No. F089465

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BAKERSFIELD CRISIS PREGNANCY CENTER, et al.
Appellant-Plaintiff
v.
DEPARTMENT OF MANAGED HEALTH CARE, et al.
Respondents-Defendants.

Appellant's Opening Brief

Appeal from an Order
of the Kern County Superior Court
Hon. Thomas S. Clark, Judge
Superior Court Case No. BCV-22-102617
Department 17

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FIFTH **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: F089465
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 117442 NAME: Catherine W. Short FIRM NAME: Life Legal Defense Foundation STREET ADDRESS: P.O. Box 1313 CITY: Ojai STATE: CA ZIP CODE: 93024-1313 TELEPHONE NO.: (707) 337-6880 FAX NO.: E-MAIL ADDRESS: kshort@lifelegal.org ATTORNEY FOR (*name*): Bakersfield Crisis Pregnancy Center, et al.	SUPERIOR COURT CASE NUMBER: BCV-22-102617
APPELLANT/ PETITIONER: Bakersfield Pregnancy Center, et al. RESPONDENT/ REAL PARTY IN INTEREST: Department of Managed Health Care, et al.	

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INTRODUCTION

"[O]nce [the government] chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference." (*Comm. to Defend Reprod. Rights v. Myers* (1981) 29 Cal.3d 252, 284 (citation omitted).) Prior to the enactment of S.B. 245, the Abortion Accessibility Act (hereafter the Act or S.B. 245), California law required health insurance plans to treat pregnant women equally, whether they chose to continue their pregnancies or terminate them. With the passage of S.B. 245, however, insurance companies are now mandated to give favorable treatment to women seeking abortion, even when the medical services they receive are identical to those received by women who choose to continue their pregnancies.

Plaintiffs, who are California taxpayers and health care providers, challenged the Act as violative of the rights to reproductive privacy and equal protection for women who choose to carry their pregnancies to term, seeking declaratory and injunctive relief against enforcement of the Act. After trial, the lower court entered judgment for Defendants. This appeal followed.

STATEMENT OF APPEALABILITY

This appeal from the judgment of the Superior Court of the County of Kern is authorized by the Code of Civil Procedure, section 904.1(a)(1). Judgment was entered on January 15, 2025, and this appeal was timely filed on March 5, 2025.

STATEMENT OF FACTS

A. The Act

The Abortion Accessibility Act, S.B. 245, was introduced on January 22, 2021, the 48th anniversary of *Roe v. Wade* ((1973) 410 U.S. 113). The Act was codified at Health & Saf. Code, § 1367.251 and Ins. Code, § 10123.1961 and became effective on January 1, 2023.

The Act prohibits health care service plans from "imposing a deductible, coinsurance, copayment, or any other cost-sharing requirement on coverage for all abortion and abortion-related services, including preabortion and followup services." (Health & Saf. Code, § 1367.251(a)(1); Ins. Code, § 10123.1961(a)(1).) The Act defines abortion as "any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth." (Health & Saf. Code, § 1367.251(d); Ins. Code, § 10123.1961(d).)

Prior to passage, the Act was referred to the California Health Benefits Review Program (CHBRP) pursuant to A.B. 1996 (*codified at* Health & Saf. Code, § 127660) which "requests the University of California to assess legislation proposing a mandated benefit or service and prepare a written analysis with relevant data on the medical, economic, and public health impacts of proposed health plan and health insurance mandate

legislation." (1 AA 285 (Defs' Trial Ex. 3 - Assembly Comm. On Health Analysis of S.B. 245)[1].)

The CHBRP produced a 79-page analysis of the Act, including appendices (hereafter CBHRP Report). (1 AA 080-149.) Judicial notice was taken of the existence of the CHBRP Report, though not for the truth of the matters asserted, other than as separately stipulated. (1 RT 44:1-4.)

B. The Parties

Plaintiffs Erin Rogers, Steven Braatz, M.D., and Patrick Baggott, M.D., are California taxpayers who paid taxes in the year preceding the filing of this action.[2] (1 AA 073 (Stipulated Fact (SF) 20).) Drs. Steven Braatz and Patrick Baggott are physicians who provide care to privately insured pregnant women who carry their pregnancies to term or suffer unintended pregnancy loss. (*See generally* 1 RT 54:14-91:9.)

Defendant Department of Managed Health Care (DMHC) "licenses and regulates health service plans" and monitors them for compliance. (2 RT 320:28-321:12.) DMHC is "charged with interpreting", "implementing," and "adopting regulations" for the Act. (2 RT 322:12-19.)

The California Department of Insurance (DOI) has the authority to discipline "its licensees who do not maintain professional standards in their conduct of the insurance business

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[1] Judicial notice was taken of the Analysis for the purpose of noting the "alleged issue that the Legislature considered" rather than for the truth of the matter asserted. (1 RT 28:3-30:9.)

[2] Defendants stipulated that "the State of California has and will expend public funds to implement the Act." (1 AA 070 (SF 1).)

. . . ." (*Anserv Ins. Servs. v. Kelso* (2000) 83 Cal.App.4th 197, 207.) The Commissioner of the DOI "leads an executive agency created by statute. He or she has only as much rulemaking power as that statute invests in the Commissioner." (*Ass'n of Cal. Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 390 (*citing Carmel Valley Fire Prot. Dist. v. State of California* (2001) 25 Cal.4th 287, 299).)

The Attorney General is the "chief law officer of the State and head of the Department of Justice. The Attorney General has a duty to see that the laws of the State are uniformly and adequately enforced." (*Chodosh v. Comm'n on Judicial Performance* (2022) 81 Cal.App.5th 248, 254-55 (internal citations and quotation marks omitted).)

C. The Procedures

The Parties stipulated to a number of facts concerning health care services related to pregnancy and abortion, and whether those services are covered without cost-sharing by California health plans. (I AA 068-74 (SF 1-20).)

Pregnant women seek medical care related to their pregnancy, regardless of whether they choose abortion or childbirth. (1 AA 070-73 (SF 5, 7, 13(c-d), 14(a-b), 17, 19).) Women choosing abortion and women choosing childbirth are both exercising their reproductive choices. (1 AA 251-52 (Nos. 7-8); 1 AA 234-35 (Nos. 3-4).) Insured pregnant women seeking abortions are seeking medical care to preserve their health as they achieve their desired pregnancy outcome. (1 AA 252 No. 9); 1 AA 235 (No. 5).) Insured pregnant women seeking to carry

pregnancies to term are seeking medical care to preserve their health as they achieve their desired pregnancy outcome. (1 AA 252 (No. 10); 1 AA 235 (No. 6).)

Women seeking abortions may have ultrasounds to ascertain the gestational age of the fetus and where it is situated. (1 RT 177:10-16 (using ultrasound to locate fetus during abortion procedure); *see also* 1 RT 41:2-13 (Defendants not contesting this fact).) Women seeking to continue their pregnancies typically have ultrasounds to ascertain the gestational age of the fetus and where it is situated. (1 RT 56:1-20.) Some California health plans impose cost-sharing for ultrasounds. (1 RT 141:23-143:9; 1 RT 145:18-146:21; 2 RT 202:28-203:16; *see also* 1 AA 070-71 (SF 5, 8).) Health care service plans may impose cost sharing for prenatal ultrasounds unless the ultrasounds are performed as part of California's Prenatal Screening Program. (1 AA 071 (SF 8).) Under the Act, some insured patients who choose abortion will obtain an ultrasound, which will be provided without cost sharing. (1 AA 071 (SF 10).)

Some pregnancies end in miscarriage, stillbirth, or premature labor and delivery before the baby can survive. (1 RT 57:22-25.) Some miscarriages are incomplete and require health care services such as a prescription for misoprostol or a dilation and curettage procedure, vacuum suction aspiration, or dilation and evacuation procedure to complete. (1 AA 073 (SF 19); 1 RT 59:16-61:1.) Women seeking abortions, or seeking to complete incomplete abortions, will require health services such as a prescription for misoprostol or a dilation and curettage or

vacuum suction aspiration procedure. (1 RT 177:17-21.) An ultrasound may be used to confirm a miscarriage was complete. (1 RT 60:6-61:1.) An ultrasound may be used to confirm an abortion was complete. (1 RT 177:5-16.) Women who miscarry may need antibiotics or pain medication to manage their conditions afterwards. (1 RT 72:15-22.) Women who have had induced procedural abortions may need antibiotics or pain medication to manage their conditions afterwards. (1 RT 177:22-28.) In short, in the words of Defendants' own witness, care given to a woman whose baby has suffered from fetal demise is "[v]ery similar" to care given to a woman seeking an induced abortion. (1 RT 178:20-179:6.)

Hospital stays, additional exams, lab tests, surgery, and prescription of additional medications such as antibiotics and medications to stop bleeding can be necessary for a successful delivery. (1 RT 71:6-72:22.) Hospital stays, additional exams, lab tests, surgery, and prescription of additional medications such as antibiotics and medications to stop bleeding can be necessary for an abortion or follow up to an abortion. (1 RT 158:4-17 (1-2% of women receiving abortions require emergency care); 1 RT 176:25-177:4 (women sometimes receive abortions in hospital); 2 AA 309-10 (ICD code O084 "Complications following (induced) termination of pregnancy"); 2 AA 310-11 (ICD code O087 "Failed attempted termination of pregnancy, includes failure of attempted induction of termination of pregnancy[,] incomplete elective abortion") (ICD codes excerpted from American Medical

Association, ICD-10-CM 2023: Chapter 15); 1 AA 394 (insurance plan description of services included in abortion coverage).)

D. Existing California Laws Regarding Access To Abortion

In the past six years, the Legislature has enacted numerous laws mandating the use of public and private funds to make it easier for women to locate and obtain abortions—but not pre-natal care, much less childbirth services. These laws include:

- Health & Saf. Code, §§ 123451-123453, Abortion Practical Support Fund (creating a fund "to administer grants to nonprofit organizations" that will "fund a new program or support an existing program that increases patient access to abortion");
- Health & Saf. Code, §§ 127630-127639, Reproductive Health Equity Fund (establishing "grant funding to safety net providers of abortion and contraception . . . and to otherwise ensure affordability of and access to abortion and contraception");
- Educ. Code, § 99251 ("each public university student health center shall offer abortion by medication techniques onsite");
- Bus. & Prof. Code, § 870 ("expedit[ing] the licensure process for an applicant who demonstrates they intend to provide abortions, as defined in Section 123464 of the Health and Safety Code");
- Health & Saf. Code, § 140, California Reproductive Justice and Freedom Fund (establishing a Fund with the goal of providing "medically accurate, culturally congruent reproductive and sexual health education that is inclusive of information on

abortion rights, care, and services. The education or outreach provided by a program shall include information on how to obtain an abortion or provide abortion referrals, especially upon request.");

• Health & Saf. Code, § 123430 (requiring creation of a website providing people with "accurate and comprehensive information when accessing abortion services in California" and informing them of the location of providers and other logistical information necessary to access and obtain an abortion);

• Lab. Code, § 2808.1 (requiring the Department of Industrial Relations to post on its website "information regarding abortion and contraception benefits that may be available at no cost through the Reproductive Health Equity Program").

E. Existing California Laws Regarding Coverage For Pre-Natal Care And Maternity Services.

To comply with the mandates of the federal Affordable Care Act, California law requires insurance plans to cover maternity services. (Ins. Code, §§ 10123.865-.866; Health & Saf. Code, §§ 1367.005-.006.) Also, to comply with federal law, California law mandates coverage without cost-sharing for certain preventative women's health screenings, two or three of which are specific to pregnant women. (*See* n.10, *infra*.) Pre-natal visits are usually included in the single global price of pregnancy care, rather than being billed separately. (2 RT 204:10-205:10.)

California also prohibits health plans and health insurance policies from charging copays for maternity services that exceed the most common amount of the copayment or deductible for

other comparable services. (Health & Saf. Code, § 1373.4; Ins. Code, § 10119.5.)

California maintains a free pre-natal testing program to screen for birth defects, encouraging pregnant women to find out whether their unborn child has a higher risk of suffering from birth defects and, therefore, is a prime candidate for being aborted. (1 AA 070 (SF 2b) (including "free follow-up testing and services" to women "whose screening shows an increased chance of birth defects").)

F. Costs And Payments

The legislative history of the Act claimed that cost-sharing for abortion imposed "cost-prohibitive" financial burdens on women seeking abortion and was a "barrier to accessing abortion services." (1 AA 284-85.) In 2022 (before the Act), the average out of pocket cost for insured patients with cost sharing for abortion services was $306 for medication abortion, $887 for procedural abortion, and $182 for associated services. (1 AA 072 (SF 13d)), totaling an average of $543 in out-of-pocket costs for all utilized abortion services, per user. (1 AA 072 (SF 13d).) Prior to the enactment of the Act, for insured Californians, the average out of pocket cost for an abortion was less than the average out of pocket cost for carrying a pregnancy to term and delivering a child. (1 AA 071 (SF 12).)

Significantly, payment of out-of-pocket costs for abortion does not occur at the time of service, other than possibly a nominal amount in the form of a co-pay. (1 RT 159:5-10, 174:17-28; 2 AA 349 ("for example, $20"), 424 (same).) Deductibles and

co-insurance for abortion services are billed later, usually months later. (1 RT 118:11-121:6; 1 RT 182:9-17; 2 RT 329:6-8; 1 AA 292-93 (Pls.' Tr. Ex. C - UCSF Health, Billing and Insurance webpage).) Defendants could not identify any woman in California who, prior to the Act, was unable to obtain an abortion due to cost. (1 AA 236 (No. 9); 1 AA 253 (No. 13).)[3]

An estimated 132,680 abortions are performed in California per year. (1 AA 071 (SF 13b).) Prior to the enactment of the Act, about half of all abortions in California were already provided without cost to the individual through Medi-Cal. (1 AA 071 (SF 13b).) The CBHRP estimated that an additional 97 women would be new users of abortion services due to the elimination of cost sharing. (1 AA 071 (SF 13a).)

PROCEDURAL HISTORY

A. The Action

On October 5, 2022, Plaintiffs filed this challenge to S.B. 245, alleging two causes of action: violation of the state constitutional right to privacy (Article I, section 1) and violation of the state equal protection guarantee (Article I, section 7). The operative complaint, the Second Amended Complaint (1 AA 50-67) alleges taxpayer standing for Rogers, Braatz, and Baggot[4],

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[3] At trial, the court took judicial notice of Defendants' Responses to Requests for Admission. (1 RT 79:5-18.)

[4] Defendants stipulated that the State has expended and will expend public funds to implement the Act. (1 AA 070 (SF 1).)

and third-party standing for Braatz, Baggot, and Bakersfield Pregnancy Center as health care providers on behalf of their patients.[5] The Complaint seeks declaratory and injunctive relief against the enforcement of the Act.

B. Trial

In September of 2024, the superior court held a two-day bench trial in which both Plaintiffs and Defendants presented witnesses, introduced exhibits, and were granted judicial notice as to discovery responses.

Plaintiffs called two witnesses: plaintiff Steven Braatz, M.D., an obstetrician with 40 years of experience providing pregnancy care (I RT 54:14-20), and Rebecca Busch, who testified as an expert witness about medical billing and coding practices. (1 RT 93:25-94:2.)

Dr. Braatz estimated that he has provided obstetric care to about 8,000 women. (1 RT 54:14-24.) As relevant to this appeal, Dr. Braatz testified about the types of medical services provided to pregnant women, both those who successfully carry to term and those who suffer pregnancy loss.

Ms. Busch testified about insurance billing practices, and specifically about the revenue cycle for insured patients, from initial pre-registration, through receiving medical treatment, to processing and then payment of the bill by the payor insurance company, to the medical provider billing the individual patient for any cost-sharing due. On average, the process takes several

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[5] Three other plaintiffs were dismissed by stipulation on February 14, 2023.

months before the patient receives a bill, at which time the patient has an additional 60 days to pay the bill before any interest can accrue. (1 RT 117:6-120:8.)

Defendants called three witnesses: Karen Meckstroth, M.D., an abortion provider in San Francisco; Sarah Roberts, a public health researcher; and Daniel Southard, an employee of defendant Department of Managed Health Care. Dr. Meckstroth was qualified as an expert in the field of obstetrics and gynecology (1 RT 152:12-15), and Dr. Roberts as an expert in the field of abortion policy (1 RT 259:23-26).

The only expert evidence Defendants presented concerning out-of-pocket insurance costs leading to delay in obtaining abortions, came from Dr. Roberts. Dr. Roberts admitted that not a single study has ever shown women delay their abortions over a fear that they will ultimately have a bill due. (2 RT 272:19-24.) Second, Dr. Roberts could produce no study which quantified the length of delay women might experience from having to raise money to pay for an abortion. (2 RT 300:23-301:27, 276:12-277:15.) Many studies show, and Dr. Meckstroth herself testified, that abortion clinics themselves frequently delay women from getting abortions by days or even weeks, demonstrating that "delay" in the abstract is simply not harmful. (1 RT 176:18-24; 2 RT 295:9-296:8.) Significantly, Roberts' cited studies showing delay indicated numerous other causes and did not separate out the data in a way that allows one to draw conclusions about whether women with private insurance that covered abortion services faced the same types of issues women without such

insurance faced. (2 RT 279:25-11, 281:7-282:20, 286:7-20, 288:9-24, 291:5-292:4; 299:28-300:20.)

C. Ruling

On December 17, 2024, the Superior Court entered its final decision in favor of Defendants, along with a Statement of Findings and Conclusions.

In that decision, the court "reject[ed Defendants'] contention that the Act covers spontaneous abortions, miscarriages, non-viable pregnancies, fetal demise, etc." (2 AA 464 (Minute Order).).

As to the effect of the Act on pregnant California women, the parties had stipulated, based on the estimate contained in the CBHRP Report, that, in addition to the approximately 132,000 abortions already taking place per year in California, an additional 97 California women would have abortions due to the elimination of cost-sharing imposed by the Act. As the court described the issue:

> In the Plaintiffs' view, this stipulated fact can only mean that the State is intruding into private matters by encouraging (or worse) 97 women who would not otherwise desire or choose an abortion to have an abortion. Plaintiffs can see no other conclusion to be drawn.
>
> Defendants conclude from the same stipulated fact that the State is removing barriers that prevent 97 women who otherwise desire abortions from obtaining one.
>
> While there is some logic to both conclusions, there is no basis to adopt either conclusion as the only logical inference or conclusion to be drawn from the stipulated fact. The truth is probably somewhere in between, but *it would require absolute speculation*

> *for the Court to attempt to make that determination based upon the record in this case*.

(1 AA 458 (emphasis added).)

On the privacy claim, the trial court ruled that the Plaintiffs had not shown by a preponderance of the evidence that the Act "interferes with the ability of California women to exercise their right to choose whether to have an abortion or continue their pregnancy; . . . constitute[s] 'state interference' with this right exercised by California women; . . . [or] encourages or coerces some women into choosing abortions." (2 AA 459.) Notably, other than a glancing reference to a "reasonable expectation of privacy" with regard to reproductive decisions, the trial court did not discuss *Committee to Defend Reproductive Rights v. Myers* ((1981) 29 Cal.3d 252), the landmark California Supreme Court decision that held that the state's Medi-Cal program could not withhold funding for abortion while paying for medical care for childbirth for indigent women.

As to the equal protection claim, the court did not dispute that the state was "treating other pregnant women in a different manner than pregnant women seeking abortions." (2 AA 467.) Given the different treatment, the court first considered whether the Act was subject to strict scrutiny or rational basis review. The court decided that rational basis was the correct standard, because "[t]he 'Strict Scrutiny' standard of review is *triggered only when* Plaintiffs demonstrates significant interference with exercise of a fundamental right. *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47." (2 AA at 461 (original

emphasis).) Because Plaintiffs did not show the Act "significantly interferes with reproductive decision-making," the burden was on Plaintiffs to show that "the Legislature did not make the findings reflected in the Act on some rational basis." (*Ibid.*)

Noting that rational basis was a "low bar" and an "extremely permissible standard" often producing "surprising" results in case law, the court then discussed the possible "reasonable basis" for the Act. (2 AA 465-66.) The court noted the "entirely different medical needs and goals with far different associated costs" of women choosing abortion and women who continue their pregnancies. The court stated, "The Act focuses on addressing the needs and goals of women choosing abortion. The needs and goals of other pregnant women are addressed by a number of other laws and programs." (*Ibid.*) As to women who experience unintended pregnancy loss, whose medical needs and associated costs would be nearly identical to those for abortion, the "reasonable basis" for excluding them from the benefit conferred by the Act is that "[t]hey are not facing a decision – the decision has been made for them. Nothing the government does or doesn't do influences any choice for them." (2 AA 467.)

Based on these considerations, the court concluded, "[T]here is a reasonable basis for treating other pregnant women in a different manner than pregnant women seeking abortions" (*ibid.*) and entered judgment against Plaintiffs on their equal protection claim.

STANDARD OF REVIEW

Pure questions of law are reviewed de novo, "giving no deference to the trial court's ruling." (*Cohn v. Corinthian Colls., Inc.* (2008) 169 Cal.App.4th 523, 527.) Relatedly, interpretation of a law, where the facts are undisputed, is subject to de novo review. (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089-1090*; People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1012.)

Because the trial court issued a statement of decision, the reviewing court is "bound by express findings supported by the evidence but will not imply other findings in support of the judgment." (*Cars 4 Causes, supra,* 139 Cal.App.4th at p. 1012.)

SUMMARY OF ARGUMENT

The lower court erred in entering judgment for Defendants on Plaintiffs' constitutional claims.

Under the California Supreme Court decision of *Committee to Defend Reproductive Rights v. Myers* ((1981) 29 Cal.3d 352), the Act violates the state constitutional right to privacy by its failure to treat abortion and continued pregnancy neutrally. The lower court did not even address the *Myers* decision, the controlling decision under California law.

In assessing whether the Act violates California's equal protection guarantee, the lower court applied the wrong standard, holding the Act needed to satisfy only rational basis review, rather than a higher level of scrutiny. The court's error sprang from its failure to distinguish between direct challenges to

statutes infringing on fundamental rights and challenges to statutes that create classifications touching on fundamental rights.

The Act fails to satisfy the correct standard, strict scrutiny, because it does not further a compelling governmental interest and is not necessary to the furtherance of any such interest, as numerous alternative means of serving the state's purported interest are available.

Finally, even if review for rational basis was the correct standard, the Act fails to meet that standard, as it provides or withholds benefits for identical or substantially similar medical services based solely on a pregnant woman's intentions for her pregnancy.

ARGUMENT

I. THE ACT VIOLATES THE CONSTITUTIONAL RIGHT TO PRIVACY

A. The Choice To Continue A Pregnancy—Or Not—Is A Fundamental Right Under The California Constitution

"Article I, section 1, confirms the right not only to privacy, but to pursue happiness and enjoy liberty. The right of a woman to choose whether or not to bear a child and thus to control her social role and personal destiny, is a fundamental right protected by that provision." (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 163 (*citing Myers*, *supra,* 29 Cal.3d at p. 275).) "[T]he constitutional rights at issue here [procreative choice] are clearly among the most intimate and fundamental of all constitutional rights." (*Myers, supra,* 29 Cal.3d at p. 275.)

B. Under *Myers*, The Act Violates The California Constitutional Right Of Privacy

In 1978, the California legislature enacted a budget that "limit[ed] Medi-Cal funding for abortions" while "affording full funding of medical expenses incurred by indigent women who decide to bear a child." (*Myers*, *supra,* 29 Cal.3d at p. 256.) These budget provisions were challenged on the grounds that they violated a woman's right to privacy, as enumerated in Article I, Section 1, of the California Constitution. In holding the provisions unconstitutional, the California Supreme Court explained that the case was not a ruling about the morality of abortion; rather, it explored only the question

> of whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support.

(*Id.* at p. 256-57.) The Court noted the well-established precedent holding that the California Constitution's right to privacy means that "all women in this state -- rich and poor alike -- possess a fundamental constitutional right to choose whether or not to bear a child." (*Id.* at p. 262 (emphasis added).)

The Court analyzed the law under a three-part test:

> In order to sustain the constitutionality of such a scheme under the California Constitution, the state must demonstrate (1) "that the imposed conditions relate to the purposes of the legislation which confers

> the benefit or privilege"; (2) that "the utility of imposing the conditions . . . manifestly [outweighs] any resulting impairment of constitutional rights"; and (3) that there are no "less offensive alternatives" available for achieving the state's objective."

(*Id.* at p. 258 (*citing Bagley v. Wash. Twp. Hosp. Dist.* (1966) 65 Cal.2d 499, 505-07).)

The Court then held that 1) the restrictions were "antithetical to the purpose of the Medi-Cal program" which was to provide the poor with the same access to medical services as the rich, 2) any cost savings from the program's restrictions were merely "illusory," and 3) that imposing these conditions "clearly does not aid poor women who choose to bear children in a manner least offensive to the rights of those who choose abortion." (*Id.* at p. 258.)

The Court went on to repeatedly stress that, although the state is not required to provide specified benefits, once it does it cannot withhold that benefit simply because the recipient exercises her constitutional right in a particular manner. California cases "have long held that a discriminatory or restricted government benefit program demands special scrutiny whether or not it erects some new or additional obstacle that impedes the exercise of constitutional rights." (*Id.* at p. 257.) Indeed, "California courts have repeatedly rejected the argument that because the state is not obligated to provide a general benefit, it may confer such a benefit on a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right." (*Id.* at p. 264.)

The "fundamental right of the woman to choose whether to bear children follows from the [U.S.] Supreme Court's and this court's repeated acknowledgement of a 'right to privacy' or 'liberty' in matters related to marriage, family, and sex" the Court held. (*Id.* at p. 275 (*quoting People v. Belous* (1969) 71 Cal.2d 954, 963 (cleaned up).) It continued, "[If] the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (*Id.* at p. 275 (*quoting Eisenstadt v. Baird* (1972) 405 U.S. 438, 453 (emphasis added)).

The Court recognized that the inverse funding situation to the one presented to it in *Myers* would also be unconstitutional:

> [A]lthough in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature -- as a population control measure, for example -- *funded Medi-Cal abortions but refused to provide comparable medical care for poor women who choose childbirth.* Thus, the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from *discriminatory* governmental treatment.

(*Id.* at p. 256 (emphasis added); *see also Missionary Guadalupanas of Holy Spirit, Inc. v. Rouillard* (2019) 38 Cal.App.5th 421, 435 (state may not "allow Plans to refrain from covering elected abortion services any more than they could

refrain from covering birthing services because the patient has elected to give birth rather than terminate the pregnancy").)

In its conclusion, the Court stated:

> By virtue of the explicit protection afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state -- rich or poor -- is guaranteed the constitutional right to make that decision as an individual, *uncoerced by governmental intrusion*. Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature.

(*Myers*, *supra,* 29 Cal.3d at p. 284-85 (emphasis added).) In short, the *Myers* court plainly equated unequal funding with "intrusion" into the pregnant woman's choice.

Thirteen years after *Myers*, the Supreme Court described the legal standard for a claim of invasion of privacy, enumerating three elements to be applied in assessing alleged invasions of privacy, and the defenses thereto. (*Hill v. NCAA* (1994) 7 Cal.4th 1, 35-40 (elements of privacy claim "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy").) In doing so, it did not intend

> a radical departure from *all* of the earlier state constitutional decisions . . . that uniformly hold that when a challenged practice or conduct intrudes upon a constitutional privacy interest, the interests or

> justifications supporting the challenged practice *must be weighed or balanced* against the intrusion on privacy imposed by the practice.

(*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 891 (second emphasis added).) The factors set forth in *Hill* were intended to "screen out intrusions on privacy that are *de minimis* or insignificant." (*Id.* at p. 895, n. 22.) But *Hill* "should not be interpreted" to "authoriz[e], in a wide variety of circumstances, the rejection of constitutional challenges to conduct or policies that intrude upon privacy interests . . . without any consideration of the legitimacy or importance of a defendant's reasons" or a balancing of the interests. (*Id.* at p. 891.)

Here, the privacy right at issue, the right of reproductive choice, is one of the most fundamental rights recognized under California law. (*Myers*, *supra,* 29 Cal.3d at p. 275.) The intrusion is direct and intentional: the Act singles out abortion for favored treatment to the tune of hundreds or thousands of dollars in waived cost-sharing (SF 13(c); RT 160:7-15) that is not provided to women who continue their pregnancies, including those who miscarry. The legitimacy and importance of the justifications underlying the Act must therefore be weighed against that intrusion.

C. The State Has Failed To Justify The Act's Intrusion On The Right To Privacy.

The lower court found that "part of the Legislative intent" of the Act was to "remove barriers (primarily financial) that would otherwise have impacted the ability of" some women to

obtain abortions. (2 AA 459.) The court also found that it was "statistically logical" to conclude that "some" of the 97 additional abortions performed annually would be on women for whom the Act removed these barriers. (*Ibid.*)

In coming to this conclusion, the court did not consider or discuss the evidence adduced by Plaintiffs showing why cost-sharing for an abortion would not pose a barrier to *insured* women seeking abortions, the only women impacted by the Act's mandates on health plans. Plaintiffs' evidence showed that, prior to the Act, insured women were at most asked to pay a co-pay. (1 RT 174:17-28; 2 AA 349 ("for example, $20"), 424 (same).) Deductibles and co-insurance for abortion services are billed later, usually months later. (1 RT 118:11-121:6; 1 RT 182:9-17; 2 RT 328:20-329:8; 1 AA 292-93 (Pls.' Tr. Ex. C – UCSF Health, Billing and Insurance webpage).)

It is not surprising, therefore, that Defendants had no direct or indirect evidence that, before the Act, any abortion-minded California woman in particular or abortion-minded women in general were delayed in obtaining, much less unable to obtain, abortions because of cost-sharing. (1 AA 203 (No. 7); 1 AA 236 (Nos. 9-10); 1 AA 253 (Nos. 13-14); 1 AA 261-62 (Nos. 17-18); 1 AA 272-73 (Nos. 11-12).)

To counter Plaintiffs' showing of no immediate costs to women seeking abortions, Defendants claimed, with vague and generalized anecdotal evidence, that, prior to the Act, cost-sharing for abortion was of such significance to pregnant women that simply seeing these costs on the horizon would be enough to

make them delay getting planned abortions, possibly to the point of foregoing getting abortions at all. (E.g., 1 RT 159:11-24.) But this argument further highlights the state's lack of neutrality. The state wished to ensure that *only women choosing abortion* would be relieved of concerns about *future* bills, not women who choose to continue their pregnancies, who would face far more significant bills after delivery. (1 AA 071 (SF 12).)

At the same time, Defendants asserted that, from a financial standpoint, the decision of whether to have a child or undergo an abortion is already significantly tilted in favor of abortion, which is a cheaper route than bearing and raising a child. In light of this disparity, they claim that cost-sharing (the same cost-sharing purportedly substantial enough to deter women from getting abortions) is inconsequential for women who are undecided. (*See* 1 RT 167:19-27.)

The lower court apparently adopted this argument where it noted that the cost of obtaining an abortion "is minimal compared to the cost of carrying a pregnancy to term [], not to mention the cost of raising a child." (2 AA 466), and then concluded, "The Legislature could assume that cost-sharing for abortion care risks nullifying the right to abortion more than cost-sharing for continued pregnancy care risks nullifying the right to continued pregnancy." (*Ibid.*)

The Supreme Court has already suggested what it would think of this convoluted reasoning that justifies the state, in the name of procreative choice, relieving costs for abortion alone, precisely because it is less financially burdensome. In *Myers*, the

Court extolled the Pregnancy Freedom of Choice Act, Welf. & Inst. Code §16145, as an "excellent example of providing of a program designed to aid indigent women who choose to bear children without impinging upon the rights of those who choose abortion." (*supra*, 29 Cal.3d at p. 283 n. 29.) The Freedom of Choice Act provided state funding for services provided by maternity homes. Because childbirth "involves care and counseling needs beyond those required for abortion" (i.e., is more expensive), the Court found the Freedom of Choice Act a legitimate measure "to eliminate financial considerations that make one choice more expensive than the other, thereby granting the woman effective freedom of choice." (*Ibid.*)[6] In other words, state assistance with the costs of childbearing by itself was permissible because it helped to level the playing field.

Thus, the California Supreme Court took the same fact relied on by the lower court to justify the Act, i.e., that childbirth is more expensive than abortion, and came to the opposite conclusion, namely, that the state enhances reproductive choice when it legislates to *reduce* this disparity. In this case, by contrast, the lower court embraced a measure that mandates subsidization of the less expensive choice.

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[6] The Legislature repealed the statute in 2004. (Stats 2004 ch 229 § 58 (SB 1104).)

D. Plaintiffs Do Not Need To Show That Women Were Encouraged Or Coerced To Have Abortions Because Of The Act.

The trial court imposed on Plaintiffs the burden of showing, by a preponderance of the evidence, that the Act "interferes with the right of California women to choose to continue their pregnancies" or that the Act "encourages or coerces some women into choosing abortion." (2 AA 459.) But this was not the standard applied in *Myers*. As discussed above, *Myers* stands for the proposition that, in the area of procreative decisions, the government must be *neutral*, not simply that the government may not twist arms. It may not discriminatorily withhold *or grant* benefits. (*See, e.g.*, *Myers*, *supra,* 29 Cal.3d at p. 256 (at issue is "the protection of either procreative choice from discriminatory governmental treatment"); *id.* at p. 268-69 (state could not provide free marriages for intra-racial but not interracial couples, even if it posed no burden to the latter[7]).)

It was this exact constitutional principle of *neutrality* that Defendant DMHC itself invoked to force all California health plans to cover abortion, when it invoked the California Constitution to "remind" insurers that "all health plans must treat maternity services and legal abortion *neutrally*." (*Missionary Guadalupanas, supra,* 38 Cal.App.5th at p. 429 (quoting DMHC letter to insurers) (emphasis added).) The bill

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[7] *See* The Supreme Court, 1976 Term (1977) 91 Harv.L.Rev. 70, 144 (source of the analogy in *Myers*; "the state has merely made intraracial marriage a more attractive alternative, without creating an obstacle to private marriage opportunities.")

analyses reports on S.B. 245 from both the Senate Committee on Health and the Senate Rules Committee noted the same constitutional requirement for health plans to "treat maternity services and legal abortion neutrally." (1 AA 170, 178.)

In 1980, the state could not show any "constitutionally legitimate" interest furthered in providing Medi-Cal coverage for childbirth but not abortion. (*Myers*, *supra,* 29 Cal.3d at p. 282.) Similarly here, Defendants have failed to show any constitutionally legitimate or important interest in providing a particular financial benefit to pregnant women exercising their state right to abortion, while excluding from the same benefit pregnant women who choose to exercise the correlative right to continue their pregnancies.

II. THE ACT VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE CALIFORNIA CONSTITUTION

A. The Act Treats Pregnant Women, Even Women Receiving The Same Medical Care, Differently Based On Their Reproductive Choices.

As detailed in Statement of Facts (C), *supra*, pregnant women seeking abortions and insured pregnant women seeking to carry their pregnancies to term both seek medical care to preserve their health as they achieve their desired pregnancy outcome. Some of this medical care is identical for both sets of women. For example, women seeking abortions as well as women seeking to continue their pregnancies may have ultrasounds to ascertain the gestational age of the fetus and where it is situated. (1 RT 177:10-16; *see also* 1 RT 41:2-13; 1 RT 56:1-20.) An

ultrasound may be used to confirm either a miscarriage or an induced abortion was complete. (1 RT 60:6-61:1; 1 RT 177:5-16.) But whether those ultrasounds are subject to cost-sharing depends on whether the woman intends or intended to abort or not.[8]

Many women who exercise their reproductive rights by choosing to continue their pregnancies will, unfortunately, not succeed in carrying to term. Rather, the pregnancy may end spontaneously in a miscarriage, still birth, or premature labor and delivery before the baby can survive. The medical services women may need in these circumstances are *the same services* provided to women seeking abortions, both to induce an abortion or as a follow up when an induced abortion is incomplete.

There is significant overlap between services potentially used by pregnant women regardless of whether they 1) have an induced abortion, 2) deliver a living baby, or 3) miscarry or deliver a stillborn baby. Hospital stays, surgeries, additional exams, lab tests, and prescription of additional medications such as antibiotics and medications to stop bleeding do not just arise for a stillbirth or successful childbirth; they are also all potential

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[8] If a woman miscarries after the ultrasound but before her scheduled abortion, can she be billed for cost-sharing for the ultrasound? If she changes her mind after a pre-abortion ultrasound and decides to continue the pregnancy, can cost-sharing then be imposed for the ultrasound? Is her intent at the time of the medical service controlling, or the outcome of the pregnancy? These examples highlight the Act's irrational distinction based on the woman's intent, rather than the nature and cost of the procedures. (Section III, *infra*.)

services or "follow ups" for an abortion, and thus, under the Act, provided without cost-sharing to those women who chose to terminate their pregnancies. (See *supra*, p. 14.)

The Act differentiates among insured pregnant women, all of whom have healthcare needs related to their pregnancies, based on whether or not they choose to get an abortion. But

> [g]iven the pregnancy of the patient, two treatments may be medically necessary: medical services to facilitate labor and delivery, or medical services to terminate the pregnancy. Both types of service are voluntary in the sense that they are chosen by the patient. *Both types of service are medically necessary to treat the condition of pregnancy*.

(*Missionary Guadalupanas*, *supra,* 38 Cal.App.5th at p. 435 (emphasis added).)

Thus, even where the services needed for abortion and continuing to term are not identical or similar, the Act creates a distinction based on reproductive choice, ensuring that only those insured women who choose abortion are guaranteed to receive for free all services "medically necessary to treat the condition of pregnancy."

B. The Act's Classification Touches On Fundamental Interests And Is Therefore Subject To Strict Scrutiny.

Equal protection:

> means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. . . . In determining whether such a deprivation has occurred, the court's ultimate task is to examine the validity of the

> underlying purpose, and the extent to which the disputed statutory classification promotes such purpose.

(*People v. Wutzke* (2002) 28 Cal.4th 923, 943 (simplified).) And, recently, in *People v. Hardin*, the Supreme Court revised the test for determining equal protection violations:

> when plaintiffs challenge laws drawing distinctions between identifiable groups or classes of persons, on the basis that the distinctions drawn are inconsistent with equal protection, . . . [t]he only pertinent inquiry is whether the challenged difference in treatment is adequately justified under the applicable standard of review.

(*People v. Hardin* (2024) 15 Cal.5th 834, 850-51.)

Where a classification "touch[es] on fundamental interests," California courts adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*D'Amico v. Bd. of Med. Exam'rs* (1974) 11 Cal.3d 1, 17.) Under strict scrutiny, the state that has the burden to prove "not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*Ibid.* (emphasis in original) (simplified); *accord Warden v. State Bar* (1999) 21 Cal.4th 628, 641 (same); *In re Marriage Cases* (2008) 43 Cal.4th 757, 832 (same); *People v. Yang* (2022) 78 Cal.App.5th 120, 131 (same).)

It is undisputed that the Act "touches on" fundamental interests, and thus, according to numerous California Supreme Court precedents cited here and below, it is subject to strict scrutiny.

C. The Court Erred In Applying Rational Basis Review.

As noted above, multiple California Supreme Court and appellate court cases state that strict scrutiny is the appropriate standard of review when a law draws *distinctions* or makes *classifications* that *touch on* fundamental interests. (*Supra*, Section IIB.) Here, however, the lower court applied rational basis review, holding that strict scrutiny "is *triggered only when* Plaintiffs demonstrate[] significant interference with exercise of a fundamental right. *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47." (2 AA 461 (emphasis added).)

But *Fair Political Practices Commission (FPPC)* was *not an equal protection case.*

The trial court here made an obvious, basic error in failing to distinguish between 1) the test for the *direct* violation of a fundamental right and 2) the test for a violation of *equal protection* by means of a statutory classification that touches on fundamental rights. (*FPPC*, 25 Cal.3d at p. 45 (because challenged regulation was invalid as direct infringement of associational freedoms, it was "unnecessary to discuss whether the section results in a denial of equal protection.").) Rather, when the Supreme Court spoke in *FPPC* of the necessity of "significant interference with the exercise of a fundamental right" to trigger strict scrutiny, the Court was enunciating a standard for evaluating laws challenged directly as restrictions on the exercise of fundamental rights. (*Id.* at p. 48-49 ("Because the transaction reporting requirements will often constitute a significant interference with the fundamental right to petition,

the strict scrutiny doctrine is applicable.").) The *FPPC* court did not discuss the standard of review for an equal protection challenge at all.

The distinction between the two types of challenges is critical to understanding the two formulations for triggering those standards: "touching on" vs. "significant interference with."

The constitutional guarantee of equal protection is a guarantee of independent force and purpose, protecting against a harm distinct from the harm of a violation of the underlying right, namely, *the harm of unequal treatment*. That is, merely being treated unequally as to certain protected rights and interests *is* a violation of the Constitution, without the need for a plaintiff to show the particular rights or interests were significantly infringed on.[9] For that reason, the California Supreme Court and lower courts use terms such as "touching on," as well as "affecting," and "involving," when describing the relationship between the classification and the fundamental right that triggers strict scrutiny under Equal Protection analysis. For example, in *People v. Chatman*, the Court held,

> Unequal treatment based on a suspect classification such as race is subject to the most exacting scrutiny. [] *So is treatment affecting a fundamental right.* [] In cases involving suspect classifications or *touching on fundamental interests . . .* courts adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny.

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[9] Analogously, separate race-based drinking fountains do not, as such, deny anyone water; yet they plainly deny equal treatment.

(*People v. Chatman* (2018) 4 Cal.5th 277, 288 (internal citations and quotations omitted) (emphasis added) (ellipses in original); *see also Darces v. Woods* (1984) 35 Cal.3d 871, 885 (rational basis review "is inapplicable in cases involving suspect classifications or touching on fundamental interests. In such cases the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that distinctions drawn by the law are necessary to further its purpose") (simplified); *Conservatorship of Eric B.* (2022) 12 Cal.5th 1085, 1107 ("differences . . . that touch upon fundamental interests are subject to strict scrutiny"); *Hardin, supra,* 15 Cal.5th at p. 847 ("Courts apply heightened scrutiny when a challenged statute or other regulation *involves* . . . *a fundamental right* such as the right to vote, and accordingly will demand greater justification for the differential treatment") (emphasis added); *People v. Barner* (2024) 100 Cal.App.5th 642, 663 (same).)

A violation of equal protection does not require a showing that other fundamental rights have been significantly burdened or infringed on. For example, a city law prohibiting soliciting donations on downtown streets after 10:00 P.M. might or might not survive a free speech challenge. But if the law exempted union members from the restriction, the law would be subject to strict scrutiny, because the law creates a classification that "touches on" fundamental rights. A non-union member challenging the law on equal protection grounds would not have to show that his rights were significantly infringed on. Rather, the burden would be on the state to show "not only that it has a

compelling interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*D'Amico,* 11 Cal.3d at 17.)

To take another example, if the state extended the deadline for voter registration only for public school teachers, that allowance would, upon challenge, be subject to strict scrutiny, rather than mere rational basis review, because it touches on a fundamental right. The potential constitutional harm to those not in the preferred class is not that their rights have been diminished, but that they are being subject to discriminatory treatment as to a fundamental right without a sufficiently compelling justification.

A final example: if a law required ride-sharing companies to provide free rides to the polls on election days, but only for apartment dwellers, or college students, or Democrats, such a mandate would violate the equal protection rights of those not in the favored classes unless the state could show that it was necessary to serve a compelling interest.

In all of these examples (which could be multiplied), the "extremely permissible" (2 AA 465) standard of rational basis review employed by the court below would be satisfied if the Legislature simply sought out anecdotal evidence about one or two individuals in the favored groups experiencing some hindrance to exercising their constitutional rights, topped off with the observation that "the Legislature need not address all facets of a problem at once, or at all, but may deal with particular parties and issues in accordance with priorities satisfying to

itself." (2 AA 466 (quoting *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 636-37).) The resulting law benefiting favored constituencies, the wisdom of which may be "debatable" (*Warden*, *supra,* 21 Cal.4th at p. 645), and the logic and science unsound (*Central Delta*, *supra,* 17 Cal.App.4th at p. 637), would nonetheless be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Warden*, 21 Cal.4th at p. 644 (simplified).)

Because rational basis is such a low bar, legislative classifications that *touch on* fundamental rights require courts to adopt "an attitude of active and critical analysis" of the state's justification, i.e., strict scrutiny.

Here, by relying on *FPPC* as authority for rejecting strict scrutiny, the lower court elided the crucial distinction between 1) claims for violation of fundamental rights and 2) equal protection claims based on those rights. The court erroneously discarded the equal protection element of Plaintiff's equal protection claim by merging it into Plaintiff's claim of direct violation of the right to privacy.

Strict scrutiny applies to Plaintiffs' equal protection claims.

D. The State Failed To Show That the Act Is Justified By A Compelling Interest

Because the trial court erroneously found the rational basis standard applied, it did not identify any compelling state interest that the Act furthers, much less find that the Act is *necessary* to accomplish any compelling state goal. Rather, it noted only that

the state had asserted "justifications for disparate [preferential] treatment of pregnant women seeking abortions." (2 AA 466.)

The fundamental "justification" identified by the trial court is that "women choosing abortion are at risk of being forced to continue a pregnancy if there are financial barriers to abortion." (*Ibid.*) But the court itself seemed skeptical of the factual basis, noting "perhaps Defendants overstate the argument." (*Ibid.*) Thus, even if the state had a compelling interest in protecting abortion-minded women from merely the risk of being unable to obtain one because of financial barriers, the state failed to meet *its burden* of demonstrating that the problem was real and the Act would address it.

Far from demonstrating the existence of a problem that the state has a compelling interest in solving, Defendants admitted they know of no woman with private insurance who was ever even delayed, let alone prevented, from receiving a wanted abortion prior to the Act. (1 AA 203 (No. 7); 1 AA 236 (Nos. 9-10); 1 AA 253 (Nos. 13-14); 1 AA 224-25 (Nos. 17-18); 1 AA 261-62 (Nos. 11-12).) To be clear: Defendants admitted they have no evidence that any woman actually needs the Act in order to be able to exercise her "fundamental right to abortion."

The CBHRP Report itself informed the Legislature that evidence supporting the Act was scanty to non-existent. Specifically, the Report found "[i]nsufficient evidence that utilization management policies affect abortion outcomes," and

"[l]imited evidence that cost-sharing policies affect abortion access and utilization."[10] (1 AA 083.)

Much less have Defendants shown that enough women need the benefits of the Act to advance the government's alleged "compelling" interest to any meaningful degree. Despite there being an estimated 132,680 abortions in California per year (1 AA 071 (SF 13b)), the CBHRP estimated that only an additional 97 women would be new users of abortion services due to the elimination of cost sharing. (1 AA 071 (SF 13a)). Even assuming *arguendo* that all of these additional abortions would take place as a matter of unfettered choice and not financial inducement created by the state, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." (*Brown v. Entm't Merchs. Ass'n* (2011) 564 U.S. 786, 803 n.9.) Or, in this case, each 0.07 parts of a percentage point.

The trial court posited a second justification for the disparate treatment, that the "needs and goals" of pregnant women who do not choose abortion "are addressed by a number of other laws and programs." (1 AA 466.) But the California statutes cited by the trial court do nothing other than require insurers to "level up" maternity services with other health care services. (*See* Ins. Code, §§ 10123.865-.866; Health & Saf. Code, §§ 1367.005-006; Health & Saf. Code, §§ 1373.4; Ins. Code, § 10119.5.)

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[10] "Limited evidence indicates that the studies have limited generalizability to the population of interest and/or the studies have a fatal flaw in research design or implementation." (1 AA 083.)

Because under California law, insurers must "treat maternity services and legal abortion neutrally" (*Missionary Guadalupanas*, *supra*, 38 Cal.App.5th at p. 429), these statutes do not provide any coverage for maternity services that was not already provided to abortion services.

Similarly, the well-woman coverage identified in Stipulated Facts 2 through 5 (1 AA 070-71), also cited by the trial court (2 AA 464), is equally available to pregnant women seeking abortions and, in large part, to women in general. Of the medical services that must be provided without cost-sharing, only two or three are entirely specific to pregnancy.[11] Almost all the services on the list are not actually treatment, but simply screening and tests for various diseases and conditions. Moreover, because

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[11] The chart at 1 AA 077 identifies Well-Woman services available to women in a number of (confusingly divided) categories. While the pregnancy and postpartum care services listed are said to be "in addition to" the services listed above, a close read of the chart reveals nearly every service available to pregnant or post-partum women is already listed in the "health care services" section organized by age. For example:

- Identical matches: anxiety screening, contraception & contraceptive care, diabetes screening, syphilis screening, and many more;
- Functionally identical matches: preeclampsia screening v. blood pressure screening; HIV testing (each pregnancy) v. HIV preexposure prophylaxis/risk assessment/screening (at least once); Healthy weight gain counseling v. Obesity screening & counseling;
- Services unique to pregnancy and post-partum: bacteriuria screening; Breastfeeding counseling, services & supplies; Preeclampsia prevention with low-dose aspirin; and Rh(D) blood typing.

physicians typically charge a lump sum for all maternity services for a pregnancy, from pre-natal visits to labor, delivery, and postpartum care, the "free" pre-natal care women receive is, in reality, accounted for and rolled into the total cost. (2 RT 224:2-225:5.) Finally, the waiver of costs for participation in California's Prenatal Screening Program, including more intensive screening for those at increased risk of having children with birth defects (1 AA 070 (SF 2b).), is not a bonus to pregnant women who want to carry to term; it is an opportunity for the state to steer them into the category of abortion-seeking women.

E. The State Failed To Show That The Distinctions Drawn By The Act Are Necessary To Further Its Purpose.

Even assuming *arguendo* that the Act actually furthered the State's asserted interest in ensuring access to wanted abortions, and that such an interest is compelling, Defendants failed to show necessity. That is, they failed to show—or even argue—that the Act was necessary to achieve its goal, that it actually would achieve its goal, and that narrower means or means less discriminatory than the one chosen by the Legislature were unavailable. (*See, e.g.*, *Serrano v. Priest* (1976) 18 Cal.3d 728, 768 ("Under [strict scrutiny] the presumption of constitutionality normally attaching to state legislative classifications falls away, and the state must shoulder the burden of establishing that the classification in question *is necessary to achieve* a compelling state interest.").)

Here, the Legislature used a fire hose to fill a hypothetical teacup. It showered the benefit of relief from cost sharing on every insured woman seeking to terminate her pregnancy—but not those women seeking to continue their pregnancies—regardless of income, regardless of ability to pay, regardless of stage of pregnancy, regardless of the amount of cost-sharing—to alleviate the risk that some hypothetical, unidentified California woman might find the amount of cost-sharing to be a barrier to her obtaining an abortion.

There were other options open to the Legislature. It could have prohibited insurers and health care providers from charging insured women any co-pays or deductibles *before* providing the requested abortion. As long as an insured woman could get an abortion on demand (1 RT 185:16-24), the state's purported interest in eliminating financial barriers to obtaining an abortion would be satisfied. The state has never claimed to have a compelling interest in providing financial assistance to women *after* they have abortions.

As a more neutral measure, the state could have prohibited insurers (and health care providers) from requiring co-pays and deductibles to be paid in advance of *any* pregnancy-related services.

Alternatively, the state could have required insurers to waive cost-sharing for all pregnancy-related services up to some fixed amount (e.g., $700) sufficient to cover most abortions. (2 AA 072 (SF 13d) (stipulation that average out-of-pocket for abortion in 2022 was $543).) Such options would treat abortion,

miscarriage management, and childbirth entirely neutrally while achieving not only the Legislature's goal of removing financial barriers to abortion, but its more general purpose of "ensuring that equitable, timely access to healthcare services is attainable to all Californians regardless of an individual's bank account size." (1 AA 168 (Senate Committee on Health analysis).)

The Legislature might also have considered solutions that were needs-based, rather than procreative choice-based, to alleviate financial hardship for insured pregnant women for their medically necessary care. As to financial assistance for abortion in particular, the state has already enacted several other laws to assist low-income women seeking abortion. (*See* Statement of Facts (D), *supra* (Health & Saf. Code, §§ 123451-123453, establishing Abortion Practical Support Fund); Health & Saf. Code, §§ 127630-127639, establishing Reproductive Health Equity Fund; Educ. Code, § 99251, mandating that every public university student health center offer abortion by medication techniques onsite").)

In the Legislature's rush to smooth the path for abortion, however, it did not even consider such alternatives. The Act fails strict scrutiny analysis.

III. THE ACT CANNOT SURVIVE RATIONAL BASIS REVIEW.

As low a bar as rational basis is (and the lower court noted several "surprising" examples of how low it is (2 AA 465-66)), the Act does not clear it. As shown above, the Act does not in fact remove barriers preventing insured women from obtaining

abortions, nor did the Legislature have any evidence of barriers for insured women or a rational basis to think such barriers existed. Even if the Act did have such an effect, its exclusion of treatments for miscarriage, although the medical care for both is virtually identical, defies logic.

The lower court explained this discriminatory treatment between induced abortion and accidental pregnancy loss with an argument that directly contradicts one of the state's primary contentions:

> Perhaps a different (but no less rational) analysis applies to pregnant women who experience pregnancy loss. *They are not facing a decision---the decision has been made for them. Nothing the government does or doesn't do influences any choice for them*.

(2 AA 467 (emphasis added).) In other words, women with continuing pregnancies are still facing a decision, while women who miscarry are not. In those two sentences, the court discarded the State's basic contention that the Act was simply meant to assist women who have already decided to have an abortion, and instead effectively admitted the Act *can* have an effect on the decision-making of pregnant women.

If the abortion decision were as fixed as Defendants contended below, abortion-determined women would be in the same position as women undergoing a pregnancy loss: they need medical services and they need them promptly. In that case, the State would have no rational basis for relieving cost-sharing for the former but not the latter. The State cannot have it both ways: either the Act amounts to government interference in abortion

decision-making, thus violating the right to privacy under *Myers*, or there is no rational basis for favoring medical services for abortion over medical services for spontaneous pregnancy loss.

The irrationality of the Act is most clearly demonstrated by this irreducible fact: insured women receiving the *identical* medical services will be exempted from cost-sharing, or not, depending on whether the termination of their pregnancy was intended.

But even as to women who successfully carry pregnancies to term, the Act actually operates irrationally, by providing financial benefits only to that class of women facing on average a significantly *smaller* cost-sharing burden ($543 vs. $2854 (1 AA 072 (SF 13d, 14a)) in achieving their desired pregnancy outcome. (*See also* pp. 32-33, *supra* (discussion of Freedom of Pregnancy Choice Act).) (Such a result runs contrary to the purpose of the Act as explained by the author, namely, "ensuring that *equitable*, timely access to healthcare services is attainable to all Californians regardless of an individual's bank account size." (1 AA 285 (Defs' Tr. Ex. 3 – Assembly Committee on Health Analysis).)

In sum, Defendants do not have a legitimate or rational basis for discriminatorily conferring financial benefits on pregnant women who seek to terminate their pregnancies while excluding those who choose to continue their pregnancies.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and enter judgment for Plaintiffs on both claims.

Alternatively, as to the Equal Protection Claim, this Court should reverse and remand to the lower court to evaluate Plaintiffs' claim under the correct standard of strict scrutiny.

DATED: November 7, 2025

Respectfully submitted,

LIFE LEGAL DEFENSE FOUNDATION

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CERTIFICATION OF WORD COUNT

Pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the undersigned hereby certified that this petition and the accompanying memorandum contain 10,445 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, the verification, and the signature blocks.

Dated: November 7, 2025

/s/ Catherine W. Short
Catherine W. Short

PROOF OF SERVICE

I am over 18 years of age and not a party to this action. My business address is P. O. Box 1313, Ojai, California 93024-1313. On November 7, 2025, I served the following documents:

APPELLANTS' OPENING BRIEF

APPELLANTS' APPENDIX

on the Defendants in this action --

CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE;
CALIFORNIA DEPARTMENT OF INSURANCE; and
ROB BONTA, Attorney General of the State of California,

by emailing counsel from the Attorney General's office, California Department of Justice, representing all three defendants and who has agreed to accept electronic service in this matter, addressed as follows:

Lauren Zweier, Esq. – Lauren.Zweier@doj.ca.gov;
Martine DAgostino, Esq. – Martine.DAgostino@doj.ca.gov;
Karli Eisenberg, Esq. – Karli.Eisenberg@doj.ca.gov

I further declare that I caused a copy of APPELLANTS' OPENING BRIEF to be served by U.S. Mail upon:

The Honorable Thomas S. Clark
Superior Court of California, Kern County
1415 Truxtun Ave
Bakersfield, CA 93301

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 7, 2025 /s/ *CATHERINE W. SHORT*

CATHERINE W. SHORT