No. 15-17497

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIVINGWELL MEDICAL CLINIC, INC. *et al.*,
Plaintiffs-Appellants,

v.

KAMALA HARRIS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California (Oakland)

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

PETITION FOR REHEARING EN BANC STATEMENT

The decision below affirmed the lower court's denial of a preliminary injunction involving a challenge by three non-profit, faith-based, pro-life pregnancy centers to compelled speech about the availability of free or low cost abortions.[1]

In undersigned counsel's judgment, the panel decision in this case, relying squarely on this Court's decision in *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Harris*, No. 16-55249 (9th. Cir. 2016), conflicts with decisions of the United States Supreme Court and prior decisions of this Court—most critically:

- *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (regarding the application of strict scrutiny to a facially content-based law);
- *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (regarding government compulsion of speech by professionals);

[1] Unless otherwise noted, references to the "panel" or "panel decision" throughout this petition refer to the decision in the *NIFLA* case, attached hereto with the decision in the instant case. The panel decision in *LivingWell v. Harris* relied exclusively on the *NIFLA* decision in holding that Plaintiffs did not demonstrate a likelihood of success on their First Amendment free speech claim. *LivingWell*, slip op. at 3. *LivingWell*, *NIFLA*, and *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 15-17517 (9th Cir. 2016) were all argued before, and decided by, the same panel.

- *In Re Primus*, 436 U.S. 412 (1978) (regarding professional non-profit speech activity);
- *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (regarding viewpoint discrimination with respect to medical services); and
- *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013) (regarding the limits of the professional speech doctrine).

En banc review is necessary to secure uniformity of this Court's decisions with itself and with the Supreme Court.

In addition, the panel decision conflicts with authoritative decisions of other federal courts of appeals on a question of exceptional importance:

- *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233 (2d Cir. 2014) (regarding the context in which abortion-related compelled speech requirements should be evaluated); and
- *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (same).

BACKGROUND

Petitioner-Plaintiffs (hereafter, "Plaintiffs") are three non-profit, faith-based pregnancy care centers established and operated with one purpose: to provide assistance to women facing a health, material, or

spiritual need at or around the time of an actual or potential pregnancy. Plaintiffs in this case engage in a number of medical and non-medical activities to carry out their religious mission, including the administration of pregnancy tests and ultrasounds, counseling and emotional support, and practical material assistance for new and expectant mothers. Plaintiffs provide these services free of charge and never ask clients for donations.

Consistent with their religious commitments, Plaintiffs believe that abortion is wrong and have never referred, nor would they ever refer, a client to have an abortion.

As explained in the panel decision, California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (hereafter "AB 775" or the "Act") requires non-exempt licensed facilities, such as Plaintiffs, to disseminate a message to all clients informing them how they might be able to obtain a free or low cost abortion.

ARGUMENT

Case law uniformly holds that compelled speech is highly disfavored under the First Amendment. *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013)

(reiterating the "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.") (citations omitted). Freedom from compelled speech is essential to liberty: "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

Nonetheless, the panel decision holds that Plaintiffs can be forced, under pain of financial penalties, to speak a message contrary to their conscience.

The panel decision is not only wrong, it conflicts directly with decisions of the Supreme Court, this Court, and other federal courts of appeals. This Court should grant rehearing en banc.

I. The Panel Decision Conflicts with Decisions of the Second and Fourth Circuits.

The panel decision's decision conflicts directly with the Second Circuit's decision in *Evergreen Ass'n v. City of New York*, 740 F.3d 233 (2d Cir. 2014) and the Fourth Circuit's decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). Both these cases invalidated compelled abortion-related speech.

In *Evergeen*, the Second Circuit upheld on First Amendment grounds a preliminary injunction against a government requirement that pregnancy centers disclose the factual and truthful information of "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care.'" *Id.* at 238. Evaluating the context in which the compelled speech was to be made, the court held that this mandated disclosure overly burdened the speech of the pro-life centers. *Id.* at 249. According to the Second Circuit, the context was clear: "a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the ordinance] provide alternatives." *Id.* Noting that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," *id.* (quoting *Riley*, 487 U.S. at 795), the court observed that "[a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins." *Id.*

It did not matter to the Second Circuit for purposes of its compelled speech analysis that the mandated disclosure contained only purportedly factual or truthful information. The context was clear: an effort by the government to tailor the speech of third parties on a highly contested subject of moral, religious, and political concern. *Evergreen*, 740 F.3d at 249 (2d Cir. 2014) ("When evaluating compelled speech, we consider the context in which the speech is made") (citing *Riley*, 487 U.S. at 796-97) The court concluded that this disclosure was not sufficiently tailored "under either strict scrutiny or intermediate scrutiny." *Id*. at 249.[2]

In *Stuart*, the Fourth Circuit upheld a preliminary injunction against a North Carolina law requiring physicians to perform an ultrasound, display the sonogram, and describe the fetus to a woman seeking an abortion. 774 F.3d at 242-43. Similar to the Second Circuit's decision in *Evergreen*, the Fourth Circuit understood that the

[2] Of course, the Act's mandated message here goes much further than the "services disclosure" at issue in *Evergreen*. Whereas that disclosure only required pregnancy centers to indicate whether or not they provide referrals for abortion, AB 775 positively and affirmatively *requires pregnancy centers to point clients to a government program that might pay for a free abortion*.

mandated *factual* statements could not be properly understood in the absence of context: "[t]hough the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage." *Id.* at 253. "While it is true that the words the state puts into the doctor's mouth are factual, that does not divorce the speech from its moral or ideological implications." *Id*. at 246.

Though the panel decision here recognizes the viewpoint-based nature of the law at issue in *Stuart*, slip op. at 21, the panel wholly glosses over the critical point that the specific compelled message in that case, *standing alone*, conveyed only *factual* information, *i.e.*, information regarding the gestation of the unborn child. Thus, in conflict with the rationale and holding of *Stuart*, the panel refuses to acknowledge how the compelled statements of "fact" in this case can, in truth, be compelled statements in furtherance of a governmental ideology.

The Act—co-sponsored by the abortion advocacy group, NARAL, *LivingWell*, EOR 39—is meant to advance California's "proud legacy of respecting reproductive freedom" and its "forward-thinking" programs

that provide "reproductive health assistance to low income women." *LivingWell*, EOR 42. While California is free to further that "legacy" and pursue its "forward-thinking" programs—just as North Carolina is free to pursue the "'important and legitimate interest' in preserving, promoting, and protecting fetal life," *Stuart*, 774 F.3d at 250 (citations omitted)—it may not hide the ideologically-based nature of the mandated speech under the guise of mere statements of fact.

The viewpoint bias of the Act is further revealed by its total exemption for those facilities have enrolled as Medi-Cal and FPACT providers and thus advance the "forward thinking" of the state. "In its practical operation," therefore, the Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391(1992)).

In short, AB 775 operates in a similar manner to the speech in both *Evergreen* and *Stuart*, requiring Plaintiffs "to speak and display

the very information on a volatile subject that the state would like to convey." *Id.*, at 253.[3]

Finally, the panel's notion that the compelled speech here does not "encourage" or "suggest" receivers of the notice to avail themselves of the advertised services does not comport with common sense. Slip op. at 33. A government regulation requiring gas stations to inform their customers that they might be eligible for free or low cost fuel elsewhere would not need to say anything further to encourage customers to pursue this offer. The notice is enough. A mortgage company advertising its refinancing services with the words, "our customers save an average $132 per month, call us to find out if you are eligible," would not have to include any further words of encouragement.

Had the panel looked beyond the four corners of the Act's mandated message, as the courts in *Evergreen* and *Stuart* did, it would

[3] This case, unlike *Stuart*, does not involve the paid provision of services. There is no government interest in curtailing potentially financially motivated exploitation of patients; hence, the coercion of charity services here more egregiously violates the First Amendment. Ultimately, the *Stuart* court held that it did not need to decide whether to apply strict scrutiny to the compelled speech at issue because it failed intermediate scrutiny. *Id.* at 247, n. 3.

have seen the Act for what it is: an effort by the State to advance its ideology over the objections of those who do not share it.

II. The Panel Decision Conflicts with this Court's decision in *Conant v. Walters.*

For these reasons, the panel decision conflicts with this Court's decision in *Conant*, *supra*. At issue in that case was a free speech challenge to a federal policy declaring that a doctor's "recommendation" of marijuana would lead to revocation of his or her license. 309 F.3d at 633. This Court held that "the government's policy . . . seeks to punish physicians *on the basis of the content of doctor-patient communications* . . . . [it] does not merely prohibit the discussion of marijuana; *it condemns expression of a particular viewpoint*." *Id*. (emphasis added). Recognizing that "[s]uch condemnation of particular views is especially troubling in the First Amendment context," *id*., the Court held that the policy had to have "the requisite 'narrow specificity'" in order to pass muster under the First Amendment. 309 F.3d at 639 (citation omitted). As this Court stated in *Pickup*, "under *Conant*, content- or viewpoint-based regulation of communication *about* treatment must be closely scrutinized. But a regulation of only *treatment itself*—whether physical medicine or mental health treatment—implicates free speech interests

only incidentally, if at all." 740 F.3d at 1231 (emphasis in original).

Here, while the Act does not *condemn* the expression of a particular viewpoint, it *mandates* the expression of the government's viewpoint, *i.e.*, the "forward-thinking" idea that abortion is an appropriate alternative to carrying a child to term and that, at least in some circumstances, abortion should be free. Indeed, there can be no serious dispute that the Act is a regulation mandating speech *about* available pregnancy services, not a regulation of those *services themselves*.

The panel decision's efforts to distinguish *Conant* fail. Slip op. at 21-22. First, as just discussed, the Act is similar in kind to (indeed worse than) the statute at issue in *Stuart*. Both compulsions of speech seek to further the viewpoint of the government. Second, it is irrelevant whether the Act applies to all clinics (with two exceptions), regardless of their stance on abortion or contraception. *Id.* The policy at issue in *Conant* applied to *all* doctors. A government policy requiring a third party to speak an ideologically-based message is impermissible whether some or all have to speak it. In *Wooley*, *supra*, all noncommercial vehicles had to bear the words, "Live Free or Die," on a license plate. In

Barnette, *supra*, all teachers and students were required to recite the Pledge of Allegiance.

The panel decision conflicts with *Conant* and en banc review is necessary to resolve it.

III. The Panel Decision Conflicts with the Supreme Court's Decision in *Reed v. Gilbert*.

Just last year, in *Reed v. Gilbert*, *supra*, the Supreme Court enunciated the unequivocal rule that laws that are facially content-based must undergo strict scrutiny: "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified *only* if the government proves that they are narrowly tailored to serve compelling state interests." 135 S. Ct. at 2226 (emphasis added). The Court was clear that even where the government might have a "benign motive" or "content-neutral justification" for the law, that law is subject to strict scrutiny if it is content based on its face. *Id*. at 2228.

Despite correctly recognizing that AB 775 is content-based, the panel declined to apply strict scrutiny under *Reed*'s firm rule. Instead, relying on this Court's decision in *United States v. Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc), the panel stated that, "[s]ince

Reed, we have recognized that not all content-based regulations merit strict scrutiny." Slip op. at 22.

Swisher, however, only reiterates the longstanding principle that a content-based restriction on a "few historic and traditional categories" of speech, such as incitement, obscenity, defamation, etc. does not merit strict scrutiny. *Id*. at 313 (citation omitted). These categories of speech "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id*. (quoting *R.A.V.*, 505 U.S. at 382-83).

Neither *Swisher*, nor the Supreme Court decisions cited therein, make any mention of "professional speech" as one of those "few historic and traditional categories of speech" that have negligible First Amendment protection; nor does *Swisher* mention professional speech as a category deserving anything less than full First Amendment protection.

In *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016), another post-*Reed* decision, this Court suggested that *Reed*'s teaching would not apply to "commercial speech or speech that falls within one of a few traditional categories which receive lesser First Amendment

protection," *id.* at 903, n.5, but again, no exception for professional speech is recognized.

This is not surprising. As the Fifth Circuit recently recognized, in a post-*Reed* decision, "[t]he Supreme Court has never formally endorsed the professional speech doctrine." *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). And in *Reed* itself, the Supreme Court noted that although the case of *NAACP v. Button*, 371 U.S. 415 (1963), predated its "more recent formulations of strict scrutiny,"

> the Court rightly rejected the State's claim that its interest in the "*regulation of professional conduct*" rendered the statute consistent with the First Amendment, observing that "it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression."

Reed, 135 S. Ct. at 2229 (quoting *Button*, 371 U.S. at 438-39) (emphasis added).

In fact, the notion that *Reed* requires strict scrutiny in the professional speech context is an issue other federal courts of appeal are currently deciding. In *Wollschlaeger v. Governor of Fla.*, 814 F.3d 1159 (2015), *vacated by, rehearing en banc granted by Wollschlaeger v. Governor of Fla.*, No. 12-14009 (11th Cir., Feb. 3, 2016), the Eleventh Circuit did not have to decide the "difficult question" of whether

professional speech should be afforded less protection than strict scrutiny in light of *Reed*, because it held that the statute at issue satisfied any level of scrutiny. *Id*. at 1186.

Reed is clear: content-based regulations of speech trigger strict scrutiny. The panel's decision not to apply strict scrutiny to the Act, per *Reed*, conflicts directly with that decision.[4]

IV. The Panel Decision Conflicts with the Supreme Court Decisions in *Riley* and *In re Primus*.

The panel decision independently conflicts with two other Supreme Court decisions regarding regulations imposed on professionals: *Riley* and *In re Primus*.

In *Riley*, the Supreme Court addressed, in part, a North Carolina statute requiring *professional* fundraisers to disclose, prior to any solicitation, "the average percentage of gross receipts actually turned

[4] The concurrences in *Reed*'s judgment understood the sweeping nature of the majority's decision: "In my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an *automatic strict scrutiny trigger*." *Id*. at 2234 (Breyer, J., concurring in the judgment) (emphasis added); *id*. ("to use the presence of content discrimination *automatically* to trigger strict scrutiny . . . goes too far") (emphasis added); "[T]he majority insists that applying strict scrutiny to *all* [content-based laws] is 'essential' to protecting First Amendment freedoms." *Id*. at 2237 (Kagan, J., concurring in the judgment) (emphasis added).

over to charities by the fundraiser for all charitable solicitations." *Id.* at 786. Even assuming, without deciding, that the "professional's speech" might be commercial, the Court applied "exacting First Amendment scrutiny," *i.e.*, strict scrutiny, which the statute failed. Not only did the Court not apply a lesser standard of review regarding the statute's impact on a "professional's speech," the Court held that any distinction between "compelled statements of opinion" and "compelled statements of 'fact'" was irrelevant—"either form of compulsion burdens protected speech." *Id.* at 797-98.

The panel decision, applying less than strict scrutiny to AB 775's compelled message that must be spoken by a "professional," and its emphasis on the "merely" factual nature of that message, is irreconcilable with *Riley*.

The panel decision also conflicts with *In re Primus*. There, the Supreme Court held that free legal services for the purpose of the "advancement" of a pro bono attorney's "beliefs and ideas" were entitled to a greater degree of First Amendment protection than that afforded attorneys engaged in legal practice for pecuniary gain. 436 U.S. at 438, n.32. While "a showing of potential danger may suffice" in regulating

solicitations by attorneys in the commercial context, that did not hold true for the pro bono attorney acting on behalf of the ACLU and its mission. *Id*. at 434. Instead, the Court required the government to show a "compelling" interest and "close" tailoring. *Id*. at 432.

The panel states that Plaintiffs' non-profit status does not transform them into an organization that engages in "political expression and association," akin to a public interest lawyer. Slip op. at 31. This misses the gravamen of the Court's decision in *Primus* and mischaracterizes Plaintiffs' nature and mission.

Plaintiffs have not simply "positioned themselves in the marketplace as pregnancy centers," slip op. at 31, in order to generate income, to be governed by nothing more than applicable rules of ethics governing such clinics. Like pro-bono attorneys who advance a moral, religious, social cause through the regulated and licensed practice of law, Plaintiffs seek to advance their moral, religious, and social message through the regulated and licensed practice of medicine. In an effort to further that cause, Plaintiffs—like pro bono, civil liberty attorneys—do not charge their clients for the services they provide. In short, Plaintiffs are the pregnancy care analogues of public interest

legal providers, warranting a more rigorous level of constitutional scrutiny on the Act than that applied to laws regulating those who engage in medicine for paying clients and monetary gain.[5]

This, of course, does not mean that non-profit licensed clinics, such as Plaintiffs, are not subject to reasonable government and agency regulations. *See Primus*, 436 U.S. at 439. It only means that when the government, as California has done here, compels them to speak a content or viewpoint-based message contrary to their religious and moral beliefs, that compulsion—like the compulsion of professional fundraisers in *Riley*—must satisfy strict scrutiny.

V. The Panel Decision Radically Expands the Nature of Professional Speech in Conflict with *Pickup*.

Even assuming the validity of a professional speech doctrine, *see supra*, Sec. III, the panel decision's explication of that doctrine conflicts with this Court's decision in *Pickup*, *supra*.

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[5] As the panel observes, slip op. at 31, n. 8, its decision on this point conflicts with that of the Fourth Circuit in *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) ("under the professional speech doctrine, the government can license and regulate those who would provide services to their clients *for compensation* without running afoul of the First Amendment") (emphasis added).

In *Pickup*, as discussed in the panel decision, this Court held that the "midpoint" of its continuum for evaluating the free speech rights of professionals, specifically physicians, is that which takes place "within the confines of a professional relationship." 740 F.3d at 1228. The professional speech doctrine therefore applies to the "[o]ne who takes the affairs of a client *personally in hand* and purports to exercise judgment on behalf of the client in the light of the client's *individual needs and circumstances*." *Id.* at 1228-29 (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) (emphasis added). As Justice White further opined:

> Where the *personal nexus* between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any *particular individual* with whose circumstances he is *directly acquainted*, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such. . .

Id. at 1227 (quoting *Lowe*, 472 U.S. at 232 (White, J., concurring)) (emphasis added).

Contrary to the limitations of the boundaries of professional speech set forth in *Pickup* (a one-on-one relationship between a specific professional in communication with a specific patient regarding that

patient's individual and particular circumstances), the panel decision holds that *all* speech "related to the clinics' professional services" within the four walls of a licensed facility, by *any* employee within those walls, falls within the boundaries of professional speech and is, thus, subject to intermediate, not strict, scrutiny. Slip op. at 29.

This new and sweeping of understanding of what professional speech involves cannot be squared with this Court's decision in *Pickup*. It radically expands the boundaries of that speech doctrine beyond the discrete professional-client interaction so that, as here, content-based compulsions of speech *prior* to that relationship being established and individual needs being addressed (indeed, even before the client sees a licensed professional), are not subject to strict scrutiny. Indeed, the Act's mandated speech is to be shared with *all* clinic visitors, before being seen by an actual professional, or even if the visitor does not need to be seen by a nurse or doctor. *See* Cal. Health & Safety Code §123472(a)(2) (describing the three ways the notice can disseminated).

The Act therefore extends *Pickup* by going beyond the regulation of *treatment*, *see Pickup*, 740 F.3d at 1231, to turning charitable professionals into *billboards for the government's message* of

alternatives. It would be like requiring abortion providers to include in their ads and lobbies reference to an information line on free abortion alternatives, or making the *Riley* fundraisers notify their audience about other existing programs to serve the blind that do not require donor support.

Expanding the professional speech doctrine to involve more than the speech between a professional and the client (here, to all speech within the licensed facility) is to sweep within its ambit any number of state prohibitions and compulsions on speech. It would permit the government to regulate what pamphlets or magazine an attorney may include in a sitting area. It would allow the government to regulate what kinds of personal signs or posters a doctor may wish to place in a waiting room. There is no reason, under the panel's rationale, why a lawyer could not be compelled to tell prospective clients seeking legal services, "You might find a cheaper lawyer elsewhere. Shop around." To place regulations like these under a professional speech rubric goes well beyond any understanding this Court has previously taken with respect to that doctrine.

CONCLUSION

This Court should grant the petition for rehearing en banc.

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CERTIFICATE OF COMPLIANCE

[Pursuant to Circuit Rules 35-4 and 40-1]

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X Proportionately spaced, has a typeface of 14 points or more and contains 4,192 words (petitions and answers must not exceed 4,200 words).

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s/ Francis J. Manion
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Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

9th Circuit Case Number: 15-17497

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 28, 2016.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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