible to those who need it most. As the brief of the United States explains, federal law includes "numerous statutory and regulatory requirements that persons disclose information to the public related to goods or services they provide." U.S. Br. at 1; *id.* at 30 n.11.

Particularly relevant here, Congress—or regulatory agencies acting pursuant to congressional delegation—have repeatedly imposed disclosure requirements that require informing individuals of federal rights they possess and how to exercise them. The type of disclosure challenged here—a requirement to inform women about government-created rights and benefits and how to exercise them—represents a pervasive form of regulation designed to ensure that individuals are able to enjoy their legal rights. *See* Post, *supra*, at 883 (discussing "marked shift toward forms of regulation that force the disclosure of information believed necessary for educated participation in the marketplace"). Such requirements are well-tailored measures that serve substantial government interests—they ensure that

rights are not lost out of ignorance of the law—while imposing only a minimal burden on First Amendment rights. Such laws do not compel service providers to conform to a state-selected orthodoxy. They merely require them to inform consumers—in neutral, objective terms—about what the law provides.

First, in the health care context, "[m]any current disclosure laws are intended to help consumers exercise substantive rights." William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 Colum. L. Rev. 1701, 1765 (1999); State Resp'ts Br. at 42 (observing that the "disclosure required by the FACT Act is simply one among many government-mandated notices in the healthcare context"). For example, the regulations implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, 110 Stat. 1936, give individuals "a right to adequate notice of the uses and disclosures of protected health information" and "of the individual's rights . . . with respect to protected health information." 45 C.F.R. § 164.520(a)(1). Entities covered by HIPAA "must provide a notice that is written in plain language," *id.* § 164.520(b)(1), that includes "a statement of the individual's rights with respect to protected health information and a brief description of how the individual may exercise these rights," *id.* § 164.520(b)(1)(iv), as well as "[a] statement that the covered entity is required by law to maintain the privacy of protected health information, to provide individuals with notice of its legal duties and privacy practices with respect to protected health information," *id.* § 164.520(b)(1)(v). These disclosures are a regular feature of the health care system, and millions of Americans receive them on a regular basis. They "provide individuals with a clearer

understanding of how their information may be used and disclosed and is essential to inform individuals of their privacy rights." Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82462, 82720 (Dec. 28, 2000) (codified at 45 C.F.R. § 164.520). They help ensure that individuals can exercise federal rights to medical privacy.

Second, Congress also has imposed disclosure requirements on employers to help ensure that eligible persons receive federal health benefits. For example, the Children's Health Insurance Program Reauthorization Act requires an employer that provides health insurance coverage in states which offer premium assistance through Medicaid or the Children's Health Insurance Program to "provide to each employee a written notice informing the employee of potential opportunities then currently available . . . for premium assistance under such plans for health coverage of the employee or the employee's dependents." 29 U.S.C. § 1181(f)(3)(B)(i)(I). The law requires the Secretary of Health and Human Services to write a model notice for employers that "include[s] information regarding how an employee may contact the State in which the employee resides for additional information regarding potential opportunities for such premium assistance, including how to apply for such assistance." *Id.* § 1181(f)(3)(B)(i)(II).

Third, federal law imposes a host of disclosure requirements on insurance companies, requiring companies to disclose to consumers their federal rights to insurance coverage and how to exercise those rights. For example, ERISA requires insurance companies to "provide, at the time of commencement of coverage under the plan, written

notice to each covered employee and spouse of the employee (if any) of the rights" to continuing coverage, guaranteed by the Consolidated Omnibus Budget Reconciliation Act, when insurance coverage is lost due to death, termination of employment, or other event. 29 U.S.C. § 1166(a); *see* 29 C.F.R. § 2590.606-1 (general notice requirement); *id.* § 2590.606-4 (notice requirement on plan administrators to provide "notice to each qualified beneficiary of the qualified beneficiary's rights to continuation coverage under the plan"); *see also id.* § 2590.701-6(c)(1) (requiring a plan to provide a "notice of special enrollment" that "must include a description of special enrollment rights," such as a right to enroll as a result of loss of coverage, or marriage, birth, or adoption).

Federal law also includes a number of other disclosure provisions designed to ensure that individuals are aware of certain federal rights and benefits. The Newborns' and Mothers' Health Protection Act of 1996, 29 U.S.C. § 1185, which requires insurance carriers to provide coverage for postpartum hospital stays of at least 48 hours for uncomplicated vaginal deliveries and 96 hours for caesarean sections, mandates that a group health plan "must disclose information that notifies participants and beneficiaries of their rights" under the Act, 45 C.F.R. § 146.130(d)(1); *see* 29 U.S.C. § 1185(d) (imposing on group health plans duty of "assuring notice of such requirements"); 29 C.F.R. § 2520.102-3(u) (requiring group health plan to disclose in the "summary plan" a "statement describing any requirements under federal or state law applicable to the plan, and any health insurance coverage offered under the plan, relating to hospital length of stay in connection with childbirth for the mother or newborn

child"). Similarly, the Women's Health and Cancer Rights Act of 1998, 29 U.S.C. § 1185b, requires a group health plan to provide "notice to each participant and beneficiary under such plan regarding the coverage" required under the Act for mastectomy-related reconstructive surgery, *id.* § 1185b(b), which "shall be in writing and prominently positioned in any literature or correspondence made available or distributed by the plan," *id.*

Fourth, federal consumer credit laws require credit agencies to inform consumers of their federal rights and how to exercise them. The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, requires the Bureau of Consumer Financial Protection to prepare "a model summary of the rights of consumers," including "the right of a consumer to obtain a copy of a consumer report," "the right of a consumer to dispute information in [his or her] file," and "the right of a consumer to obtain a credit score from a consumer reporting agency." 15 U.S.C. § 1681g(c)(1)(A), (c)(1)(B)(i), (c)(1)(B)(iii), (c)(1)(B)(iv). The FCRA not only requires the Bureau to "actively publicize the availability of the summary of rights," *id.* § 1681g(c)(1)(C)(i), it also imposes a disclosure requirement on "consumer reporting agenc[ies]," requiring them to inform consumers of their federal rights, which must be provided "with each written disclosure by the agency to the consumer" under the FCRA. *Id.* § 1681g(c)(2). The FCRA requires consumer reporting agencies to provide consumers with "the summary of rights prepared by the Bureau," "a list of all Federal agencies responsible for enforcing" the FCRA, and "the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate

agency." *Id.* § 1681g(c)(2)(A), (C). The required disclosures must also include "a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general . . . to learn of those rights." *Id.* § 1681g(c)(2)(D).

The FCRA also requires the Bureau of Consumer Financial Protection to prepare a "model summary of the rights of consumers . . . with respect to the procedures for remedying the effects of fraud or identity theft." *Id.* § 1681g(d)(1). The FCRA requires a "consumer reporting agency" to "provide the consumer with a summary of rights . . . and information on how to contact the Bureau to obtain more detailed information" when "any consumer contacts a consumer reporting agency and expresses a belief that the consumer is a victim of fraud or identity theft." *Id.* § 1681g(d)(2).

Fifth, reflecting concerns that workers may not know their rights or how to exercise them, virtually every major piece of legislation governing the federal rights of employees requires employers to post notices designed to inform their employees of their rights under federal law, as well as how to exercise those rights. *See* Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 Am. Bus. L.J. 487, 490 (2016) (explaining that "notice-posting requirements" are "designed both to remedy workers' lack of legal knowledge and to . . . trigger[] enforcement activity by those same workers"). For example, Title VII of the Civil Rights Act of 1964 requires employers and others bound by the Act to "post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are

customarily posted a notice . . . setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint." 42 U.S.C. § 2000e-10(a). Other laws and regulations contain similar disclosure requirements. *See* 8 U.S.C. § 1324b(l) (Immigration and Nationality Act); 29 U.S.C. § 627 (Age Discrimination in Employment Act); 42 U.S.C. § 12115 (Americans with Disabilities Act); 29 U.S.C. § 2003 (Employee Polygraph Protection Act); *id.* § 2619(a) (Family and Medical Leave Act); *id.* § 1821(b) (Migrant and Seasonal Agricultural Workers Protection Act); *id.* § 657(c)(1) (Occupational Health and Safety Act); 45 U.S.C. § 152 (Railway Labor Act); 38 U.S.C. § 4334(a) (Uniformed Services Employment and Reemployment Rights Act); 29 C.F.R. § 516.4 (Fair Labor Standards Act); *id.* § 1635.10(c) (Genetic Information Nondiscrimination Act).[3]

Other federal civil rights laws require disclosure of protected rights outside the employment context. For example, regulations implementing the Fair Housing Act require businesses that sell or rent real estate, or engage in residential real estate-related transactions and brokerage services, "to post and maintain a fair housing poster," 24 C.F.R. § 110.10(a), (c), (d), at their places of business which

[3] In addition to these mandates, federal law also includes numerous disclosure requirements that require federal grantees to inform persons of federal rights and how to exercise them as a condition of receiving federal financial assistance. *See, e.g.*, 34 C.F.R. § 100.6(d) (Title VI of the Civil Rights Act); *id.* § 104.8 (Rehabilitation Act); *id.* § 106.9 (Title IX of the Education Amendments Act); *id.* § 108.9 (Boy Scouts Equal Access Act); *id.* § 110.25 (Age Discrimination Act); 42 C.F.R. § 124.604 (Hill-Burton Act); 45 C.F.R. § 92.8 (Affordable Care Act).

"shall be prominently displayed so as to be readily apparent to all persons seeking housing accommodations or seeking to engage in residential real estate-related transactions or brokerage services," *id.* § 110.15; *id.* § 110.25 (describing content of poster); *see* 12 C.F.R. § 202.9(a)(2), (b) (disclosures required under Equal Credit Opportunity Act). Likewise, the regulations implementing Title II of the Americans with Disabilities Act require state and local governments to "make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity" in order to "apprise such persons of the protections against discrimination assured them by the Act." 28 C.F.R. § 35.106.

As the next section shows, petitioners' unyielding view of the First Amendment is so broad that it threatens to sweep away all of these forms of regulation. This Court should decline petitioners' invitation to rewrite First Amendment principles and deny government the authority to require service providers to inform consumers of their rights and benefits and how to exercise them.

II. PETITIONERS' INTERPRETATION OF THE FIRST AMENDMENT WOULD GUT A VAST ARRAY OF DISCLOSURE LAWS.

Petitioners insist that laws mandating disclosure of neutral, factual information about statutory rights and services are "precisely the kind of compelled speech that the Constitution forbids." Pet'rs Br. at 22. Any requirement of disclosure, in NIFLA's view, is a presumptively unconstitutional, content-based restriction on speech, because "[m]andating speech that a speaker would not otherwise make necessarily

alters the content of the speech." *Id.* at 28 (quoting *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988)). But that has never been the law. As the United States recognizes, "petitioners' contention that all disclosure requirements are subject to strict scrutiny is . . . wrong and inconsistent with this Court's precedent." U.S. Br. at 10. It "would require overruling this Court's many precedents applying lower levels of scrutiny to required disclosures" and "would call into question countless federal, state, and local laws." State Resp'ts Br. at 48.[4]

Consistent with this Court's recognition that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," *Citizens United*, 558 U.S. at 369, this Court has repeatedly upheld the authority of the government to impose disclosure requirements on service providers to ensure that consumers and others can make decisions based on accurate information. *See Milavetz*, 559 U.S. at 249-52; *Casey*, 505 U.S. at 884; *Zauderer*, 471 U.S. at 650-51. As these holdings reflect, disclosure

[4] Petitioners also claim that strict scrutiny is appropriate because the Act discriminates on the basis of viewpoint. Pet'rs Br. at 31-39. But the Act's disclosure requirement applies to clinics based on the services they perform, not the views they espouse. *See* Cal. Health and Safety Code § 123471(a). "That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious . . . viewpoint-based purpose motivated" the Act. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); *see McCullen*, 134 S. Ct. at 2531 (concluding that statute was content-neutral despite "'inevitable effect' of restricting abortion-related speech more than speech on other subjects"); U.S. Br. at 31-32. Further, as the United States observes, the record does not clearly show that the Act, in operation, discriminates on the basis of viewpoint. *Id.* at 32-33; State Resp'ts Br. at 49-51.

is often a constitutionally permissible means of furthering important governmental interests and is entirely in sync with "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield*, 507 U.S. at 766. Indeed, "[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," this Court has refused "to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized." *Zauderer*, 471 U.S. at 651 n.14.[5]

Further, this Court has given the government leeway to tailor a factual disclosure requirement to a particular problem, proceeding one step at a time. As this Court's precedents reflect, a disclosure requirement is not "subject to attack" simply because "it does not get at all facets of the problem it is designed to ameliorate." *Id.* In this context, "governments are entitled to attack problems piecemeal," *id.*, as California has done here by imposing a

[5] NIFLA insists that the Act cannot be treated as a regulation of commercial speech because the services it provides are offered free of charge. Pet'rs Br. at 21-22. But the point of disclosure laws, including the Act, is to ensure that consumers have access to complete and accurate information. The validity of these laws does not depend on whether a price is charged or not because the injury to consumers who are denied important information about available rights and benefits is the same, regardless of whether they pay for any services they receive. As the United States correctly recognizes, "the government's interest in requiring disclosure about the goods or services does not automatically disappear merely because they are offered without charge." U.S. Br. at 21; State Resp'ts Br. at 37.

disclosure requirement on licensed clinics that are unable to enroll women immediately into the state's publicly funded programs. "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *McCullen*, 134 S. Ct. at 2532 (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992)).

NIFLA's invitation to apply strict scrutiny across-the-board turns a blind eye to these repeated holdings. Its argument would wreak havoc on a whole host of disclosure laws that help ensure consumers and others can make decisions fully aware of their rights and the benefits to which they are entitled. This would stifle the free flow of information and leave consumers in the dark, disserving "societal interests in broad access to complete and accurate commercial information," *Edenfield*, 507 U.S. at 766. As this Court's cases reflect, the First Amendment's guarantee of freedom of speech does not deny the government the authority to require that consumers be informed of their rights and how to exercise them.

Further, NIFLA's sweeping objection to the Act has no limiting principle and would open the door to a host of new challenges to disclosure laws. NIFLA insists that the Act runs afoul of First Amendment principles because it unnecessarily "intrudes upon private thought by mandating that Petitioners mouth ideas that contradict their own convictions." Pet'rs Br. at 24. In NIFLA's view, "the State could itself publish information about where women may obtain free and low-cost abortions in California . . . without forcing private citizens like Petitioners to be the messengers." *Id.* at 55. NIFLA's *amici* make similar arguments. *See* U.S. Br. at 25, 27-29; Members of

Cong. Br. in Supp. of Pet'rs at 19. Similar arguments could be levelled against many—if not virtually all—disclosure requirements that require informing persons of their rights and how to exercise them.

This reflects the fact that many rights spark bitter controversy. The many disclosure requirements Congress has enacted in the civil rights context are a case in point. For example, many view federal civil rights law as critical to ensuring the Constitution's promise of equal opportunity for all, regardless of race, gender, national origin, or religion. Others consider such laws an impermissible interference with the workings of the marketplace that tramples on rights of speech and association. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (constitutional challenge to public accommodations provisions of the Civil Rights Act on grounds that requirement to provide equal service infringed on religious beliefs); *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (constitutional challenge by a law firm to prohibition on gender discrimination in employment contained in Title VII of the Civil Rights Act). That persons engage in robust debate on these issues does not turn federal disclosure requirements in the civil rights context into an unconstitutional abridgement of speech. An employer that believes that religion does not belong in the workplace still has to notify her employees of Title VII's prohibition on religious discrimination and how to exercise federal rights to obtain religious accommodations. An employer who believes war is sinful still has to post a notice informing persons of the federal prohibition on employment discrimination on the basis of military service enacted by Congress. The same is true here.

Disclosure requirements that inform persons of their rights and of services to which they are legally entitled do not cease to be constitutionally permissible simply because a service provider disagrees—even vehemently so—with the content of the statutory rights and benefits he is obligated to disclose. Many disclosure regulations deal with controversial matters, but that does not render them unconstitutional. A company "may differ with the wisdom of the law . . . even to the point as done here, of challenging its validity. . . . But the First Amendment which gives him the full right to contest validity to the bitter end cannot justify his refusal to post a notice Congress thought to be essential." *Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (rejecting First Amendment challenge to notice requirement contained in the Occupation Safety and Health Act). Requiring a First Amendment exemption whenever a person disagrees with the legal requirement he is required to disclose would wreak havoc on a whole host of disclosure requirements.

NIFLA's argument that the First Amendment requires the government to pay for a state-funded advertising campaign to inform persons of their rights, rather than impose a disclosure requirement, would upend a long list of disclosure requirements. Congress's considered judgment, reflected in the federal disclosure laws discussed above, is that the most effective way of ensuring that persons know their rights and how to access them is through disclosure requirements that require the posting of a notice. California here made that same judgment. Assembly Bill 775, § 1(d). As these enactments attest, a disclosure requirement is likely to be more effective in informing persons than a state-funded

advertising campaign, which is unlikely to reach as many people. *See* State Resp'ts Br. at 53 (noting limited effectiveness of "general advertising campaigns" on their own, as evidenced by the "high number of people who are eligible for publicly funded healthcare but remain unenrolled despite extensive marketing and outreach efforts"). Sometimes Congress utilizes a disclosure requirement together with a government-funded advertising program, *see, e.g.*, 15 U.S.C. § 1681g(c)(1)(C)(i); *id.* § 1681g(c)(2), but it has repeatedly refused to rely on advertising programs alone.

Indeed, under petitioners' view that the government should engage in an advertising campaign rather than mandate disclosure, HIPAA disclosure requirements as well as numerous federal insurance, consumer credit, and civil rights disclosure requirements would be unconstitutional. In each of these contexts, Congress and/or agencies acting pursuant to congressional delegation of power have imposed disclosure requirements on service providers and employers, reflecting their judgment that a government-advertising program alone would not adequately inform persons of their rights and how to exercise them. Rather than going down this path, this Court should decline the invitation to second-guess the legislative judgment—reflected in numerous enactments—that a disclosure requirement like the one at issue here is "tailored in a reasonable manner," *Edenfield*, 507 U.S. at 767, to the interest in protecting consumers and ensuring the effective vindication of protected rights.

The First Amendment "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Va. Citizens Consumer Council*, 425 U.S. at 772. The

government has considerable leeway to select the most conducive means of ensuring that consumers have complete and accurate information, including by imposing a disclosure requirement that requires informing persons of their rights and benefits. As this Court's cases reflect, government regulation of commercial and professional activity is "subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State." *Bd. of Trs. of the State Univ. of N.Y. v. Fox,* 492 U.S. 469, 477 (1989) (quoting *Ohralik,* 436 U.S. at 456). Further, "because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," this Court has refused to "strike down" disclosure "requirements merely because other possible means by which the State might achieve its purposes can be hypothesized." *Zauderer*, 471 U.S. at 651 n.14. It would be a radical departure from these precedents to hold the Act's disclosure requirement unconstitutional on the ground that the government could fund an advertising campaign of its own. Under such a holding, no disclosure regime would be safe from invalidation.

In short, the applicable First Amendment standards permit the government to require a service provider to inform consumers of their rights and how to exercise them. Petitioners' challenge to the Act should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 27, 2018

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APPENDIX:
LIST OF *AMICI*

U.S. Senate

Harris, Kamala D.
Senator of California

Feinstein, Dianne
Senator of California

Murray, Patty
Senator of Washington

Blumenthal, Richard
Senator of Connecticut

Booker, Cory
Senator of New Jersey

Cortez Masto, Catherine
Senator of Nevada

Duckworth, Tammy
Senator of Illinois

Hassan, Margaret Wood
Senator of New Hampshire

Hirono, Mazie K.
Senator of Hawai‘i

Kaine, Tim
Senator of Virginia

Markey, Edward J.
Senator of Massachusetts

LIST OF *AMICI* – cont'd

Sanders, Bernard
Senator of Vermont

Shaheen, Jeanne
Senator of New Hampshire

Smith, Tina
Senator of Minnesota

Warren, Elizabeth
Senator of Massachusetts

Wyden, Ron
Senator of Oregon

U.S. House of Representatives

Nadler, Jerrold
Representative of New York

Chu, Judy
Representative of California

Pelosi, Nancy
Representative of California

Slaughter, Louise M.
Representative of New York

DeGette, Diana
Representative of Colorado

Adams, Alma S.
Representative of North Carolina

Aguilar, Pete
Representative of California

LIST OF *AMICI* – cont'd

Barragán, Nanette Diaz
Representative of California

Bass, Karen
Representative of California

Bera, Ami
Representative of California

Beyer Jr., Donald S.
Representative of Virginia

Bonamici, Suzanne
Representative of Oregon

Brownley, Julia
Representative of California

Capuano, Michael E.
Representative of Massachusetts

Carbajal, Salud O.
Representative of California

Carson, André
Representative of Indiana

Clarke, Yvette D.
Representative of New York

Clay, Wm. Lacy
Representative of Missouri

Cohen, Steve
Representative of Tennessee

LIST OF *AMICI* – cont'd

Costa, Jim
Representative of California

Crowley, Joseph
Representative of New York

Davis, Danny K.
Representative of Illinois

Davis, Susan A.
Representative of California

DeLauro, Rosa L.
Representative of Connecticut

DelBene, Suzan
Representative of Washington

Demings, Val Butler
Representative of Florida

DeSaulnier, Mark
Representative of California

Deutch, Theodore E.
Representative of Florida

Ellison, Keith
Representative of Minnesota

Eshoo, Anna G.
Representative of California

Engel, Eliot L.
Representative of New York

LIST OF *AMICI* – cont'd

Espaillat, Adriano
Representative of New York

Foster, Bill
Representative of Illinois

Frankel, Lois
Representative of Florida

Fudge, Marcia L.
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Gomez, Jimmy
Representative of California

Grijalva, Raúl M.
Representative of Arizona

Gutiérrez, Luis V.
Representative of Illinois

Hastings, Alcee L.
Representative of Florida

Huffman, Jared
Representative of California

Jackson Lee, Sheila
Representative of Texas

Jayapal, Pramila
Representative of Washington

Jeffries, Hakeem
Representative of New York

LIST OF *AMICI* – cont'd

Johnson, Jr., Henry C. "Hank"
Representative of Georgia

Keating, William R.
Representative of Massachusetts

Khanna, Ro
Representative of California

Kuster, Ann McLane
Representative of New Hampshire

Lee, Barbara
Representative of California

Lieu, Ted W.
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Lofgren, Zoe
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McEachin, A. Donald
Representative of Virginia

LIST OF *AMICI* – cont'd

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Payne, Jr., Donald M.
Representative of New Jersey

Peters, Scott H.
Representative of California

Pingree, Chellie
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Pocan, Mark
Representative of Wisconsin

Raskin, Jamie
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Rice, Kathleen M.
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Richmond, Cedric L.
Representative of Louisiana

Rosen, Jacky
Representative of Nevada

LIST OF *AMICI* – cont'd

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Schiff, Adam B.
Representative of California

Serrano, José E.
Representative of New York

Sherman, Brad
Representative of California

Speier, Jackie
Representative of California

Swalwell, Eric
Representative of California

Takano, Mark
Representative of California

Thompson, Mike
Representative of California

Titus, Dina
Representative of Nevada

Tonko, Paul
Representative of New York

LIST OF *AMICI* – cont'd

Vargas, Juan
Representative of California

Velázquez, Nydia M.
Representative of New York

Wasserman Schultz, Debbie
Representative of Florida

Waters, Maxine
Representative of California

Welch, Peter
Representative of Vermont

Yarmuth, John
Representative of Kentucky