IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, et al.,	)	
Plaintiffs,	)	No. 16 CV 50310
v.	)	Judge Frederick J. Kapala
BRUCE RAUNER and BRYAN A. SCHNEIDER,	)	Magistrate Judge Iain D. Johnston
Defendants.	)	

BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The *amicus curiae*, the American Center for Law and Justice ("ACLJ"), submits this *amicus curiae* brief in support of Plaintiffs' Motion for Preliminary Injunction (Dkt. 35).

INTEREST OF *AMICUS CURIAE*

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law and the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States, the United States Court of Appeals for the Seventh Circuit, this Court, and other courts, and have participated as *amicus curiae*, in a number of significant cases involving abortion, the freedoms of speech and religion, and the Illinois Health Care Right of Conscience Act.[1]

This case is of particular importance to the ACLJ as it has represented, and is currently representing, clients in litigation involving speech-mandates imposed on crisis pregnancy centers ("CPCs"). For example, the ACLJ represented plaintiffs in *Evergreen Association, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), successfully challenging portions of a New York City law similar in purpose to the amendment to the Illinois Health Care Right of Conscience Act, Senate Bill 1564 (hereinafter "SB 1564"), at issue here.

The ACLJ also currently represents three California CPCs in *LivingWell Medical Clinic v. Becerra*, No. 15-17497, 2016 U.S. App. LEXIS 18532 (9th Cir. 2016), *petition for cert. filed*, No. 16-1153 (Mar. 20, 2017), a case challenging a California statute that requires such centers to

[1] *See, e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Lindsay v. HHS*, No. 1:13-cv-1210 (N.D. Ill. Mar. 20, 2013); *Hartenbower v. HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013); *Moncivaiz v. DeKalb Cnty. Health Dep't*, 3:03-cv-50226 (N.D. Ill. Mar. 12, 2004)); *Adamson v. Superior Ambulance Serv.*, No. 1:04-cv-3247 (N.D. Ill. May 7, 2004); *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (Ill. 2008).

speak against their conscience. In addition, the ACLJ recently appeared as *amicus curiae* in a case before the United States Court of Appeals for the Fourth Circuit, *Greater Baltimore Center for Pregnancy Concerns, Inc., v. Mayor and City Council of Baltimore*, No. 16-2325 (Apr. 3, 2017), asking the court to affirm the lower court decision finding a Baltimore compelled-speech ordinance that was directed at CPCs content-discriminatory in violation of the First Amendment.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

"It is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). SB 1564 violates that fundamental principle.

As Plaintiffs allege in their complaint, "SB 1564 requires the Pregnancy Centers, Dr. Gingrich, and Maryville Women's Center to violate their consciences and beliefs by either referring women for abortions, transferring a patient to an abortion provider, or providing a patient asking for abortion with a list of providers they reasonably believe may perform the abortion." Dkt. 1 at 3. Additionally, SB 1564 requires CPC workers to offer and discuss abortion as a "legal treatment option" for handling a pregnancy and must also come up with some "benefits of the treatment option[]" to offer the patient. This content-discriminatory amendment requires Plaintiffs to undermine the very nature of who they are, what they believe, and the work they do.

[2] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made such a monetary contribution. An uncontested motion for leave to file accompanies this brief in support of Plaintiffs' Motion for Preliminary Injunction (Dkt. 35).

Partisans on both sides of the abortion debate advance their particular viewpoints in the public square with passion befitting an issue, which, for one side, involves literally a matter of life and death, and for the other side, involves egregious governmental interference with fundamental autonomy and privacy. To the extent that government can and sometimes must implement measures that touch upon some aspect of controversial medical procedures or other issues, it must be wary of doing so in such a way as to throw its weight on one side of an underlying philosophical, moral, and political debate. Abortion is, of course, such a subject. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring) ("The issue of abortion is one of the most contentious and controversial in contemporary American society.").

Mere differences of interpretation drawn from conflicting evidence are not the proper subject of government regulation of speech since "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-41 (1974). When governments overstep this bound by deliberately favoring one side under the guise of under-inclusive regulations that, both on their face and in their operation, target the opposing side, governments engage in impermissible viewpoint discrimination. What matters here—as in every case involving attempts by government to dictate the speech of groups like CPCs—is the contending parties' contrasting viewpoints about how and when the subject of abortion is best discussed with clients seeking assistance. Therefore, to the extent that SB 1564 compels speech that both in substance as well as in manner and time of delivery Plaintiffs would not otherwise choose to make, it goes beyond inappropriately regulating the content of speech and ultimately constitutes impermissible viewpoint discrimination.

ARGUMENT

I. SB 1564 Compels Speech that Forces CPCs to Violate their Pro-Life Views and Mission.

SB 1564 does more than require CPCs to speak a generic or factual message. It requires that they speak in a manner contrary to their pro-life identity and mission.

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court held that when evaluating a compelled speech regulation, *context matters*. *See id*. at 796-97; *see also Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014) ("With all forms of compelled speech, we must look to the context of the regulation to determine when the state's regulatory authority has extended too far.") (citing *Riley*, 487 U.S. at 796); *Evergreen*, 740 F.3d at 249 ("When evaluating compelled speech, we consider the context in which the speech is made.") (citing *Riley*, 487 U.S. at 796-97)).

In *Evergreen*, the United States Court of Appeals for the Second Circuit upheld on First Amendment grounds a preliminary injunction against a government requirement that CPCs disclose information regarding "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care.'" *Evergreen*, 740 F.3d at 238. Evaluating the context in which the compelled speech was to be made, per *Riley*, 487 U.S. at 796-97, 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 correctly 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.*

In other words, 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 in which the pro-life centers were being made to speak the government's message was clear and could not be ignored. The speech mandated by SB 1564 goes much further than the compelled disclosures in *Evergreen*. Whereas New York City's Services Disclosure required pregnancy centers to indicate whether or not they provide referrals for abortion, SB 1564 positively and affirmatively requires CPCs, like Plaintiffs, to point clients to abortion as a legitimate treatment option, discuss so-called benefits to abortion, and provide a list of, or referral to, doctors who will provide the service that Plaintiffs will not.[3]

SB 1564 requires CPC workers to speak a message that undermines their religious and political views as well as their social mission and identity. Moreover, any such disagreement with the compelled message cannot simply be cured by Plaintiffs supplementing the required speech with their own contrary speech. The Fourth Circuit rejected that very idea in *Stuart*, which examined compelled *pro-life* speech: "[T]he clear and conceded purpose of the [law] is to support the state's pro-life position. That the doctor may supplement the compelled speech with his own perspective does not cure the coercion—the government's message still must be delivered (though not necessarily received)." *Id*. at 246.[4] A law that "forces speakers to alter their

[3] *See, e.g., Stuart*, 744 F.3d at 242-43, 247, 253 (Fourth Circuit finding that "though the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage" and that the "factual" nature of the compelled speech does "not divorce the speech from its moral or ideological implications").

[4] Indeed, it would not have availed the State of New Hampshire in *Wooley v. Maynard*, 430 U.S. 705 (1977), to argue that George and Maxine Maynard could have placed bumper stickers on their car

(Text of footnote continues on the next page).

speech to conform with an agenda they do not set" is unconstitutional even if that law does not restrict other speech on that same topic or the speaker is permitted to contradict himself. *Pac. Gas & Elec. Co.*, 475 U.S. at 9. Cognitive dissonance is no cure to compelled speech.

It is axiomatic that the government may not "'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978)). By means of SB 1564, Illinois has radically skewed the public debate over abortion by forcing pro-life pregnancy centers to recommend or refer clients to the very services to which these pro-life centers religiously object and offer alternatives. Forcing Plaintiffs to speak a message diametrically opposed to their religious mission is equivalent to forcing an individual to advocate a political position contrary to his political beliefs. SB 1564's compelled speech will cause Plaintiffs to "obscure their own message" for the sake of what the government wants them to say. *See Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1082 (N.D. Ill. 2005). That is legally impermissible.

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objecting to the motto, "Live Free or Die." It would not have helped the State of California in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (holding unconstitutional a requirement that a utility company include speech from an opposing group in its newsletters) to argue that the utility company could have included additional information in its newsletters. The decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that a public school could not compel students to recite the Pledge of Allegiance), would have been the same even if West Virginia allowed students to cross their fingers as an expression of their disapproval.

II. SB 1564 is a Content- and Viewpoint-based Restriction on Speech that is Subject to Strict Scrutiny.

It is well established that "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Furthermore, laws that discriminate against the speech of individuals or groups based on the *viewpoints* they seek to express are presumptively invalid and, for all intents and purposes, forbidden. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules"); *see also City of Ladue*, 512 U.S. at 51 ("[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'") (quoting *First Nat'l Bank*, 435 U.S. at 785-86); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000) (citing *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999)) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

Unconstitutional content-based regulations are not only those that restrict certain speech, but also includes regulations that "[m]andat[e] speech that a speaker would not otherwise make [and] necessarily alters the content of the speech." *Riley*, 487 U.S. at 795; *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (the "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys"); *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (a speech regulation is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred")

(citation omitted). Because SB 1564, on its face, requires CPCs and facility workers to speak a message mandated by the government, in a manner dictated by the government, it cannot be characterized as anything but content-based.[5]

CPCs seek to protect women and unborn babies. This mission is based on the moral and religious beliefs of those who run the CPCs. While the Illinois Health Care Right of Conscience Act allows CPC workers to decline offering abortion or objectionable contraception services, the passage of SB 1564 fundamentally gutted the Act. Now, Plaintiffs are required to discuss abortion as a legitimate option for their pregnant patients in direct violation of their moral and religious beliefs. Moreover, if the patient requests assistance that the physician will not provide because of his or her conscientious objection, the physician then must point the patient to where she may obtain such assistance. Although physicians are still able to refuse to conduct procedures they object to, they must now usher a patient into the office of another doctor who will. Additionally, physicians are forced to not only discuss the objectionable procedures as *viable* treatment options, but must also offer an explanation of their so-called *benefits*. Not only is the state mandating that CPC workers discuss abortion services with their patients, but they are forced to do so from a supportive perspective. This is textbook viewpoint discrimination.

In their combined reply in support of their motion to dismiss and their response to Plaintiffs' motion for preliminary injunction, Defendants state, "Here [] medical providers are not barred from offering any opinion; nor are they required to offer any opinion." Dkt. 48, at 4. But this is simply incorrect. Physicians are required to offer a medical opinion—that abortion has benefits and is a reasonable option for a patient—even if the doctor does not believe that opinion.

[5] Notably, in *Reed*, the Supreme Court unequivocally reaffirmed that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2222 (citation omitted).

This undermines an essential facet of the practice of medicine in which oftentimes two different doctors will have two differing opinions on the proper treatment plan for a particular patient. This is a well-known, culturally recognized aspect of the medical field, and is why, in many cases, individuals with health concerns consult more than one doctor—because they may find additional treatment options or varying opinions on their specific medical situation that they may not have considered at a consultation with another doctor. Doctors should have the independence, once certified by the State to practice medicine, to practice as their conscience and experience allows, without the state essentially sitting in the examination room orchestrating the conversation between doctor and patient. *See Garcetti v. Ceballos*, 547 U.S. 410, 446 (2006) (Breyer, J., dissenting) (where speech "is subject to independent regulation by canons of the profession . . . the government's own interest in forbidding [or compelling] that speech is diminished"); *see also Wollschlaeger v. Governor*, 848 F.3d 1293, 1328 (11th Cir. 2016) (en banc) (Pryor, J., concurring) ("If anything, the doctor-patient relationship provides more justification for free speech, not less.").

In enacting SB 1564, the State of Illinois did exactly what the First Amendment forbids. It gave partisans on the pro-choice side of the abortion debate a decided advantage in expressing their views on how conversations should be shaped with women considering the options facing them in crisis pregnancies.[6] Those favoring a different approach—such as the Plaintiffs in this case—must either agree to promote a viewpoint they reject on numerous grounds or face

[6] It is therefore no wonder that Planned Parenthood of Illinois actively encouraged citizens to persuade Governor Rauner to sign SB 1564 into law. *See* "Tell Governor Rauner to sign SB 1564 to protect patient rights," Planned Parenthood of Illinois, https://secure.ppaction.org/site/Advocacy?cmd=display&page=UserAction&id=19813 (last visited June 6, 2017).

punishment. This Court should grant Plaintiffs' Motion for Preliminary Injunction on the basis that SB 1564 is content- and viewpoint-discrimination that cannot withstand strict scrutiny.[7]

III. SB 1564 Violates Plaintiffs' Right to Freedom of Assembly.

While Plaintiffs' Motion for Preliminary Injunction is based squarely on the freedom of speech and free exercise clauses of the First Amendment, this Court should recognize that SB 1564 also unconstitutionally burdens Plaintiffs' right to freedom of assembly and association. "'It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces the freedom of speech.'" *Irshad Learning Ctr. v. County of DuPage*, 804 F. Supp. 2d 697, 718 (N.D. Ill. 2011) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

In determining whether a "statute or ordinance violates an individual's right to association under the First Amendment," this Court, echoing the Supreme Court of the United States, has stated that such a violation occurs "only if the governmental interference is 'direct and substantial' or 'significant.'" *Strohl v. Vill. of Fox River Grove*, 2014 U.S. Dist. LEXIS 82116, at *14 (N.D. Ill. 2014) (quoting *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 366 (1988)). SB 1564 impermissibly interferes with, restrains, and undermines the ability of Plaintiffs to speak with their patients without complying with the bill's requirements. As established previously, this statute is a content- and viewpoint-based restriction on speech in violation of the First Amendment. As such, it is subject to strict scrutiny, the highest standard for the constitutionality of a government restriction on

[7] Plaintiffs have fully addressed why SB 1564 does not satisfy strict scrutiny in their Motion for Preliminary Injunction. Dkt. 36 at 17. *Amicus curiae* is in full agreement that SB 1564 is not the least restrictive means to achieve a compelling governmental interest.

speech. Likewise, SB 1564 prevents assembly between CPC workers in Illinois and pregnant women seeking healthcare *unless* the CPC workers follow a script that violates their moral and religious beliefs. Clearly such a statute is a "direct," "substantial," and "significant" infringement on the Plaintiffs' freedom of assembly protected by the First Amendment.

IV. A Preliminary Injunction is Appropriate Because Plaintiffs Face Irreparable Harm.

Defendants have placed Plaintiffs in a no-win situation. They face an inescapable decision: violate SB 1564 in order to remain true to their religious principles; or comply with it, in violation of their religious principles, in order to operate their establishments without fear of enforcement actions.

No Supreme Court case holds that "self-censorship" caused by the "chilling effect" of speech-limiting laws is the *only* form of "irreparable injury" in this context. It would be plainly erroneous to suggest that a plaintiff who refrains from speaking for fear of government sanctions is irreparably injured, but a plaintiff who speaks in the face of governmental sanctions, and thereby risks penalties, suffers no "irreparable injury." Exercising one's precious freedoms while constantly glancing nervously in the rearview mirror for flashing lights is hardly less injurious than simply deciding to play it safe and not leave the house; indeed, the former is arguably *far more* of an infringement than the latter.

Additionally, this compelled speech could irreparably harm the reputation of the affected CPCs, and their physicians and workers. If a woman comes to a CPC apprehensive about a pregnancy, but with hopes of saving or continuing an otherwise difficult pregnancy, and abortion is brought up as a viable option, this can be frightening to the expectant mother and may likely discourage a potential patient from returning to the clinic, thereby harming the doctors and facility both professionally, by preventing them from fulfilling their mission to protect pregnant

women and unborn babies, and in reputation, by leading prospective patients to believe that these clinics may not be as pro-life as they hold themselves out to be.

Additionally, the results of SB 1564 could have financial ramifications for the clinics. Much of the funding for CPCs comes from fundraising efforts and donations from likeminded people. When donors realize that, although CPCs do not conduct abortions, they must tell the mothers where they can obtain one—and the benefits of it—those crucial donations may well go elsewhere. Centers will close, and access to free healthcare and family planning will decrease. If Defendants' true interest is in protecting access to care for women, SB 1564 flies in the face of that goal.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Preliminary Injunction (Dkt. 35).

Dated: June 8, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2017, I caused a copy of the foregoing *amicus* brief to be served by electronic filing on all registered counsel of record via the ECF system of the U.S. District Court, Northern District of Illinois.

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