Written Testimony of Natalie M. Hejran, Esq.
Staff Counsel, Americans United for Life
Against S.B. 144
Submitted to the Joint Committee on Public Health
March 9, 2020

Dear Chair Abrams, Chair Steinberg, and Members of the Committee:

My name is Natalie Hejran, and I serve as Staff Counsel at Americans United for Life (AUL), the oldest and most active pro-life nonprofit advocacy organization. Established in 1971, AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death, as well as for the free speech rights of pro-life pregnancy centers. AUL has represented pro-life pregnancy centers and medical professionals in briefs before the U.S. Supreme Court in *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*")[1] and *First Resort v. Herrera*.[2]

Thank you for the opportunity to testify against S.B. 144, an Act concerning the alleged "deceptive" advertising practices of "limited service" pregnancy centers. It is my legal opinion that the Act violates the First Amendment by singling out and targeting pro-life pregnancy centers and chilling protected speech. It purports to address deceptive advertising when in reality it would only subject these pregnancy centers to harassment and burdensome legal fees.

S.B. 144 singles out pro-life pregnancy centers.

S.B. 144 singles out pro-life, and only pro-life, pregnancy centers. The Act's provisions apply only to a "limited services pregnancy center," which is defined as a facility that does not "directly provide or provide referrals for abortions or emergency contraception." Sec. 1(7).

Despite defining "pregnancy services center" broadly as a facility that has "the primary purpose . . . to provide services to clients who are or have reason to believe they may be pregnant," the sole qualification to be considered a "full services" pregnancy center is referring for abortion

[1] Brief *Amicus Curiae* of the American Association of Pro-Life Obstetricians & Gynecologists et al. in Support of Petitioners, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), https://aul.org/wp-content/uploads/2018/10/AUL-Amicus-Brief-NIFLA-Becerra.pdf.
[2] Brief *Amicus Curiae* of Heartbeat International, Inc. in Support of Petitioner, *First Resort, Inc. v. Herrera*, No. 17-1087 (U.S. March 5, 2018), https://aul.org/wp-content/uploads/2018/10/20180305165317599_USSC-17-1087-Amicus-Brief-of-Heartbeat-International.pdf.

or emergency contraception. In its definition of "pregnancy services center," the Act lists the requirements that qualify a facility as such a center. It either "offers obstetric ultrasounds, obstetric sonograms, pregnancy testing or diagnosis or prenatal care to pregnant clients" or it "has the appearance of a medical facility" indicated by two or more specific factors: staff or volunteers who "wear medical attire and uniforms," examination tables, "private or semiprivate" rooms with medical supplies or instruments, staff or volunteers who "collect health information from clients," or "the facility is located on the same premises as a licensed health care facility or licensed health care provider or shares facility space with a licensed health care provider." Sec. 1(9).

Noticeably absent from this is the provision of or referrals for abortion and emergency contraception. If a facility *only* refers for abortion or emergency contraception and does not provide any other services—such as ultrasounds, sonograms, pregnancy tests, referrals for adoption, or material assistance for new mothers—it is not considered a "limited services pregnancy center." *See* Sec. 1(7). But, if a facility offers *all* of those other services, but does *not* refer for abortion or emergency contraception, it is considered to have "limited services." This absurd result can only be explained by an attempt to purposely single out pro-life pregnancy centers, since they are the only facilities that cannot, for reasons of conscience or conviction, provide referrals for abortion or emergency contraception.[3]

Further, offering referrals for abortion or emergency contraception is insufficient to qualify a facility as a "pregnancy services center." But not providing referrals, while providing other pregnancy-related services, is sufficient to qualify the facility as a "limited services pregnancy center." This inconsistency can only be explained by the transparent intent of singling out pro-life pregnancy centers. Under this Act, a facility that does not provide referrals for abortions would be opened up to harassing lawsuits, while a facility only referring for abortion would remain unbothered.

S.B. 144 targets pro-life pregnancy centers because of their pro-life views.

S.B. 144 singles out and targets pro-life pregnancy centers because of their pro-life views. In *NIFLA,* the Supreme Court explained that the Court is "deeply skeptical" of regulations that target speakers, not speech, and that distinguish among different speakers, effectively allowing speech by some but not others.[4] A law's underinclusiveness raises "serious doubts" that the

[3] Hypothetically, there could be a non-pro-life pregnancy center that does not provide referrals for abortion or emergency contraception, but if such a center did exist, it could easily exclude itself from the contours of the Act by now providing referrals for abortion or emergency contraception. It is only the pregnancy centers that hold pro-life views who will be unable, for reasons of conscience and conviction, to self-exempt from the Act's requirements.
[4] *NIFLA*, 138 S. Ct. at 2378. Although *NIFLA* involved a law that was different from S.B. 144, its principles still apply. Likewise, just because the Supreme Court denied certiorari in *First Resort*, does not mean that it agrees with the Ninth Circuit's opinion that San Francisco's Ordinance does not violate the First Amendment.

government is not "disfavoring a particular speaker or viewpoint."[5] On its face, the Act does little to hide its true purpose. The Statement of Purpose declares that the Act seeks to "prohibit deceptive advertising practices by limited services pregnancy centers." In other words, the explicit purpose of the Act is to target pro-life pregnancy centers. In effect, the Act does not prohibit deceptive statements by *all* pregnancy centers and does not apply to *all* pregnancy centers that offer limited services, but to *only* pregnancy centers that do not refer for abortion or emergency contraception. The Act's blatant underinclusiveness reveals that the Act's purpose is to disfavor a particular speaker or viewpoint, particularly pro-life pregnancy centers and the pro-life viewpoint.

S.B. 144 is overbroad, vague, and chills constitutionally protected speech.

As written, S.B. 144 is overbroad since it goes much further than prohibiting just deceptive advertising practices. First, the Act is overbroad since it applies to all "limited services" pregnancy centers regardless whether they advertise at all. *See* Sec. 2 ("No limited services pregnancy center shall make or disseminate before the public, or cause to be made or disseminated before the public . . . ."). Second, the Act is overbroad since it is not limited to advertising as it prohibits "*any* statement concerning *any* pregnancy-related service or the provision of any pregnancy-related service" that is "deceptive" Sec. 2 (emphasis added).

"Deceptive" is not defined and thus both vague and overbroad. It is unclear whether the standard for determining whether a statement is "deceptive" is an objective standard based on what a reasonable person would think or a subjective standard based on how a potential client allegedly feels. The Act also goes one step further and prohibits statements "that a limited services pregnancy center knows or *reasonably should know* to be deceptive." Sec. 2 (emphasis added). This vague and expansive definition of prohibited speech unconstitutionally covers protected speech.

Moreover, the Act is unnecessary to prevent deceptive advertising. Connecticut already has a statute that prohibits false advertising in commerce. *See* Conn. Gen. Stat. § 42-110b. The Act's overbroad and vague regulation of speech will only serve to chill protected speech by pro-life pregnancy centers and keep the pregnancy centers from helping the very women the Act claims to protect.

S.B. 144 is content-based, viewpoint discriminatory speech regulation and subject to strict scrutiny.

Speech regulations, such as S.B. 144, are content-based when they cannot be "justified without reference to the content of the regulated speech," or were "adopted by the government

[5] *NIFLA*, 138 S. Ct. at 2376 (quoting *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 802 (2011)).

'*because of* disagreement with the message [the speech] conveys.'"[6] Viewpoint-based regulations are a "more blatant" and "egregious form of content discrimination" and occur when the government regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[7] In his *NIFLA* concurrence, Justice Anthony Kennedy (joined by Chief Justice John Roberts and Justices Samuel Alito and Neil Gorsuch) pointed out that "viewpoint discrimination [wa]s inherent in the design and structure of [California's] Act" since "the State require[d] primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions."[8] Both content-based and viewpoint discriminatory regulations are subject to strict scrutiny.[9] To satisfy strict scrutiny the government must prove that the speech regulation "furthers a compelling governmental interest and is narrowly tailored to that end."[10]

The Act is content-based and viewpoint discriminatory because the law cannot be justified without reference to the content of pro-life pregnancy centers' speech and was proposed because of disagreement with pro-life pregnancy centers and their pro-life viewpoint. Viewpoint discrimination is inherent in the design and structure of S.B. 144 because it singles out and targets pro-life pregnancy centers and pro-life views. As such, the Act is subject to strict scrutiny.[11]

S.B. 144 fails strict scrutiny and violates the First Amendment.

S.B. 144 singles out and targets pro-life pregnancy centers and pro-life views. Because the Act is a remedy in search of a problem, Connecticut has no compelling governmental interest in regulating *only* pro-life pregnancy centers' speech. In addition, the speech regulation is not narrowly tailored to combat the alleged purpose of preventing "deceptive advertising." As a result,

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[6] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (alteration in original) (emphasis added) (citing *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)).
[7] *Id.* at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995)); *see also NIFLA*, 138 S. Ct. at 2378 (Kennedy, J., concurring) (writing to "underscore that the apparent viewpoint discrimination [by California was] a matter of serious constitutional concern").
[8] *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).
[9] *See Reed*, 135 S. Ct. at 2227; *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 658 (1994).
[10] *Reed,* 135 S. Ct. at 2231.
[11] Classifying the speech as "commercial" or "professional" speech does not change the level of scrutiny. The Supreme Court has held that, even within the context of commercial speech, the government has no authority to selectively regulate speech since commercial speech is not an exception from the general prohibition on viewpoint discrimination and strict scrutiny. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) ("[I]t is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance."); *Matel v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring) ("[V]iewpoint based discrimination . . . necessarily invokes heightened scrutiny," and "remains of serious concern in the commercial context."); *id.* at 1769 (Thomas, J., concurring) (even content-based regulations of commercial speech should be subject to strict scrutiny). And the Court in *NIFLA* refused to adopt "professional speech" as a separate category of speech that is subject to lesser scrutiny. *NIFLA*, 138 S. Ct. at 2375 ("[N]either California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.").

the Act both regulates protected speech and will lead to the chilling of other protected speech. In sum, S.B. 144 fails strict scrutiny and violates the First Amendment.

S.B. 144's remedies allow for unconstitutional targeting, harassment, and silencing of pro-life pregnancy centers and pro-life views.

S.B. 144's statutory remedies open up pro-life pregnancy centers for targeting and harassment. The Act provides that Connecticut's Attorney General may sue a pro-life pregnancy center for allegedly violating the Act. Sec. 3(a). Connecticut's unfettered ability to bring suit, coupled with the expansive and undefined nature of the speech prohibited, opens up pro-life pregnancy centers to targeting and harassment by an Attorney General who may not share or tolerate their views.

The Act provides several remedies for violating its speech restrictions, including forcing pregnancy centers to "pay for and disseminate appropriate corrective advertising" and "post[ing] a remedial notice that corrects the effects of the deceptive advertising." Sec. 3. In general, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to . . . rigorous scrutiny."[12] For example, in *NIFLA*, the Supreme Court found that requiring pregnancy centers to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them" violated the First Amendment.[13] The California law at issue in *NIFLA* is "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression" and a law that "imperils" the freedom of speech, thought, and belief.[14] Likewise, the Fourth Circuit Court of Appeals found that a Baltimore City ordinance which required pregnancy centers that do not offer or refer for abortions to disclose that fact through signs posted in their waiting rooms violated the First Amendment.[15] Since S.B. 144's remedies compel speech, something the government likely cannot do directly, the remedial speech regulations would likely be subject to strict scrutiny and found to violate the First Amendment.

In addition, pregnancy centers found in violation of the Act are subject to monetary penalties, as well as attorney's fees and costs. *See* Sec. 3(c). These fines and fees would not only funnel money away from the good work pregnancy centers do to help Connecticut women who are pregnant, but merely one such lawsuit could financially cripple and shut down the offending pro-life pregnancy center since most offer their services at low cost or free of charge, are funded

[12] *Turner Broad. Sys.*, 512 U.S. at 642.
[13] *NIFLA*, 138 S. Ct. at 2371.
[14] *Id.* at 2379 (Kennedy, J., concurring).
[15] *See Greater Balt. Pregnancy Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101 (4th Cir. 2018).

mainly by donations, and are staffed by unpaid volunteers. In the end, this would harm the women of Connecticut who need to rely on pro-life pregnancy centers for care and support.

This Committee should reject S.B. 144.

In conclusion, the Act is an effort to silence pro-life pregnancy centers' pro-life viewpoint and stifle their work. While Connecticut can disagree with pregnancy centers' pro-life speech, it cannot constitutionally suppress their free speech by government fiat under the First Amendment. Therefore, this Committee should reject S.B. 144.

Respectfully,

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