NEW JERSEY STATE LEGISLATURE
* *Office of* LEGISLATIVE SERVICES *

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February 21, 2024

Honorable Jay Webber
160 Littleton Rd., Suite 204
Parsippany, NJ 07054

Dear Assemblyman Webber:

This legal opinion is in response to your request, through Robert Quinn of your district office, for a legal opinion concerning the constitutionality of a pending bill, A861 (Reynolds-Jackson/Park/Hall), which, per its synopsis, "[p]rovides [that] certain deceptive practices in advertising of pregnancy-related services violate the consumer fraud act."[1] This request was prompted in part by a recent decision of the U.S. District Court for the Northern District of Illinois, Nat'l. Inst. of Fam. & Life Advocates v. Raoul, Docket No. 23-cv-50279, 2023 U.S. Dist. LEXIS 145807 (N.D.Ill. Aug. 4, 2023), which issued a preliminary injunction enjoining the enforcement of a 2023 Illinois statute, P.L.103-0270 (also referred to as Senate Bill 1909), which contains provisions similar to A861.

A861 prohibits nonprofit, pro-life crisis pregnancy centers from making false or misleading advertisements or other such communications about abortion, contraception, and other pregnancy-related services. While OLS cannot predict the outcome of any constitutional litigation, a review of the bill and relevant case law indicates that the bill's potential constitutionality under a First Amendment challenge would be decided under either the U.S. Supreme Court's developed standard for permissible regulation of "commercial speech" or its more heightened "strict scrutiny" standard concerning non-commercial, protected speech.

[1] Identical bill, S2522 (Turner/Ruiz).

The bill would likely be examined using the strict scrutiny standard, unless the evidentiary record in a lawsuit showed that the advertising and other speech about pregnancy-related services by nonprofit crisis pregnancy centers was economically motivated in a commercially competitive context to make it possibly subject to regulation as commercial speech. This, however, appears to be a somewhat doubtful outcome based upon the reasoning of the majority of court decisions from other jurisdictions that applied strict scrutiny to speech regulations similar to A861. Under the strict scrutiny standard, the State would be burdened with proving the bill is narrowly tailored to serve a compelling interest. If strict scrutiny is applied to A861, based on the strict scrutiny court reviews from other jurisdictions, the bill would likely be ruled unconstitutional, due to it not being narrowly tailored, or serving a compelling interest that is actually, and not hypothetically, under threat by false or misleading crisis pregnancy center speech.

Bill Background

A861 supplements the Consumer Fraud Act ("CFA"), N.J.S.A.56:8-1, et seq., by making it an unlawful practice for a crisis pregnancy center to "(1) make, publish, disseminate, [...] an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to pregnancy-related services or the provision of pregnancy-related services which is untrue, deceptive, or misleading; or (2) make false or misleading statements about, or misrepresent the center's intent to provide, pregnancy-related services." The bill provides definitions for "crisis pregnancy center" and "pregnancy-related services" which establish the scope of its application.

Under the bill, a "crisis pregnancy center" is "a facility administered by a nonprofit organization that provides a client with peer-related counseling services related to pregnancy and childbirth, including, but not limited to, referrals to non-medical services, child-rearing resources, and adoption services, but does not provide referrals to abortion or other pregnancy-related services." A "crisis pregnancy center" also includes "a facility that presents the appearance of a licensed health care facility by: requiring staff or volunteers to wear medical attire or uniforms and to collect from a client identifiable health information [...]; having one or more examination rooms or semi-private rooms or areas containing medical supplies or medical instruments; or sharing physical space with a physician's office or a licensed health care facility."

The definition of "crisis pregnancy center" expressly excludes licensed health care facilities, ambulatory care facilities, and birthing facilities that provide "family planning services and prenatal care." The latter two types of facilities, like health care facilities, are required to be licensed by the Department of Health. *See* N.J.S.A. 26:2H-12, sub. a. ("No . . . health care facility shall be operated unless it shall [] possess a valid license."); N.J.A.C. 8:43A-1.3 ("'Ambulatory care facility' means a health care facility or a distinct part of a health care facility in which . . . persons . . . receive services and depart from the facility on the same day."); N.J.A.C. 8:57-3.3 ("'Birthing facility' means a health care facility that provides birthing and newborn care services and includes birth centers."); N.J.A.C. 8:43G-19.1 ("'Birth center' means an ambulatory care facility or distinct part of a facility" providing routine prenatal and childbirth services).

In accordance with the definition, crisis pregnancy centers may be narrowly described as being unlicensed operations, associated with nonprofit organizations, that provide peer-related counseling which includes referrals generally related to services supporting pregnancy and childbirth but not referrals for abortions or "other pregnancy-related services."

The bill defines "pregnancy-related services" as "any medical services or health care counseling services related to pregnancy or pregnancy prevention, including, but not limited to, ultrasound or sonogram evaluations, pregnancy testing, prenatal care, and education and counseling on contraception and unplanned pregnancy options." Combining this definition with the definition of "crisis pregnancy center," these services, which may include services to prevent or terminate pregnancies, are not provided by crisis pregnancy centers, nor do such centers make referrals for these services, but these services may be provided by, or recommended based on referrals from, licensed health care facilities, ambulatory care facilities, and birthing facilities.

Thus, under the bill, the potential communications described as an unlawful practice under the CFA are only those made by an unlicensed crisis pregnancy center that neither performs nor makes referrals for abortions or other "pregnancy-related services" as heretofore described. As such, the bill's scope does not reach any communications made by those licensed facilities that may perform or make referrals for such services.

The Attorney General, who has broad investigatory and enforcement authority pursuant to the CFA, is charged with enforcing the bill's provisions. The Attorney General may seek injunctive relief to cease an unlawful practice regarded as an untrue, deceptive, or misleading communication by a crisis pregnancy center. *See* section 3 of A861 and N.J.S.A. 56:8-8. The CFA also provides for monetary penalties, N.J.S.A. 56:8-13, plus it permits individuals who suffer a loss due to an unlawful practice to sue and recover treble damages, together with attorney's fees and costs of suit, N.J.S.A. 56:8-19.

A861 is similar to legislation proposed or enacted in other jurisdictions that seek to regulate certain communications by crisis pregnancy centers. These include Illinois P.L.103-0270 (SB 1909),[2] California Assembly Bill 775 (enacted as Laws of 2015, c.700),[3] Baltimore, Maryland Ordinance 09-252 (2009),[4] San Francisco, California Admin. Code c.93, ss.93.1 to 93.5 (2011),[5] New York Assembly Bill 7084 (2023), Massachusetts House Bill 377 and Senate Bill 174 (2023), Maine House Bill 1137 (2023), Vermont House Bill 254 (2023), and North Carolina House Bill 740 (2023), among others.

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[2] Preliminarily enjoined from enforcement, Nat'l Inst. of Fam. & Life Advocates v. Raoul, Docket No. 23-cv-50279, 2023 U.S. Dist. LEXIS 145807 (N.D. Ill. Aug. 4, 2023).

[3] On application for preliminary injunction, First Amendment challenge was likely to succeed, Nat'l. Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[4] Summary judgment holding that ordinance violated First Amendment, Greater Balto. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balto., 879 F.3d 101 (4th Cir. 2018).

[5] Upheld as constitutional regulation of commercial speech, First Resort, Inc. v. Herrera, 80 F.Supp.3d 1043 (N.D. Cal. 2015), *aff'd*, 860 F.3d 1263 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2709 (2018).

In the context of the national debate on abortion, this legislation may potentially be driven by a concern "that women seeking abortions might be misled into visiting pro-life pregnancy centers and delaying the abortion." Greater Balto. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balto., 879 F.3d 101, 106 (4th Cir. 2018). A861 is particularly similar to the overturned Illinois statute, as well as the Massachusetts, Vermont, and North Carolina bills, in seeking to regulate the speech of crisis pregnancy centers using consumer fraud laws. However, unlike the overturned California statute and Baltimore ordinance, A861 does not require crisis pregnancy centers to post signs or make affirmative disclosures concerning abortion.

Constitutional Analysis: Consumer Fraud and Commercial Speech

A861 potentially implicates the right of free speech under the New Jersey State Constitution, Article I, para. 6, and under the First Amendment of the U.S. Constitution, in that it seeks to regulate certain speech based on its content (i.e., statements about "pregnancy-related services") and the identity of its speaker (i.e., a "crisis pregnancy center"). Under Article I, para. 6 of the State Constitution, "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." Under the First Amendment of the U.S. Constitution, "Congress shall make no law [...] abridging the freedom of speech, or of the press." The First Amendment is applicable to State law through Section 1 of the Fourteenth Amendment, whereby "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; [...] nor deny to any person within its jurisdiction the equal protection of the laws."

As A861 seeks to regulate the speech of crisis pregnancy centers under the aegis of the CFA, the free speech analysis begins with how speech may be regulated in the CFA context. In Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 72-74 (1985), the New Jersey Supreme Court held a CFA regulation concerning automobile advertising to be constitutional in that the advertising was commercial speech entitled to less protection than other constitutionally guaranteed expression, and the State had a legitimate interest in facilitating honest commercial transactions through the restriction of false, deceptive, and misleading speech. *Accord* Zauderer v. Ofc. of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading [...]." (internal citations omitted)). Thus, in a First Amendment challenge, a threshold question for the court will likely be whether A861 regulates commercial speech.

As the New Jersey Supreme Court stated in E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 569 (2016), "commercial speech has been defined as 'expression related solely to the economic interests of the speaker and its audience[,]' or 'speech proposing a commercial transaction[.]'" (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n., 447 U.S. 557, 561-62 (1980)). In determining whether speech is commercial, courts make a "commonsense distinction between speech proposing a commercial transaction ... and other varieties of speech," using a three factor test: "(1) is the speech an advertisement; (2) does

the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech." Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1017 (3d Cir. 2008) (quoting, respectively and in pertinent part, In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 792 (3rd. Cir. 1999) (quoting other sources) and U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 933 (3d Cir. 1990)).

"An affirmative answer to *all three questions* provides 'strong support' for the conclusion that the speech is commercial." Id. (internal citations omitted, emphasis added). However, each of the three characteristics need not "necessarily be present in order for speech to be [considered] commercial." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 n.14 (1983).

U.S. Healthcare cautions that "advertising pure and simple" cannot be elevated to the level of higher protection given to non-commercial speech "simply because they include statements about issues of public debate and concern." U.S. Healthcare, 898 F.2d at 937. However, where a nonprofit organization's solicitation is "inextricably" "intertwined with informative and perhaps persuasive speech," a court may refuse to dissect the speech to separately evaluate its commercial and non-commercial parts, and instead will likely deem its entirety to be protected non-commercial speech. Riley v. Nat'l. Fed'n. of the Blind, 487 U.S. 781, 796 (1988) (quoting Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980)).

In Greater Balto., 879 F.3d at 106, 108, the U.S. Fourth Circuit Court of Appeals held that the plaintiff, a nonprofit crisis pregnancy center that advertised the services it offered without "expressly broadcast[ing] its religious opposition to abortion,"[6] was not engaging in commercial speech because "[a] morally and religiously motivated offering of free services cannot be described as a bare 'commercial transaction.'" Further, responding to efforts by the city to characterize the center's advertising as economically motivated commercial speech because attracting more clients would help drive fundraising efforts, the court found "the relationship here between clinic patronage and fundraising is too attenuated to amount to 'economic motivation.'" Id. at 109.

However, the court in Greater Balto. nevertheless acknowledged that under certain circumstances regulation targeting false advertising of services offered by crisis pregnancy centers could be constitutional regulation of commercial speech. Id. at 108, 112-113 (citing First Resort, Inc. v. Herrera, 80 F.Supp.3d 1043 (N.D. Cal. 2015), *aff'd*, 860 F.3d 1263 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2709 (2018), and Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986)). Notably, in First Resort, the U.S. Ninth Circuit Court of Appeals upheld San Francisco's ordinance prohibiting false advertising in part because it was conceded that the plaintiff, a nonprofit crisis pregnancy center, did engage in advertising in a commercial context to compete with abortion providers, and did provide certain pregnancy-related services, such as pregnancy testing, ultrasounds, and nursing consultations, that had economic value even though they were provided free of charge. First Resort, 860 F.3d at 1274 and 1276.

[6] Examples cited by the court included a 2010 campaign using advertisements on Baltimore buses: "FREE Abortion Alternatives"; "FREE Confidential Options Counseling"; "FREE Pregnancy Tests;" and "FREE Services." Greater Balto., 879 F.3d. at 106 (emphasis in original).

The San Francisco ordinance in First Resort defines a "pregnancy services center" as "a facility, licensed or otherwise, and including mobile facilities, the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility," and defines a "limited services pregnancy center," more commonly referred to as a crisis pregnancy center, as "a pregnancy services center, [...] that does not directly provide or provide referrals to clients for the following services: (1) abortions; or (2) emergency contraception."[7]

The San Francisco ordinance made a legislative finding, later substantiated in court, that crisis pregnancy centers "often purchase 'pay per click' ads on online search services such as Google for terms such as 'abortion,' so that persons searching for abortion services will see a link and advertisement for the [crisis pregnancy center] at the top of the results page."[8] First Resort, 860 F.3d at 1274 and 1276. Under these specific findings and definitions, First Resort held that speech concerning the services that a "limited services pregnancy center" intended to provide was advertising subject to regulation as commercial speech, thus permitting the prohibition against any false or misleading advertising. Id.

By contrast, the content of the speech regulated by A861 concerns "pregnancy-related services," which by the bill's own definitions are services that crisis pregnancy centers do *not* provide or recommend by referral. Additionally, while the upheld San Francisco ordinance applies to both licensed and unlicensed entities, under A861, a crisis pregnancy center "shall not include [a licensed] ambulatory care facility, a licensed health care facility, or a [licensed] birthing facility."

This distinction between A861 and the San Francisco ordinance may be central to the commercial speech analysis, since the bill would not be regulating licensed and unlicensed facilities alike, and would not be directly regulating the advertising of a nonprofit crisis pregnancy center's own services. Instead, unless a factual record established that such nonprofit centers made statements and advertised in an economically motivated, commercially competitive context against abortion providers and other providers of "pregnancy-related services," like in First Resort, a New Jersey court is more likely to follow the holding of the Fourth Circuit's Greater Balto. decision and U.S. Supreme Court's Riley decision, in finding that the speech of these nonprofits, offering, per the bill's definitions, "peer-related counseling services," and not "medical services or [licensed] health care counseling services," is not purely commercial speech. Rather, the advertised offering of services by crisis pregnancy centers may be too "inextricably intertwined" with their protected morally and religiously motivated "persuasive" speech, *see* Greater Balto. 879 F.3d at 108, for A861 to be permissible commercial speech regulation under the First Amendment.

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[7] S.F. Admin. Code c.93, s.93.3.
[8] S.F. Admin. Code c.93, s.93.2.

In such a case, a court is likely to find that the commercial speech standard would be inapplicable to A861 and instead evaluate the bill under the more heightened strict scrutiny standard applicable to content-specific regulations.

Constitutional Analysis: Strict Scrutiny

If the speech being regulated falls outside the definition of commercial speech, and is being regulated because of the topic discussed or the idea or message expressed, then the law is subject to strict scrutiny "and may be justified only if the government proves that [the law is] narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (internal citations omitted). Even a facially content-neutral law will be considered content-based if it "cannot be justified without reference to the content of the regulated speech," or if the law was "adopted by the government because of disagreement with the message the speech conveys." Id. at 164 (internal citations omitted).

In examining content-based regulations through the "lens" of strict scrutiny, U.S. Supreme Court precedent is "deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others." Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. at 2378 (quoting Citizens United v. Fed Election Comm'n, 558 U.S. 310, 340 (2010)). "Government discrimination among viewpoints . . . is a more egregious form of content discrimination." Reed, 576 U.S. at 168-169 (internal quotation omitted). "Speaker-based laws run[] the risk that a State has left unburdened those speakers whose messages are in accord with its own views." Becerra, 138 S. Ct. at 2378 (internal quotation omitted).

As previously noted, A861 only attempts to target the communications of unlicensed crisis pregnancy centers that are characterized as false or misleading, subjecting the centers to being enjoined by injunction from making further remarks, monetary penalties, and civil damages under the CFA. *See* A861, section 3; N.J.S.A. 56:8-8, -13, and -19. It does not apply to communications made by the variety of facilities offering or recommending pregnancy-related services that are licensed and regulated by the Department of Health, and such licensed facilities appear to not fall under the purview of the CFA if they engaged in making false or misleading remarks about those services. *See* Hampton Hosp. v. Bresan, 288 N.J. Super. 372 (App. Div. 1996) (CFA does not apply to hospitals because State already heavily regulates their activities under the sole supervisory responsibility of the Department of Health). Outside the context of a commercial speech analysis, because A861 would regulate the content of speech made by a particular set of speakers it would likely be subject to strict scrutiny.

Under a strict scrutiny analysis, a court may be presented an argument by the State[9] to accept that the compelling State interest is a concern "that women seeking abortions might be misled into visiting pro-life pregnancy centers *and delaying the abortion.*" Greater Balto., 879

[9] A861 does not contain legislative findings and declarations, and the bill statement does not specify the sponsors' views or intent.

F.3d at 106 (emphasis added). However, as a side effect of the State's existing protections for the right to abortion, a court may be hard-pressed to find that the mitigation of any risk in delaying the timing of an abortion rises to the level of a compelling State interest. *See* Right to Choose v. Byrne, 91 N.J. 287 (1982) (right to abortion generally); Planned Parenthood of Cent. N.J. v. Verniero, 41 F.Supp.2d 478 (D.N.J. 1998), *aff'd sub nom.* Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000) (invalidating the "Partial-Birth Abortion Ban Act of 1997"); N.J.S.A.10:7-2 (reproductive choice rights codified in statute).

Alternatively, the State may be able to articulate a compelling interest, as a matter of public health, in ensuring that women who are or may be pregnant are provided at all times with accurate, non-misleading information. In the Greater Balto. case, the city's "stated goals in enacting the ordinance were to address allegedly deceptive advertising and *to prevent health risks that can accompany delays in seeking to end a pregnancy*," which the Fourth Circuit Court of Appeals acknowledged may rise to a compelling interest. Greater Balto., 879 F.3d at 111 (emphasis added); *see also* Raoul, 2023 U.S. Dist. LEXIS 145807, at *25 (citing Greater Balto.).

However, in that case, the otherwise valid public health reasoning failed because under the strict scrutiny analysis, the city could not prove that there was any evidence that such health risks were, in fact, under attack by potential false or misleading advertising. Greater Balto., 879 F.3d at 111. For A861, any attempt by the State to use the same reasoning to justify the bill's enactment would similarly have to provide sufficient evidence to the court to support its constitutionality. In any event, it would be impermissible for the State to declare the wholesale deterrence of people from visiting a crisis pregnancy center outright as a compelling interest.

Even if a compelling State interest can be articulated, A861 may nevertheless be found to be unconstitutional if the measures to achieve the compelling State interest are not sufficiently narrowly tailored. *See* Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 802, 804-805 (2011). In Brown, even though the State had a compelling interest in protecting children, a statute restricting a minor's access to "violent" video games was held to be not narrowly tailored where it was both underinclusive regarding the targeted form of expression, and overinclusive for covering too broad a category of persons. Id.

The statute in Brown was underinclusive because it focused on video games to the exclusion of other types of entertainment accessible to minors that may contain violent content. Id. It was found to be overinclusive because by restricting all minors, "its entire effect is only in support of what the State thinks parents *ought* to want," without regard to the First Amendment rights of minors whose parents did not object to young people playing violent video games (under the law, any adult could purchase and give a game to a minor); making minors dependent upon the on-going, affirmative actions of "consenting" adults in order to freely exercise their protected ability to experience violent video games was not sufficiently tailored to the compelling interest of protecting children. Id. (emphasis in original).

A861 provides that only a crisis pregnancy center is subject to punishable speech regulations regarding communications about pregnancy-related services, which services by

definition it does not provide. The bill limits the definition of "crisis pregnancy center" to only a facility administered by a nonprofit organization, and does not include a facility operated by any other form of organization or corporation, or operated by an individual. Additionally, while the definition includes "a facility that presents the appearance of a licensed health care facility," it excludes the actual licensed health care facilities and other licensed facilities at which pregnancy-related services are offered.

While a compelling State interest may be found concerning the regulation of health care professionals (*see*, *e.g.*, In re Polk, 90 N.J. 550, 565-566 (1982)), A861 does not propose a licensing scheme or a safe harbor from laws against the unlicensed practice of medicine. *See*, *e.g.*, N.J.S.A.45:9-18.1 (physician licensing not applicable to "persons practicing healing by spiritual, religious or mental means if no material medicine is prescribed or used and no manipulation or material means are used"). For its proposed regulation of speech, A861 may be found to be underinclusive in regulating only the speech of crisis pregnancy centers administered by nonprofits, as well as for its exclusion of the speech of the various licensed facilities providing and recommending pregnancy-related services, which entities as previously noted do not appear, based on Hampton Hosp. v. Bresan, 288 N.J. Super. at 372, to be subject to the CFA if they make false or misleading statements.

Underinclusivity based on not including certain parties performing the very services that are the subject of regulated speech was the conclusion reached in Raoul, 2023 U.S. Dist. LEXIS 145807, at *24, and was one reason the court overturned the Illinois statute. It noted that the Illinois statute subjected crisis pregnancy centers to civil penalties for allegedly untruthful statements about abortion services, but did not subject abortion providers to the same penalties.

Furthermore, the speech restrictions in section 2 of A861 may be overinclusive. As noted, crisis pregnancy centers by definition do not provide abortions or other pregnancy-related services that are provided by licensed facilities. Thus, section 2 of A861 could be better tailored to simply require a crisis pregnancy center to not tell false or misleading information about the counseling services that *it does offer*, as was upheld in the crisis pregnancy center speech restrictions reviewed in First Resort, 860 F.3d at 1273-1274. As currently drafted, section 2 of A861 may be found to be not narrowly tailored, in that it would regulate speech by crisis pregnancy centers about abortion and other pregnancy-related services in general, and not just those limited services which a crisis pregnancy center intends or does not intend to offer.

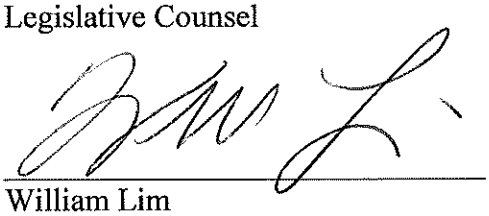
Because A861 does not contain legislative findings and declarations, if enacted in its current form, a court will have no initial guidance about a potential compelling State interest and be left to discern the compelling State interest under the bill, if any exists, using an evidentiary record developed through court filings, the discovery process, and evidentiary hearings. Research thus far has shown that in the last ten years, the only similar law that has been constitutionally upheld is the San Francisco ordinance in First Resort, which was decided by the court applying the lower commercial speech analysis, and that analysis did not require a finding of any compelling interest. Additionally, the court in First Resort was able to find that the ordinance's provisions

were consistent with its legislative findings and declarations, and that the legislative findings and declarations were supported by evidence adduced during litigation.

The strict scrutiny analysis requires not only a discernable State interest, but also a narrow tailoring of the law to serve that interest. If the heightened strict scrutiny analysis is applied, there is a strong likelihood that a court will find A861 both underinclusive and overinclusive similar to the Brown analysis concerning restrictions on minors' access to violent video games, and as such rule the bill unconstitutional as it is not sufficiently narrowly tailored to achieve a compelling State interest.

Very truly yours,

Gabriel R. Neville
Legislative Counsel

By: 
William Lim
Deputy Counsel

GRN/wl:

c. Senators Turner and Ruiz, and Assemblywomen Reynolds-Jackson, Park, and Hall, presented in accordance with the requirements of subsection h. of N.J.S.A. 52:11-61, as prime sponsors of the legislation or identical counterpart discussed in this opinion.